ARTICLE

Retribution, restoration and the public dimension of serious wrongs

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Abstract

Restorative justice has been criticised for not adequately giving serious consideration to the 'public' character of crimes. By bringing the ownership of the conflict involved in crime back to the victim and thus 'privatising' the conflict, restorative justice would overlook the need for crimes to be treated as public matters that concern all citizens, because crimes violate public values, i.e., values that are the foundation of a political community. Against this I argue that serious wrongs, like murder or rape, are violations of agent-neutral values that are fundamental to our humanity. By criminalising such serious wrongs we show that we take such violations seriously and that we stand in solidarity with victims, not in their capacity as compatriots but as fellow human beings. Such solidarity is better expressed by organising restorative procedures that serve the victim's interest than by insisting on the kind of public condemnation and penal hardship that retributivists deem necessary 'because the public has been wronged'. The public nature of crimes depends not on the alleged public character of the violated values but on the fact that crimes are serious wrongs that provoke a (necessarily reticent) response from government officials such as police, judges and official mediators.

Keywords: public wrongs, R.A. Duff, agent-relative values, criminalisation, punishment.

1 The public dimension of wrongs

Advocates of restorative justice have long criticised the nearly absent (or at least completely passive) role of victims in criminal procedures and the antagonistic setting before a court with its focus on legal struggle instead of forms of accordance that might serve clarification and reparation for the victim (Garbet, 2017; Van Camp, 2014: 102; Zehr, 1998: 64-69; Zehr, 1990/2015). In a restorative process the victim is more in charge of the procedures that may involve a meeting between perpetrators and victims (and their peers) aimed at finding agreement on reparative

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actions and ways to find closure (Presser & Hamilton, 2006). While in criminal procedures it is the state represented by the prosecutor who 'owns' the process, the victim serving as no more than a witness, in restorative justice it is the victim whose voice is primarily heard (Christie, 1977; Wemmers & Cyr, 2006). Restorative procedures do not focus on formal trial and punishment but on the lived stories of victims and perpetrators and on the restoration of relationships and trust (Vander Vennen, 2016). The three pillars of restorative justice are encounter, amends and reintegration (Van Ness & Heetderks Strong, 1997).

Restorative justice is, however, criticised by proponents of retributive justice as not taking the public dimension of crime seriously enough, because it involves primarily the semi-private sphere of victims, perpetrators and their peers (and/or communities). Restorative justice, says Anthony Duff, unduly 'privatises' the conflict, 'but some kinds of wrongs should be treated as public matters that concern us all as citizens' (Duff, 2011: 74). Criminal wrongdoing is a public rather than a private matter, says Duff, and therefore 'the polity as a whole calls the alleged perpetrator to account for a wrong that concerns all citizens' (Duff, 2011: 76). This is done through a 'formal process through which an alleged wrongdoer is called to answer to his fellow citizens by the court that speaks in their name' (Duff, 2011: 76). Such a process normally results in a formal, public condemnation of criminal wrongdoing, which includes the imposition of penal hardship as punishment. In restorative justice procedures, so the complaint is, this whole dimension of publicly calling to account (because some wrongs are *public* matters) is neglected or at least not sufficiently acknowledged.

Advocates of restorative justice cannot but take this criticism seriously, especially because the restorative justice 'movement' more or less started with Nils Christie's plea in 1977 to give victims back the ownership of their case (Christie, 1977). Following this plea, restorative justice proponents hold that offences should be considered as issues that belong in the first place to victims and offenders and not to criminal justice institutions and their officials who represent the public or the state (Van Camp, 2014: 85 and 102). It is therefore necessary to bring the offended back into the driver's seat of the processes following a crime (Aertsen, Bolívar, De Mesmaecker & Lauwers, 2011). This will in a certain sense imply that crimes are considered as wrongs that, first and foremost, concern the victim, the perpetrator and their communities and not so much the public at large. Does that mean that restorative justice indeed unduly privatises the conflict involved in crime? This depends on what exactly is involved in a restorative justice approach and on how we understand the 'public character' of crimes. The conception of restorative justice that we take as our starting point in this article is the one Duff apparently has in mind: restorative justice not so much as a holistic change in the way we respond to injustices in the world, but as a specific policy of addressing crime, seeking restoration of violated lives and relations through more or less informal processes, like conferencing and victim-offender mediation (Duff, 2003: 45, 2011: 74). As for the 'public character' of crime, we will turn to the way Anthony Duff and his Stirling colleague Sandra Marshall have, in the last two decades, defended the public character of crimes in terms of 'what concerns us all as citizens' (Duff & Marshall, 2010: 71; 2019: 28). They consider crimes not just as wrongs

'done to individual members of the community' but also as 'wrongs against the whole community – injuries to a common or shared, not merely to an individual good' (Marshall & Duff, 1998: 20). In this article we scrutinise and criticise their defence of such a conception of the public dimension of crimes. We do so by addressing the following questions: (1) What exactly could make a wrong a *public* wrong and (2) what reaction to such an alleged public wrong is needed? Does the alleged public character indeed require the kind of public process of condemnation and punishment that Duff is thinking of?

