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ORIGINAL PAPER

Public Wrongs and Human Rights: An Orderly Approach?

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Abstract
Criminal law is a system for societal ordering, as much as it is for protection against interpersonal harm and wrongs. Whilst such laws can engage rights to privacy and freedoms of expression and movement, international human rights rarely feature in criminal theory. Using Duff's public wrongs theory, a normative argument is made for recognition of international human rights within the national civil order, as well as through a proposed supra-national human rights polity. This is tested through identification of human rights criminalization principles from public ordering cases in the European Court of Human Rights. International human rights offers a formal route to recognition of liberal principles, as well as adding possible new boundary conditions within criminal theory.

Keywords Criminalization · European court of human rights · Public order · Criminal theory · Civil order · Societal organisation

1 Introduction

The sheer range of conduct covered by criminal law presents a significant challenge to the task of the criminal theorist. The breadth and complexity of the modern criminal law means that criminal offences are not only limited to serious moral wrongs, but rather are joined, indeed outnumbered, by regulatory criminal law, making the modern criminal law a mechanism for the preservation of *social order*, as much as it is a means of protection against interpersonal harms and wrongs.[1] Alice Ristroph characterizes this as criminal law for *public ordering*.[2] Events such as the COVID-19 pandemic, as well as new movements engaged in public protest, have pulled into sharp relief the role of criminal law in societal and public ordering. Despite this

[1] Ashworth, A., *Positive Obligations in Criminal Law* (2013) Oxford: Hart Publishing at 17 and 22.

[2] Ristroph, A., Criminal Law as Public Ordering, (2020) *University of Toronto Law Journal* 70(Supp 1), 64–83 at 67.

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reality, criminal theory is still some way from developing a compelling account of the use and limits of criminal sanctions for public ordering purposes.

The article examines one leading public wrongs-based criminalization theory, that of Antony Duff, that is especially suited to public ordering offences, and asks whether international human rights law has the potential to assist in its further development.[3] It does so for three reasons: Firstly, because Duff's public wrong criminalization theory is avowedly 'thin', that is, it leaves most of the substantive work still to be done about what kinds of conduct might qualify for criminalization—inviting the question as to which further resources might guide that endeavour. Secondly, because Duff's guiding notion of a public polity has faced criticism for not sufficiently accounting for the fact that polities, as conceived by Duff as corresponding to the nation state, do not exist in isolation, but rather subsist alongside other polities and as constituent members of international systems.[4] And thirdly, because from the perspective of criminal theory, international human rights law offers a relatively under-researched potential source of reasoning and principles that have particular application in the case of public ordering criminalization.[5] Critically, public ordering offences are also ones that have significant potential to engage human rights by interfering with rights such as the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, or freedom of assembly and association; generating a rich jurisprudence that could inspire normative theory.

Following a brief synopsis of Duff's theory of public wrongs, the article suggests two new normative moves that aim to further develop public wrongs theory towards an account that better recognizes the impact of international human rights on criminalization. It argues firstly for recognition of international human rights by Duff's national public polity, and secondly for a *supra*-national human rights polity construct that would require Duff's national polity to incorporate international human rights principles into its criminalization decisions. In order to assess the possible consequences of these proposals for criminalization of public ordering conduct, the article briefly examines jurisprudence from one international human rights system, the European Convention on Human Rights (ECHR) and its European Court of Human Rights (ECtHR). Taking results and principles from this jurisprudence as the type of criminalization outcomes which might result from the normative steps suggested, the article reflects on the possible contribution of international human rights to Duff's theory. It concludes that an international human rights addition to Duff's theory would add significant value. Not only by better reflecting international influences on criminalization in practice, but also by providing a formal route to positions that Duff suggests his liberal national polity might take on public ordering, as well as new opportunities for further theorizing rights-based criminalization principles.

[3] Duff, A., *The Realm of Criminal Law* (2019) Oxford: Oxford University Press.

[4] Liss, R., Criminal Law in A World of States, (2022) *Michigan Journal of International Law* 43(2).