The plan of the article is as follows. First, we investigate Duff and Marshall's arguments in favour of conceiving crimes as public wrongs. According to them, crimes are wrongs that involve the whole community, because (1) they violate values that define the political community of which we are members, and (2) by criminalising such violations the political community shows solidarity with victims. Against this conception of the public dimension of crimes we argue that especially values violated by *mala in se* do not primarily define a political community. Rather, such values are fundamental to our common humanity. They concern us not as members of a polity, but as moral beings who respect certain core moral values that define the 'moral commonwealth'. In all jurisdictions certain wrongs will be criminalised because they violate exactly those values. It is this process of criminalisation that turns these *mala in se* into 'public wrongs', understood by us as wrongs that are so important that they have to be addressed by public officials like police officers, prosecutors and judges. In this sense crimes are 'public events' because as crimes they attract a response by public officials of the state (Walgrave, 2013: 80-81). They do not attract such a response *because* they are 'public wrongs'; rather, they become 'public' because they attract such a response. We will show, however, that for principled and/or pragmatic reasons only a selection of important values are protected in this way. Humans attach considerable importance to values like reliability and honesty, but usually only very specific cases of mendacity are criminalised. Infidelity is experienced by betrayed partners as a serious wrong, but most states do not prosecute adulterous partners because it would require a huge invasion of the private sphere.

But why, so we will ask, might such pragmatic or principled considerations, for instance concerning the interest of victims, not also be a reason to (partly) waive the usual criminal procedures with which perpetrators, according to Duff, should be publicly called to account, publicly condemned and punished. We may need public officials to investigate criminal cases, to determine guilt and to empower individuals in seeking acknowledgement and redress for wrongs committed to them. But why would punishment, understood as the infliction of penal hardship, be necessary in response to crime? Why not choose other procedures that show our solidarity with victims, if these would serve the interest of all parties much better, as advocates of restorative justice claim? We will critically discuss the reasons Duff has for sticking to the usual retributive response to crime and show how weak these arguments are. Restorative justice procedures are often better suited to doing what Duff wants penal retribution to do: stern communication of censure and condemnation of wrongs and recompense. After a short historical excursus, we

then, in our conclusion, come back to the question of whether restorative justice unduly privatises the conflict involved in crime.

We now investigate what might constitute the 'public' character of a criminal offence.

2 Harms and wrongs, 'private' wrongs and 'public' wrongs

The public character of crime may be related to the fact that in crime not only the victim, but also the public at large may be harmed. If a young woman is assaulted, raped and murdered it will probably affect the feelings of (un)safety of many who have not been victim in this case. There are even crimes, such as terrorist attacks, that are deliberately meant to harm the public by creating widespread fear and chaos or by triggering governments to limit civil rights. And even in less severe cases one might argue that crime always harms the public because it involves a breach of public peace, mutual trust and a shared sense of public order. Traditionally, it has been argued that assault, for instance, should not be regarded merely as a private matter to be mediated between victim and assailant, but that it should be characterised as a public infraction because of its 'pernicious effects to society' given the 'bad example' it sets and the 'unforgivable passions' with which it threatens to contaminate the public space (Blackstone, 1765-1769: Book I, ch. 1, 2 and 120).

Even so, crime does not just cause *harm* to the victim and possibly to society (Duff, 2001b). For victims of crime suffering is not limited to, e.g., loss of possessions or psychological distress or long-term feelings of insecurity; rather, the symbolic meaning of crime is often more important: they have been wronged by the perpetrator who has wrongfully invaded their house, damaged their property or caused physical injury. The *wrong* done changes the character of the harm done (Bilz, 2016). The perpetrator has not only taken advantage of the victim but has also treated them as a person one can take advantage of, thereby hurting their dignity. The perpetrator has violently appropriated status and power over the victim and the wider community (Okimoto & Wenzel, 2008). What victims therefore seek is not just compensation for harm done but an accounting for the wrong they have suffered (Wenzel, Okimoto, Feather & Platow, 2010).

But in what sense might such a wrong also be a 'public' wrong? In what sense might it be that crime is not just something that harms the public at large (e.g. because it nurtures widespread feeling of insecurity), but also something that actually *wrongs* the public? Crimes, like tax evasion or election malpractice clearly harm the public collectively, but there is more. By breaching the public regulations that serve the common good, the tax evader or election forger unduly tries to take advantage of fellow citizens and thus treats them as persons one can take advantage of. She thinks she can get away with her deceit and in this way appropriates a certain status and power that, as such, is already an insult to her law-abiding fellow citizens. Even so, most crimes, like *mala in se* as murder and rape, can hardly be considered as having such a wrongful impact on the public (apart from their harmful effects like the threat of feelings of public safety). Even if a murderer or a rapist insults his law-abiding fellow citizens, that is not what is central to the

criminal wrongfulness of his action (Lee, 2015: 157). *Mala in se* are not wrong because they in some sense injure or offend the public; they are wrong because they harm and deeply offend the victim. Restorative justice is concerned with that harm and offence, focusing on the victim, their peers and their community and the perpetrator, peers and community. What reason might there then be for thinking that such wrongs concern not only the victims but also the public at large and that therefore restorative justice unduly 'privatises' serious wrongs?