[5] Malby, S., *Criminal Theory and International Human Rights Law* (2020) Oxon: Routledge.

2 Theorizing Criminal Law for Public Ordering

For the purposes of this article, public ordering offences are understood as use of the criminal law for preventing disorder, enforcing social conventions, distributing societal burdens, preventing offence to groups, and ensuring the protection of the state and its core institutions. Many acts within these categories consist of conduct that is often described as *mala prohibita*.[6] Depending upon the criminalization framework subscribed to, liberal criminal theorists make a range of different moves in respect of *mala prohibita* offences.[7] For theorists who characterize crime with reference to its institutions and societal and legislative context, such offences can often be accepted for maintenance of the social order[8]: a line of thought that goes back to Beccaria's view of the criminal law as created by and sustaining the social contract between peoples and state.[9] Antony Duff offers by far the most developed account of this approach to criminal theory. For Duff, the criminal law defines and enforces the central norms of the practice of *living together* as members of a political community—a *polity*. Duff's polity conceives, through its reflections on what it values and how it defines itself, a civil order that is a normative ordering or structuring of its civil life. The civil order includes institutions, laws, and the ends and values by which the polity's shared life is shaped.[10] This civil order is the "public realm" of the polity. A particular, and often contestable, normative space that defines those matters that properly concern the polity's governing institutions and its citizens—those that belong to their shared life as citizens. By definition, the public realm equally defines what remains in the sphere of *private* life, into which the polity is not to intrude.[11] As the role of criminal law is to help maintain the civil order, there is reason, in principle, to criminalize a certain type of conduct if, and only if, the conduct: (i) falls within the public realm, and (ii) is wrongful in that it violates or threatens the polity's civil order.[12] In other words, for Duff, crimes are conceived as

[6] That is, conduct that is not considered wrongful prior to or independent of law, but rather is "wrong by prohibition", distinguishing it from crimes that are *mala in se* ("wrong in itself"). The distinction is often blurred, however, and offences may be considered as having components of each, rather than falling squarely within one category or the other. See Lee, Y., Mala Prohibita and Proportionality, (2021) *Criminal Law and Philosophy* 15, 425–446 at 428.

[7] Simester and von Hirsch, for example, draw from a dual-element harm and wrongfulness account to hold that the wrongfulness of a *mala prohibita* rule-violation depends on the instrumental value of the rule. See Simester, A.P., and von Hirsch, A., *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011) Oxford: Hart Publishing at 27.

[8] Farmer, L., *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) Oxford Scholarship Online at 45.

[9] Cesare Beccaria, *On Crimes and Punishments* (trans. Davies, R. et al.) (1995) Cambridge: Cambridge University Press.

[10] Duff, A., Crimes, Public Wrongs, and Civil Order, (2019) *Criminal Law and Philosophy* 13, 27–48 at 34.

[11] Duff, A., Criminal Law and the Constitution of Civil Order, (2020) *University of Toronto Law Journal* 70(Supp 1), 4–26 at 14.

[12] *Ibid*. at 22.

"public wrongs"—acts that fall within the public realm and are inconsistent with the values by which that realm is constructed.[13]

Whereas public wrong theory is a criminalization theory for *all* criminal offences, its focus on the shared life of a community offers an obvious structure for theorizing public ordering offences. Duff identifies, for example, offences such as violent disorder and affray under the Public Order Act 1986 of England and Wales as clearly public wrongs that disrupt the conditions of civic life.[14] As Duff openly acknowledges, however, polities will of course differ, sometimes radically, in how they define their civil orders, and so in what they count as public matters, as well as in what they count as wrongs within the public realm.[15] Thus, public order offences, such as disorderly behaviour, will hang on the polity's position on difficult questions about how we should react to others' behaviour that we find disturbing or distressing.[16] The criticism of course is that this leaves public wrong theory wide open to the relativism of the polity's particular conception of its civil order. In response, Duff takes tentative steps towards principles for the *type* of civil order that might qualify for the purposes of a public conception of the criminal law. He argues that "any decent or minimally just" polity will recognize certain core values and espouses the notion of a liberal republican polity committed to central goods of autonomy, freedom and privacy.[17] As liberal democracies demonstrate in practice, however, the range of understanding of such values, and the balance between them, can still vary significantly.