In their seminal essay *Criminalisation and Sharing Wrongs* (1998) and in later work, Marshall and Duff argue that *mala in se* have to be considered as public wrongs for two reasons: (1) because they violate shared values that define the political community and (2) because as fellow citizens we owe it to victims of such wrongs that we notice and care about what they have suffered, and we do so by organising a formal, public condemnation of the crime (Duff, 2010; Marshall & Duff, 1998). The idea is that we owe it both to the victims and to ourselves to consider *mala in se* like murder, rape and robbery as public wrongs. We owe it to the victims because in this way we publicly recognise the wrong they have suffered. And we owe it to ourselves collectively 'as members of a polity that defines itself by a shared commitment to certain values' because 'to be committed to a value is to be committed to taking note of its violation' (Duff, 2011: 72). In the following we investigate both reasons for considering crimes as public wrongs and Duff and Marshall's substantiation of those reasons.

3 Crimes as violations of core public values

In the article in which Duff criticises restorative justice for 'unduly privatising crime', Duff characterises crimes as wrongs 'that properly concern "the public" – all citizens, simply by virtue of their shared membership of the polity' (Duff, 2011: 70). And this shared membership requires, first, that we show solidarity with other members of the polity and, second, that we collectively take notice of the violation of the values that are definitive of the polity we form. Both requirements follow from the nature of the 'civic enterprise of living together as a polity', says Duff (Duff, 2011: 70). The idea is that we live in a public realm in which we share values that are so important to us as a collective that we consider a violation of those values as something that 'wrongs' us as members of the public. As we cannot leave the violation of such values unanswered, we call to account those who have violated core values through the formal process of a criminal trial (Duff, 2013: 195-196).

In order to elucidate the idea of a public realm and the values that are definitive of the polity we form with our fellow citizens, Duff & Marshall use the analogy of a code of ethics that defines kinds of wrongful conduct by the members of a professional community, such as lawyers, doctors or scholars (Duff & Marshall, 2018: 31 ff; see also Duff, 2016: 103-104 and 2001a: 42-48). Such a code of ethics will limit its scope to right and wrong professional conduct, related to what values are definitive of being a certain professional. We therefore need to know what kinds of aim and value define the practice of a lawyer, doctor or scholar. Duff calls this the *res publica* of a profession: 'the goal-related activities and relationships that constitute the shared business (the public affair) of those within the profession'

(Duff, 2016: 104). By analogue, the *res publica* of a polity – its aims and aspirations – can be spelled out only if we consider what is to be a citizen of such a polity: what does the 'civic enterprise of living together as citizens' involve (Duff, 2016: 105)? Particular conceptions of the civic enterprise are usually found in constitutions that formulate the basic values to be upheld and goods to be promoted in order for a polity to be firmly constituted (defined by Duff (2001a: 54) as a 'liberal-communitarian polity'). Values like autonomy, freedom, privacy, equality, bodily integrity and safety will figure in the constitutions we are familiar with. They concern the 'public conduct' of citizens, i.e. their conduct in the public sphere, which is distinct from the private sphere and which is not our collective business, just as professional codes concern the professional conduct of doctors, etc. and (usually) not what they do or think in private. *Mala in se* are then considered as public wrongs because they are the proper collective concerns of the citizens of a polity.

Illuminating as this analogy may be, it leaves us with a serious problem. The problem is that the basic values purported to define a polity ('our polity') seem to be more universal than that. While a doctor may be required to respect the value of secrecy in a way ordinary citizens are not, because the doctor is a member of the professional guild of physicians, it would be strange to think that I as a member of this polity may be required to respect the value of bodily integrity of others *in virtue of my being a member of this polity*. I am required to respect the bodily integrity of others simply by virtue of being a human person. There is no reason to think that a member of a different polity with a different constitution is, in fact, not required to uphold such values as autonomy, freedom, privacy, equality and bodily integrity. We would not take values like liberty of speech or equality of the sexes seriously if we were simply to accept that in other polities such values do not count. Similarly, there is no reason why I should be more indignant and called to protest against the violation of such core values by fellow citizens than by members of another polity. Of course, professional misconduct by doctors or scholars may also be reason for *everybody* to protest, but members of a professional community may have *more* reason to stand up against the violation of professional values by their colleagues, because such misconduct threatens to undermine the trust of the public and the professional reputation of the whole group of professionals. Such does not seem to be the case when citizens violate core 'public' values: then not just fellow citizens but everybody should stand up against the alleged misconduct. We have as much reason to call to account the assailants of Mr Khashoggi (murdered by a team of Saudi agents) as do his peers and his fellow citizens. Of course, we might not have the instruments to do so, but that is the reason why there is a developing institutionalisation of international law and international trial (a UN expert has required that there should be an international inquiry into the Khashoggi case). Of course, we might *feel* more 'connected' to the serious misconduct of a fellow citizen than of a complete stranger, just as we *feel* more compassion with the fate of victimised fellow citizens than victimised strangers. But that does not mean that Mr Kashoggi's horrible death is of less concern than the death of somebody with whom we share a nationality.

4 Agent-neutral values and norms

It seems, then, that the public dimension of wrongs has less to do with the violation of values that define a polity than with their violation of what moral philosophers call 'agent-neutral' values (and norms) that we deem very important (Dancy, 1993: 166-252; McNaughton & Rawling, 1991; Nagel, 1986: 164; Parfit, 1984: 104). Agent-neutral norms are norms that apply to anyone in a situation regardless of any special relationship to other individuals (who may be affected by the agent's doings) and regardless of any special feature (like a role or task) of the agent involved. By contrast, an agent-relative norm would apply to a person only because of such a relation or role. For agent-relative values and norms identity, role or group membership are definitive. Relational norms, like the special responsibility parents have for their own children, are agent-relative because they apply by virtue of the family relation. Parents do not have the same responsibility for someone else's children, although they might have some agent-neutral duty to take care for other children (if some child is in need and you are the only one who can reasonably help, then you should do so). Also professional norms are agent-relative because they apply only to the members of a professional guild like doctors or lawyers. And we have certain agent-relative duties by virtue of being members of a particular polity or as guest within its jurisdiction, like obeying traffic laws or respecting certain manners that are in this polity culturally important.[1]

But the duty not to murder, rape or rob is not just a duty because the law forbids it. The law forbids it because it is one's agent-neutral duty not to murder, rape, rob, assault, etc. *Mala in se* are not wrong because they violate agent-relative norms. The prohibition to rape, etc. applies to anyone regardless of identity, role, profession or nationality. Crimes like *mala in se* are a public concern because they violate important agent-neutral values and norms. And the reason why we should take notice of such violations is that we are humans who care about values that are in some sense constitutive of our (and others') dignity. Of course, people in different times and different cultures may have different convictions as to what counts as the important values that are constitutive of human dignity. This may result in different constitutions and different directions in which a polity's legal system may develop. But in all these jurisdictions democratically endorsed moral values and norms will be regarded as values and norms that have binding force not because they are the values of 'our polity' ('our group') but because these are values and norms of universal import.

5 Criminalising wrongs

In all jurisdictions the violation of certain agent-neutral norms is criminalised because in this way a polity acknowledges the need to protect important

1 Some *mala prohibita*, that is things prohibited by the law, even if they are not *mala in se*, may also result in agent-relative duties to respect such prohibitions within a specific jurisdiction. Think of specific speed limits or demanded closing times of bars – legal regulations that are meant to protect the common good.

agent-neutral values. And it does so, not because these are 'shared values that define the political community', as Duff has it, but because these are values that define our humanity. A polity will criminalise *mala in se* in order to 'declare their wrongfulness' so to 'remind citizens (if they need reminding) that and why such conduct is wrong', as Duff (2001a: 58-59) remarks. But such a declaration does not involve a reminder that such *mala in se* 'constitute a public wrong properly condemned by the community', as Duff has it (2001a: 64). They are criminalised in order to remind us (if we need reminding) that they constitute serious violations of important agent-neutral values. Because of the importance of such values the law will often, next to declaring their wrongfulness, also provide more precise determinations of those values and specifications of what constitutes an infringement (e.g. by specifying an age of consent or by defining forms of invasion of privacy). Criminalisation of *mala in se* simply underlines how much we condemn the violation of important agent-neutral values.

Any decent polity will therefore criminalise murder because murder is a gross violation of the value of life and the value of human integrity. Not all agent-neutral values are thus treated, however. Think of lying and deceit. For Immanuel Kant lying or breaking promises are the quintessential examples of the violation of human dignity (Kant, 1901: 45-46). By lying to someone else one does not treat this person as equally rational and autonomous. One uses this person as a means for one's own purposes. Even so, most jurisdictions will not generally criminalise lying or promise-breaking but only particular forms of lying or deceit (Feinberg, 1984). The reason that lying or promise-breaking is not criminalised is not only that in many cases it is not considered as serious misconduct, but also that the prosecution of all cases of mendacity would be simply impossible, if not a gross violation of the private sphere of citizens (think of a situation in which infidelity were to be criminalised).

It is always these kinds of pragmatic and principled arguments that determine whether an agent-neutral value will be protected by the criminal law or not (Ashworth, 1999: 67). Some wrongs (e.g. simple offences like minor insults) may be so trivial that they are not regarded as worth responding to via the criminal law (*de minimis* principle). In other cases it would be too costly for the state to respond by way of legal prosecution. And it could be that legal prosecution would have a detrimental impact on the victims or – more in general – grossly intrude into the private sphere (Lee, 2015: 159; Moore, 1997: 763-777).

Not all violations of agent-neutral norms are regarded as wrongs that have to be prosecuted. Some are and some are not. However, it is not the case that certain wrongs are criminalised because they are 'public' wrongs in Duff's sense (wrongs that we properly care about *as members of the public*). No: we properly care about these wrongs *as human beings*. It is the criminalisation of such wrongs that makes them 'public' in the sense that these wrongs should invite an appropriate reaction by public officials, like police investigators or judges. By criminalising the violation of certain agent-neutral values, the polity acknowledges their importance. And by approving certain competences of public officials in handling crime we give expression to our indignation concerning such violations.

6 Recognising the wrong done to victims

What about the second reason for considering the violation of certain values as of 'public' import, something the polity should respond to by criminalising it and prosecuting the perpetrator? The second reason is that in this way we show victims our solidarity. We acknowledge the wrongs they have suffered, and we stand up in favour of their case by arranging prosecution and trial of those who have wronged them. Reacting with prosecution and trial of perpetrators is a way of making plain that victims of crimes are to be recognised as fellow citizens who have seriously been wronged. Seeing crimes as wrongs against fellow citizens implies, so Duff (2001a: 63) argues, that victims are wronged 'as members of the community' and therefore such crimes are 'also wrongs against the community'.