Duff's theory is avowedly 'thin' in this sense, and whilst he explores the impact of different public/private understandings on criminal law in areas such as abortion and polygamy, he consciously does not extend his theory in the direction of substantial markers or mediating guidelines for this balance by the liberal polity.[18] Similarly, when it comes to exploring the *way* in which conduct can violate or threaten the civil order, the limitations of Duff's approach are apparent. He recognizes, for example, that a violation could arise either because of an act's consequential impact on shared social life, or because it is intrinsically inconsistent with, destructive of, or deconstructive of a civil order.[19] But, at least in the case of public ordering, Duff does not investigate in detail how possible violation thresholds might guide the substance of such offences. For *mala prohibita* more generally, Duff holds simply that regulations whose breach is potentially criminalizable should be well-designed and

[13] See further Lamond, G., What is a Crime?, (2007) *Oxford Journal of Legal Studies* 27(4), 609–632. Thorburn, M., Criminal Law as Public Law? In: Duff, A., and Green, S. (eds.), *Philosophical Foundations of Criminal Law* (2010) Oxford: Oxford University Press. Chiao, V., What is the Criminal Law For?, (2016) *Law and Philosophy* 35, 137–163.

[14] Duff, *supra* note 3 at 309.

[15] Duff, A., Crimes, Public Wrongs, and Civil Order, (2019) *Criminal Law and Philosophy* 13, 27–48 at 35.

[16] Duff, *supra* note 3.

[17] *Ibid*. at 192–201.

[18] *Ibid*. at 171–177.

[19] *Ibid*. at 218.

narrowly tailored towards a significant aspect of the common good, imposing only reasonable burdens on those whose conduct they constrain.[20]

3 A Contribution for International Human Rights?

Duff's public wrongs project begins to theorize from within a particular, contingent, intellectual and political context of the Anglo-American system of criminal law in a contemporary liberal democracy.[21] Accordingly, Duff equates his polity almost exclusively with the *nation state*, resulting in a theory of *domestic* criminal law. Duff does acknowledge that domestic laws are sometimes influenced, and sometimes determined, by the requirements of *transnational and international* commitments. However, Duff takes little account of or inspiration from this contingency within his construction of the polity and its civil order.[22] Neither does he attempt to theorize any form of international system as a polity in its own right, or, given that one might be characterized as such, its interaction with national polities.[23]

From a practical perspective, as a theory for contemporary societies, this is a significant omission. In today's interconnected world, developments in the criminal law of any one individual country are no longer the concern of merely that country. The substantive content of national criminal law has wide implications for the state in areas such as international cooperation in criminal matters and its participation in regional and global economic and social systems. Near the heart of this multilateral system sits international human rights law. Although not originally intended as a system of general regulation of criminalization, international human rights law nonetheless plays a significant role in determining the values within which states, as polities, craft their own national law. International human rights treaties contain a number of direct criminalization obligations, and international human rights courts and tribunals, such as the ECtHR, have developed extensive jurisprudence on when state obligations in human rights treaties may require, permit, or prohibit criminalization of certain acts.[24]

A few theorists, notably Tatjana Hörnle and Miriam Gur-Arye, have suggested the potential for human rights to assist in thickening Duff's theory of criminalization.[25]

[20] *Ibid*. at 320.

[21] *Ibid*. at 4–5.

[22] Duff does acknowledge the role of the ECHR in serving as a constraint on legitimate governmental action that helps to determine the limits of the criminal law, and the kinds of consideration that can justify varying those limits, although he does not develop this argument further. Duff, *supra* note 3 at 260.