Again, only the specification Duff gives of our concern about crime as a concern about the fate of our fellow patriots makes it possible to view crimes as 'wrongs against the community' (because a member of that community has been wronged). If we, however, understand our concern about the wrong done to victims as a wrong done to a *fellow human*, it does no longer follow that crimes are 'wrongs against the community'. The victims of crime are wronged in their capacity as human beings, not necessarily in their capacity as citizens (that might perhaps be the case when, for instance, citizens are prevented from casting their vote). As citizens, we have, however, organised ways in which the community can react to such a wrong and show her solidarity with the victim. We have organised a system of justice with public officials that have the authority and means to investigate crime and prosecute the perpetrator. The 'public' character of crimes consists in the appropriateness of such a reaction by public officials.

Again, pragmatic and principled reasons delineate the kinds of wrongs that we consider appropriate for such a reaction. Infidelity may bring great suffering to a betrayed spouse and a profound sense of being wronged, but in most jurisdictions citizens do not show their solidarity by criminalising and prosecuting the infidel partner. One reason for not criminalising infidelity is that unfaithfulness might not be a matter of one-sided guilt: the case is often much more nuanced. Another reason has already been mentioned: publicly standing up for the 'victim' in these cases will probably involve an unacceptable intrusion into the private sphere.

Might such pragmatic or principled reasons not also be an argument to waive (part) of the usual procedures of prosecution (formal trial, public condemnation and penal retribution) and to choose restorative procedures instead? Restorative procedures are meant to discuss, negotiate, accept and discharge responsibilities. Restorative procedures can be much more nuanced than the binary mechanisms involved in a formal trial (guilty or not guilty) and the limited tools for redress (imprisonment, fines, community service, probation). Restorative justice does not regard sentence and punishment as the crucial means of establishing justice but focuses on the needs and nuanced stories of the people involved: first, the victim and the related community and, second, the perpetrator and the related community. If in the end pragmatic and principled reasons determine which violations are being criminalised and which are not, then the nuanced approach advocated by restorative justice may be a good (pragmatic or principled) reason to waive (some

of the) usual criminal procedures. However, it is exactly this kind of nuance that, according to Duff, is the reason that such procedures 'fail to appreciate the significance of the distinctive kind of calling to account that the criminal law can provide' (Duff, 2011: 74). This publicly calling to account (because important values are violated and fellow citizens wronged) requires, so Duff has it, a response via the usual criminal procedures (Duff, 2013: 180). What is so special about such a way of calling to account, and why should it be preferred above restorative procedures?

7 Calling perpetrators to account: what procedures serve victims and public best?

Duff and other critics of restorative justice not only argue in favour of a 'public' response to violation of certain norms but also take it that the whole chain of consequences of norm violation according to the criminal law is appropriate: investigation by the police, prosecution, public trial and verdict and punishment by imposing hardship on the perpetrator. Especially the focus on retributive punishment as the quintessence of calling perpetrators to account marks the difference with restorative procedures that rather enhance reconciliation and rehabilitation instead of penal retribution. Critics like Duff, however, contend that we need the whole chain of judicial procedures and measures in order to provide a sound way of 'publicly calling to account'. But is this true?

It is surely true that victims may be served by the investigation by police and other officials of the wrong they have suffered. Yes, sometimes the investigation is more burdensome and traumatising than the crime suffered. But, in general, by officially investigating a case and prosecuting alleged perpetrators the state empowers individuals to seek and obtain acknowledgement and redress for wrongs committed to them. In addition, the judicial resources the criminal law provides may help victims to obtain clarity, recognition and compensation (Holderstein Holtermann, 2009). In this sense, advocates of restorative justice may welcome part of the procedures of standard criminal justice. I agree with Kathleen Daly that at least without a 'fact-finding or investigating mechanism' restorative justice cannot replace established criminal justice procedures (Daly, 2006: 136).[2] Restorative justice procedures focus on what she calls the 'penalty phase' of the criminal process. It seeks imaginative ways to respond to a crime in opposition to a retributivist philosophy, which holds that perpetrators should be subjected to penal suffering because this is their 'just desert'. A criminal investigation and trial to establish guilt can ideally be in the best interests of victims, but it is questionable whether a public conviction with the primary purpose of punishing offenders would also serve the interest of the victim (and the interest of the public in general).

2 We might also need existing criminal justice procedures for confinement and incapacitation of perpetrators in order to serve the safety of victims and the society at large. I therefore favour, on pragmatic and principled grounds, a certain combination of traditional criminal justice procedures and restorative justice interventions. I cannot expand on this here, as my aim is to argue against Duff's idea that retributive punishment is a necessary part of our response to crime and that restorative procedures will not do the job.

There are principled and pragmatic reasons to choose the communicative procedures that restorative justice proposes in order to empower victims, humanise perpetrators, seek reparations and amends and assure victims (and the public at large) that the perpetrator will not victimise them (or others) again.

Even so Duff holds that the punitive response that is at the heart of the retributive philosophy is a necessary part of how we should deal with crime. According to him, restorative procedures will not do, because we need a penal response to crime in order to attain three goals that he sees as the main advantages of retributive justice: 1. Stern communication, 2. Categorical recognition and condemnation, 3. Recompense. We will analyse these three goals and ask whether retribution really has the advantages Duff advertises.

7.1 Stern communication

According to Duff, the primary goal of trial and punishment of perpetrators is to communicate public censure (Duff, 2001a, 2008). Public censure makes it clear that society takes the rule of law and the values that have been infringed seriously and conveys to victims the acknowledgement that they have been wronged (Duff, 2011: 78). Probably the first to identify this expressive function of punishment was the philosopher Joel Feinberg (1970). The question, however, is why punishment is needed to convey the message of public censure. Feinberg distinguishes punishment from penalties, in general, and argues that punishment is

> a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted. (Feinberg, 1970: 96)

Feinberg, however, stresses that punishment is a conventional device and that, therefore, 'we can conceive of ritualistic condemnation unaccompanied by any further hard treatment …' (Feinberg, 1970: 96). Duff disagrees. For him the hard treatment involved in punishment is not a conventional and therefore contingent property of criminal censure but is *intrinsic* to the communicative function of such public censure. He argues that penal suffering makes it 'harder for the offender to ignore the message that punishment communicates'. The imposition of serious burdens and hard treatment is necessary to induce in the offender 'a properly repentant understanding of what he has done' (Duff, 2011: 78). Punishment not only expresses censure but also aims to elicit in the offender a (remorseful) response (hence the term 'communicative' function, see Duff, 2001a: 79-80; see also Morris, 1981).

Even so, hard treatment like incarceration in high security prisons (or even in lighter regimes) has rarely been shown to result in repentance, confession of guilt and rehabilitation (see also Shafer-Landau, 1991: 200 ff). Hard treatment rather results in more hardened criminals. Also, the whole setting of a criminal trial does not foster sincere motions of apology. Duff argues that it is no problem if apologies or expressions of remorse by the perpetrator are insincere, because for the public

what matters is that the ritual of holding the offender to account is undertaken (Duff, 2011: 79). Moreover – and this is a principled argument – by at least making the communicative effort that punishment involves we address the offender as a moral agent and appeal to his moral understanding, thus respecting his autonomy (Duff, 1986: 264-266). Even so, Duff himself acknowledges that most forms of penal hardship, like incarceration, subject offenders to 'infantilizing, disciplinary regimes in which all opportunities for responsible conduct and moral choice are removed' (Duff & Garland, 1994: 27). It is strange to think that such forms of punishment do seriously address offenders as autonomous moral agents. Even the much more lenient forms of punishment that Duff prefers (like five years' imprisonment for homicide) would seriously limit the autonomy of offenders (Duff, 2001a: 134). Duff hopes that such relatively lenient forms of penal retribution will induce in the offender repentance for the wrong he has done 'by focussing … his attention on that wrong', resulting in a willingness 'to accept his punishment as a justified response to his crime' (Duff, 2001a: 107 and 112). But most prisoners will have other worries to focus on during their time of incarceration, because prisons bring together a frustrated and violent population. The lack of freedom, danger and other hardships involved in imprisonment result more likely in defensiveness, anger and denial (in order to avoid low self-esteem) (Van Willigenburg, 2020).

What is more important: what good will penal retribution (mild or severe) do *for victims*? What good does the censuring recognition of their suffering by the public bring them if the offender who has wronged them gives them a dishonest apology and twists the truth about what has happened? It appears that the adversarial process during a trial focused on conviction followed by punishment of the offender may increase the suffering of victims rather than heal their psychic wounds (McGregor, 2001: 36). The encounter between perpetrators and victims in restorative justice processes, however, may bring victims much more in terms of recognition, clarification and regained self-respect (Wemmers & Cyr, 2006).[3] Restorative procedures make it possible for victims to address the offender directly, and this is something that may be of great help, even for victims of serious crimes like sexual offences (McGlynn, Westmarland & Godden, 2012). Being able to look the offender in the eye and speak out is immensely empowering (Choi, Bazemore & Gilbert, 2012; Miller, Hefner & Iovanni, 2020). In restorative justice processes there is always room for expressing disapproval and censure of the wrongful act. But this censure is 'lateral' and not 'vertical' (emanating from the state towards the offender) (Armstrong, 2014: 364). The opportunity for the victim to address the perpetrator, and (if possible) to get an honest explanation and perhaps an apology, is infinitely more valuable than a formal, public condemnation of what the

3 See for an overview of studies that present findings regarding enhanced satisfaction and healing (involving dramatic decrease in post-trauma symptoms) for victims participating in restorative justice procedures: Dancig-Rosenberg and Gal (2013), especially note 2 and 41. The special feature of some of these studies is that the victims observed were randomly assigned to restorative procedures instead of court. Dancig-Rosenberg and Gal (2013: 2341) conclude that especially in cases of heinous crime, 'restorative justice has the most to offer in terms of victim healing' (but the least 'in terms of retribution').

perpetrator has done (Smith, 2014: 83). Restorative procedures at least seriously increase the opportunities for such forms of sincere encounters.

Of course, perpetrators may refuse to comply with such procedures, and some will maintain their innocence. Non-compliant offenders might be sanctioned, but again this sanction is not applied with the sole (retributive) goal of inflicting hardship (Braithwaite, 2002). The sanction should be appropriate in stimulating the offender to comply with restorative justice procedures even if only for prudential reasons. This will certainly not be easy, but as long as the retributive philosophy does not interfere, there will be possibilities and progress. For it is exactly the adversarial nature of retributive justice procedures that may reinforce mechanisms of denial and non-compliance (Hayner, 1999: 368).