[23] *Ibid*. at 117. In response to Gur-Ayre's critique, Duff later acknowledged that more attention could have been paid to human rights, as a grounding for some parts of substantive criminal law and as a framework within which other polities can take an interest in a polity's domestic criminal law. See Duff, A., Criminal Law and Criminalization: A Response to Critics, (2019) *Jerusalem Review of Legal Studies* 18(1), 82–87 at 82.

[24] Malby, *supra* note 5 at 183.

[25] Hörnle, T., One Masterprinciple of Criminalization—Or Several Principles?, (2019) *Law, Ethics and Philosophy* 7, 208–20 at 212, and Gur-Arye, M., Public Wrongs that Violate Human Rights—Following Duff, The Realm of Criminal Law, (2019) *Jerusalem Review of Legal Studies* 18(1), 1–15.

However, their accounts either invoke a 'horizontal' notion of moral claim rights, rather than the vertical (state–individual) rights of constitutional law or international human rights law, or focus on different understandings of human rights as an underlying reason for criminalization differences.[26] This article argues that a contribution of human rights to criminal law derives not from its use as an explanation for difference at the national (polity) level, but rather from its supra-national boundaries and *parameters* within which that difference may legitimately lie. For the ECHR, for instance, whereas the ECtHR has held that states are not required to incorporate the Convention into domestic law, the substance of the rights and freedoms within it must be secured under the domestic legal order.[27] ECHR rights and freedoms thus form part of the formal structure of laws in contracting states, helping to define the values of its civil order. The way in which a state defines and interprets the ECHR rights as part of its civil order derives both from within the state, via its national legislature and courts, and from outwith the state, through its acceptance of judgments of the ECtHR. Judgments of the ECtHR do not strictly bind non-parties to a particular case. However, as noted by the Court in *Pretty*, judgments issued in individual cases nonetheless establish precedents, albeit to a greater or lesser extent.[28] At the same time, under the principle of subsidiarity and the doctrine of the margin of appreciation, states may have different ways of implementing and interpreting Convention rights within the value and context of their own civil orders.[29] To the extent that Duff's public wrongs theory consciously attempts to theorize not an abstract but a diverse range of *actual* practices and institutions, located within sets of legal and social practices and institutions,[30] the failure to account for such influences on the criminal law represents a clear theoretical gap.

3.1 The National Polity and International Human Rights

The challenge then is to formulate a *normative* argument for why Duff's account of the public polity should incorporate international human rights obligations and jurisprudence, such as that of the ECHR. A first step in this direction would be to show principled reasons why the kind of civil order that Duff has in mind in public wrong theory should also be one in which international human rights form an aspect, if not a central aspect. A good starting point is the position in Duff's account that the criminal law is not simply instrumental for helping sustain a civil order, but rather is itself partly *constitutive* of the civil order that it is also to sustain. That is, the criminal law embodies values that determine, in important ways, the civic character of the polity of which it is part. As Duff recognizes, a polity that constitutes itself and its civil order in this way, and takes civic wrongdoing seriously, is also a

[26] Gur-Arye, *Ibid*. at 12.

[27] Caligiuri, A., and Napoletano, N. Application of the ECHR in the Domestic Systems, (2010) *Italian Yearbook of International Law* 20, 125–162.

[28] *Pretty v. United Kingdom* (Appl no. 2346/02), ECHR. 29 April 2002 at para 75.

[29] Council of Europe, Brussels Declaration, 27 March 2015.

[30] Duff, *supra* note 3 at 3.