It could, however, be that an offender really repents (even before he has been sentenced) and that the pain of remorse drives him to make whatever amends are possible. He willingly participates in meetings with his victim(s), is honest about his crime and takes responsibility for what he has done, and he is prepared to answer any question the victim has. In tears he apologises for the wrong he has done, and he is prepared to take on any burdensome task that might be required of him to show his sincere remorse (see for a definition of 'categorical apologies' Smith, 2014: 17-19). What then would be the reason for sentencing him to some form of harsh punishment, such as imprisonment? Duff argues that what is lacking in the case of such an already repentant offender is 'public penance'. According to Duff, such an offender 'has not done what is required to reconcile herself with the political community whose laws and values she has infringed' (Duff, 2001a: 119). Because her crime was a 'public wrong against the community' she should not only be tried and convicted but also punished. In this way Duff uses his questionable conception of the 'public character' of serious wrongs as 'wrongs against the community' to justify penal hardship even on the deeply repentant who has gone to great lengths to make up for his crime. We hold that it is much more important that a perpetrator in repenting focuses his attention on the victim than that he be brought to suffer penal hardship in order to focus 'his attention on the wrong' he has done, as Duff has it (Duff, 2001a: 107).

But will sincere apologies and serious amends made by the offender be enough to satisfy conditions of proportionality?[4] Will 'lateral' censure by the victims (and her peers and the offender's peers) be enough to match the seriousness of the crime? What if victims are more (or less) inclined to forgive than seems appropriate given the wrong committed? Do we not also need some form of 'vertical', public censure apart from the censure involved in the process of criminal investigation, trial and conviction? Should the judge, as Ross London (2011: 40) has proposed, not set up the kind of lower (and upper) limits to prevent excessive leniency (or severity)? Will restorative justice outcome, in general, not violate an equality requirement that opposes the highly unequal treatment of similar offences? Invoking restorative justice procedures in the post-conviction phase will certainly lead to differences in what will be expected of offenders, even if they are convicted for what is legally the identical offence. But such differences are not unfair as they

4 I thank an anonymous reviewer for raising this point.

match the unavoidable differences of personal circumstances, histories, personalities and social settings in which both offenders and victims are implicated. Criminal procedures can hardly account for such nuances. Restorative justice is designed to take those differences seriously, which seems to be more of an advantage than a disadvantage. As Dancig-Rosenberg and Gal (2013: 2334) have argued, equal treatment in its restorative meaning 'is followed through the respectful and fair treatment of all participants during the process notwithstanding the outcomes'. Taking personal and circumstantial differences into account contributes to the respect and fairness with which all parties are treated. This leads us smoothly to Duff's second alleged advantage of the retributive philosophy.

7.2 Categorical recognition and condemnation

Criminal laws and criminal trials turn the (dis)respect for values into an all or nothing issue, while violation is nearly always a more nuanced matter (as would be clear if we were to listen carefully to the stories of victims and perpetrators). If two people get into a fight with each other during a cafe quarrel, and one pushes the other so that he falls and hits his head against a metal rim, this is qualified in many jurisdictions as a homicide attempt. But according to the perpetrator, he had no intention whatsoever to abuse the other, let alone kill him. Similarly, according to the law, erotic or sexual encounters (even a forced kiss) may be labelled as rape, while reality is usually much more nuanced. But the law is never so nuanced, and therefore neither are the criminal proceedings. Criminal trials point out specific persons as perpetrators and their acts as crimes. In reality, however, responsibility for a wrong done could well not be properly allocated to just one person (Baumeister, Stillwell & Wotman, 1990). Responsibility is often, as Duff himself acknowledges 'shared in complex and nuanced ways that cannot be captured in the formal process of a criminal trial' (Duff, 2011: 74). Even so, says Duff,

> the wrongs that we should treat as public are typically wrongs that require categorical recognition and condemnation rather than (or at least before) the kind of nuanced negotiation (and compromise) that a conflict-oriented process is likely to involve. (idem)

But what does such a categorical recognition and condemnation bring victims or the public at large? Leaving nuances out may, certainly in the long run, do more bad than good. It may lead to caricatural images of perpetrators, seeing monsters where there are none. By neglecting nuances, not only the victim but also the public at large may come to overgeneralise the event, which might foster the negative feeling as if nowhere is safe (Pemberton, Winkel & Groenhuijsen, 2007). Leaving out the nuances by framing culprits in categorical legal terms dehumanises a perpetrator and could stir up public concern and anxiety (Smith, 2014: 106). If the ordinariness of (most) perpetrators is hidden from our view, we may start fantasising about their evilness, thus enlarging the impact of the crime. Similarly, 'fixing' victims in their role as the passive recipients of a wrong as it is defined by the law may in a sense dehumanise them, turning them into 'patients' rather than agents.

7.3 Recompense

The basic function of retributive punishment is 'paying back' the perpetrator, thereby satisfying the call for vindication of victims (and responding to the outrage of the public at large). Victimisation predominantly involves a sense of loss of dignity (Bilz, 2016). Victimisation means that the offender has violently appropriated status and power over the victim and the wider community (Okimoto & Wenzel, 2008). The urge for retribution and 'getting the perpetrator back' might well be understood as an attempt to regain agency and dignity: 'The lord must be humbled to show that he isn't the lord of the victim' (Murphy & Hampton, 1998: 126).

Even so, punitive retribution is a notoriously indirect and inefficient way of annulling the affront that the victim has experienced. It is not difficult to see that restorative processes are much more effective and efficient in restoring the dignity and autonomy of victims (Van Willigenburg, 2018). Because restorative justice sees crime as a relationship issue, it promotes practices that directly foster the restoration of interpersonal respect and worth (Zehr, 1998). Restoration processes may, in the first place, be profoundly empowering because victims can exercise much more control than in regular criminal procedures. And, secondly, by being able to stand up oneself in front of the perpetrator, looking him in the face and telling one's story, one gains self-respect and respect from significant others.

We hold that restorative procedures are much more suitable in defining the many forms of recompense that might be of help to the victim and that might be needed to restore relationships, trust and self-respect. The crude form of recompense through penal retribution is perhaps the least suitable reaction to crime.

8 The public character of crimes: the government as victim?

The criticism of restorative justice approaches was that these approaches do not sufficiently account for the 'public' character of crime (regarded as violations of 'public values', i.e. values that are definitive of a political community). We have, however, argued that especially *mala in se* cannot be understood as violations of such 'public' values, as they are violations of agent-neutral values that are definitive of our humanity as such (and not just violations of the agent-relative values that are important for members of a professional group or national community). Agent-neutral values are made 'public' by criminalising their violation, thus signalling their import. Restorative justice does not exclude such criminalisation but opposes the way a polity responds to these violations by way of retributive punishment instead of the procedures aimed at restoring persons, relations and communities. The criticism that restorative justice approaches 'privatise' criminal violations boils down, then, to the criticism that restorative justice promotes restorative procedures instead of retributive measures. This, according to Duff, is the wrong response to crime. But that is not because restorative justice advocates deny that we should stand up for important values and for the victims of value-violations but because Duff believes that only the imposition of burdensome

punishment on perpetrators can do the work, an assertion that restorative justice advocates deny.

We have the suspicion that the appeal to the 'public' character of crime reflects an old tendency in criminal law. Since the Leges Henrici Primi, a treatise written in 1,120 about the legal customs in medieval England, the king acquired royal jurisdiction over offences such as theft, counterfeit, arson, premeditated assault, robbery, rape and abduction (Huscroft, 2005). This meant that (the state) became the primary 'victim' of such crimes. Local systems of dispute resolution and trial, focused on restitution and reparation for the victims, were abandoned. From the ninth century onwards, fines paid to the state had replaced restitution to the victim. Corporal punishment and the death sentence became the central responses to serious wrongdoing (Downer, 1972). The thus developing 'public' character of criminal offences resulted in forms of public retribution like whipping, the stocks, pillory and branding, serving to inflict physical pain and to humiliate offenders on order of the 'offended' state. It seems that this shift from victim-centred reparative procedures to state-centred retributive responses forms part of the background of the complaint that restorative justice is too much 'privatising' crime.[5] The reality, however, is that restorative justice has a strong claim in denying that penal retribution is the best way of responding to criminal offences. Penal retribution is a defective way of answering crime, as it often does not serve the interest of victim and public or, at most, serves those interests in an ineffective and inefficient way.

9 Conclusion

In reaction to Duff's (and Marshall's) criticism, we have argued that restorative justice does not unduly privatise the conflict between victim and offender but rather restores their ownership of the conflict by excluding the state (or the public community) as 'victim' (Zehr & Mika, 1997). We have conceptualised the public character of serious wrongs (limiting ourselves to *mala in se*) not in terms of the violation of 'associative obligations' of members of the polity (Duff & Marshall, 2018: 42) but in terms of the criminalised infringement of important agent-neutral values. Such criminalisation (sometimes avoided on pragmatic or principled grounds) leads to a conception of 'public wrongs' as wrongs that attract a response by public officials, like police, prosecutors and judges. Restorative justice advocates argue on principled and pragmatic grounds that such a response must be restrained, e.g. by only officially investigating a case and prosecuting alleged perpetrators and not necessarily imposing penal retribution (but seeking restorative ways of

5 Critical social science reveals how the criminal justice system is designed to transform acts of wrongdoing between individuals into acts of aggression against the state itself, in order to forcefully underline people's belonging to the state through a logic of debt and promise (all your past actions will be 'honoured' in the future!). Paradoxically, this social mechanism relegates 'contextual elements and social forces to the background in order to attribute blame for an event or action to a single actor', thus depoliticising penal judgment and punishment (de Lagasnerie, 2018: 100, 118). I thank an anonymous reviewer for referring me to this line of research, which shows the importance of further connecting the normative philosophical arguments in this article to multidisciplinary discussions.

recompense). Any action by public officials in this regard should promote the empowerment of victims in their search for acknowledgement and redress for wrongs committed to them.

Such an approach to some extent 'privatises' the conflict involved in crime, but such a limitation is justified. Restorative justice advocates deny that the public imposition of penal hardship on the offender is necessary to reach a satisfactory response to the crime, which involves censuring the wrong done, changing the perpetrator and restoring the dignity of the victim. Restorative justice procedures are more efficient and effective in resolving the interpersonal conflict that is inherent of crime, in repairing harm and in restoring relationships and self-worth (Clark, 2008). Restorative justice procedures in this way effectively address public concerns about violated values and seriously wronged victims.

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