polity that takes *agency* and responsibility seriously, and insists on treating its members as agents who can guide their own conduct by appropriate kinds of reason.[31] That the quality of agency requires or grounds *human rights* is a common move, including by Alan Gewirth and James Griffin.[32] For Gewirth, for example, agents must accept that freedom and well-being are necessary goods needed in order to act and to act successfully in general. They must further logically accept that they have generic rights to freedom and well-being, as denying this would permit other persons to interfere or remove those conditions necessary for agency. As all prospective purposive agents have such generic rights, and since the generic rights are rights had equally by all agents, and since all humans are actual, prospective, or potential agents, the generic rights are seen to be human rights.[33] The argument is strictly one for claim rights that may be addressed against both individuals and institutions, rather than the vertical right–duty relationship of constitutional or international human rights. Nonetheless, if such claims can be addressed to institutions, the agency of the polities' citizens would not be meaningful if agents constituting the civil order, who logically accepted that all other agents have claims against them, did not recognize such claims simply because agents acted through the institutions of a polity. The civil order that Duff has in mind must therefore recognize a system of human rights that allows the possibility of human rights claims also against those institutions. Whilst Duff does not explicitly hold as such, he certainly considers that human rights *may*, and likely *will*, be inherent to his account of the kind of polity, and hence the kind of criminal law, in which we could plausibly aspire to live.[34] He further envisages that rights such as those to liberty or to privacy could have a constitutional status as defining elements of the civil order.[35]

The next step is to extend the argument to the recognition of human rights conceived at a level *external* (international) to the polity, such as those contained in the ECHR. Duff's theory is about defining a *level of relationship* at which X is answerable to Y—a relationship that Duff considers is best conceived at the level of the nation state.[36] This position has been criticized in the context of international criminal law by Ryan Liss as seeming to place the state in a vacuum—considering it as an isolated political community.[37] Massimo Renzo argues along similar lines. He distinguishes conduct such as "*violations of basic human rights*", that he claims are wrong *independently* of the types of conduct that a polity otherwise agrees as wrong at its nation state level. The wrongness of these types of conduct is not contingent upon the particular shared principles and values of a particular civil order, but

[31] *Ibid*. at 214–215.

[32] Gewirth, A., *The Community of Rights* (1996) Chicago: University of Chicago Press, and Griffin, J., *On Human Rights* (2008) Oxford: Oxford University Press.

[33] *Ibid*. at 17–19.

[34] Duff, *supra* note 3 at 5, footnote 23.

[35] *Ibid*. at 259.

[36] *Ibid*. at 106–107.

[37] Liss, *supra* note 4 at 274.

properly concern "the whole of humanity".[38] For Renzo, this represents a relational account that is *external* to the nation state polity but which nonetheless has domestic implications *within* the polity. This is because any minimally decent political community will declare violations of basic human rights as incompatible not only with the values on which the civic enterprise depends, but also with more fundamental principles that regulate the relationship with all fellow human beings, independently of being part of the same political community.[39]

An equivalent argument exists, not for international human rights as values that when violated will always be public wrongs and criminalizable by any individual polity. But rather as the values that all polities will recognize by virtue of the fact that these are the common rights to freedom and well-being that the same agent acting successfully in *any* polity (of the minimally basic type that values agency that Duff and Renzo both envisage) will require. The universality of humans as agents effectively requires that Duff's polity must integrate an external, cross-polity, understanding of the content of those human rights that such agency demands, in order to ensure that it provides full chances for its agent members to act and to act successfully in general. The fact that all humans have agency means that it cannot be left solely to the relationship established by individual (even conscientious) polities to determine which human rights are necessary, for instance by creating their own choice of constitutional rights; on risk that those polities will not meet the basic minimum that Duff envisages. As Gewirth highlights, for the most part, the generic rights required by agency coincide extensionally with international recognition of human rights, such as the Universal Declaration of Human Rights (UDHR), including both civil and political, and social and economic rights.[40] The minimally decent, agency respecting, polity will therefore recognize such *external international* human rights as part of its civil order, insofar as these represent those required for effective agency in any polity. Whilst Duff himself does not take this step, such a move would hardly be inconsistent with his public wrong theory. He relies, for instance, in a number of places in *The Realm of Criminal Law* on a polity recognizing external rights from both the ECHR and UDHR, but without expanding upon why this should be so.[41]

The argument so far, however, says little yet about the precise criminalization implications of the civil order necessarily including recognition of international human rights, such as those contained in the ECHR. Whilst a rights violation would now almost certainly be a public wrong (being in the public realm and of concern to the polity), Duff emphasizes that criminalization is only one among a number of possible ways of responding, including by otherwise doing nothing, adopting non-criminal regulation, or use of private law.[42] Whilst it would be open to the national

[38] Renzo, M., Responsibility and Answerability in the Criminal Law. In: Duff, R.A., Farmer, L., Marshall, S.E., Renzo, M., and Tadros, V. (eds.), *The Constitution of the Criminal Law* (2013) Oxford: Oxford University Press at 217.

[39] *Ibid*. at 231.

[40] Gewirth, *supra* note 32 at 2.

[41] Duff, *supra* note 3 at 259.

[42] *Ibid*. at 280–292.

polity to follow the ECtHR's approach to criminalization of particular conduct, there would be no normative reason for it to do so, given the ECtHR's status as external to the polity. We must then consider whether the public wrongs model could address Liss's criticism and more accurately reflect the existence of institutions beyond the national polity. In other words, could Duff's theory be expanded to include the ECHR system as a *supra*-national polity?

3.2 A Supra-National Human Rights Polity

Under Duff's relational account of public wrongs, community membership must entail a relationship that is substantive enough to authorize the practice of holding to account; that makes the wrong committed by one the proper concern of the other. For Duff, this primarily arises in political terms through the shared membership of a political community. Duff argues that the only plausible candidate for that political community is the *local polity*; essentially the national legislature.[43] If the local polity is to be seen as acting on behalf of some larger political community then, Duff asserts, we need an account of what that larger community is, of its aims, of which kinds of wrong fall within its public concern, and of what the relationship is between that larger political community and the local polity.[44] Duff recognizes, for example, the European Union (as opposed to the Council of Europe for the ECHR) as a gradually developing political community, at least in relation to crimes in which the European Parliament and Council take an interest.[45]

When it comes to an international human rights instrument such as the ECHR, the Convention embodies rights and freedoms, and hence aims and values, that its States Parties purport to share, and which they commit to secure within their jurisdiction subject to the supervision of the ECtHR.[46] Membership is a prerequisite for joining the Council of Europe, an international organization of 46 Member States with 700 million citizens, which aims to promote democracy, human rights and the rule of law across Europe and beyond.[47] As regards Duff's features of a political community, it is clear that the ECHR sets out shared foundational aims for its (national polity) members. It consists of formal legal dimensions, institutions and legally ordained practices by which it governs itself as an international community of national polities.[48] This includes through the ECtHR and the role of Council of Europe institutions, such as the Committee of Ministers in supervising execution of

[43] *Ibid*. at 113.
[44] *Ibid*.
[45] *Ibid*. at 114.
[46] The ECHR Preamble affirms that High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction.
[47] See Council of Europe, *Key facts*. Available at: https://www.coe.int/en/web/portal/the-council-of-europe-key-facts (Accessed 1 June 2024).
[48] Duff, *supra* note 3 at 159.

Court judgments.[49] It might also be argued that ECHR membership creates an additional informal, shared, extra-legal understanding amongst individuals in its Member States as to their identity, freedoms, aspirations, and what they owe each other in their mutual dealings, as members of a potential supra-national polity.[50] On the other hand, the case law of the ECtHR demonstrates just how wide and deep disagreement can run, both between states as to interpretation of the Convention, and between individuals and their societal institutions and laws; potentially undermining any notion of genuine shared values in a supra-national community. That said, normative disagreements at the supra-national level need not necessarily undermine the prospects of a genuine supra-national polity—as long as those disagreements are pursued within a framework of shared procedural values that themselves reflect a respect for each other as equal members of the community.[51] In so far as Duff's conception of a polity can be a matter of aspiration as much as established fact, an ECHR supra-national form of (political) life of both states and individuals at least holds promising elements of a polity from Duff's theory.

If ECHR members were to be accorded Duff (supra-national) polity status, what type of civil order would this entail? Whilst the ECtHR has described the Convention as a "constitutional instrument of European public order",[52] it would likely still be a *limited* civil order in light of the tightly defined nature of the ECHR 'constitution'.[53] It would be concerned strictly with ensuring realization in practice of the law (and perhaps spirit) of the Convention, rather than any wider social, economic, or common good—although Convention rights may certainly underpin such wider aims. Its formal legal members who must abide by the civil order would be national polities. Although individuals, through their own membership of a national polity, would also have a critical stake and might be considered as members in some sense—as rights holders within the ECHR polity, through an interest in the compliance of their national polity with the ECHR civil order, and arguably through an aspirational, if not genuine, sense of shared commitment to international human rights values—it would *not* be the case that criminal law is constitutive of an ECHR civil order to the same extent as in Duff's national polity. ECHR rights and freedoms were never intended to *all* be protected by criminal law embodying such values in the same way as national criminal law sustains a national civil order. The national civil order, by its nature, consists of a far greater range of laws, regulations and institutions that require protection.

However, criminal law cannot be said to be in *no* way constitutive of the civil order of an ECHR polity. For the ECtHR, and in international human rights law in general, *serious* human rights violations, such as in the case of serious threats to

[49] See Council of Europe, *The supervision process.* Available at https://www.coe.int/en/web/execution/the-supervision-process (Accessed 1 June 2024).

[50] Duff, *supra* note 3 at 178–179.

[51] *Ibid*. With thanks to Antony Duff for highlighting this point in correspondence.

[52] See for example *Loizidou v. Turkey* (Appl no. 15318/89), ECHR. 23 March 1995, and *N.D. and N.T. v. Spain* (Appl no. 8675/15), ECHR. 13 February 2020.

[53] Consisting of an overarching obligation on Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms contained in the 17 articles of Section I of the Convention.

life and bodily integrity, do entail a criminalization requirement in order to provide both adequate protection and remedial possibilities for rights such as those to life and to freedom from cruel, inhuman and degrading treatment, and the prohibition on slavery or servitude.[54] In addition, ECHR rights have a range of implications for criminal law, both distinctly permitting it and, in some cases, prohibiting it. This relationship between the individual, the criminal law, and an ECHR supra-national polity would not be the same though as for national polities. As with other international human rights systems, the ECtHR (as the court of the supra-national polity) is not a criminal court with power itself to impose criminal penalties on either states, as its formal legal members, or individuals within those states. Rather, where criminal law is permitted, required, or prohibited for the protection of the ECHR civil order, it must be created and enforced by national polities, as the constituent legal members of the supra-national polity. National polities can call each other to account for alleged breaches of the ECHR civil order.[55] But more pertinently, individuals, as the holders of ECHR rights and freedoms, can call their national polity to account before the international ECtHR, where their national polity fails to act consistently with the (de)criminalization requirements of the ECHR supra-national polity.[56] Individuals thus remain members of their national polity and are in parallel, if not strictly members of an ECHR polity, at least holders of a limited legal (by virtue of their standing before the ECtHR) and values-based relationship to the ECHR civil order. By virtue of that relationship, individuals themselves are called to account by the courts of a national polity for their acts that are inconsistent with ECHR rights and freedoms in those cases where the ECHR civil order permits or demands criminalization in order to protect certain rights and freedoms. Conversely, as rights holders within the ECHR civil order, individuals enjoy protection from criminalization by their national polity that is inconsistent with those rights and freedoms.

A public wrongs theory that incorporated both a national polity recognizing international human rights law, *and* a parallel supra-national human rights polity would give us the missing normative basis for fully incorporating international human rights criminalization principles. What may be criminal under such a theory would be a function *both* of conduct falling within the national public realm and inconsistent with the values of that realm, *and* (for acts engaging human rights) conduct constituting a threat to the ECHR civil order of rights and freedoms in such a way that permitted or required criminalization. In addition, the ECHR civil order would *restrain* national criminalization where the criminal law itself violated rights and freedoms. Such a *dual* polity model not only well represents the relationship between criminal law and human rights, but importantly accounts for the criticism that a political theory of the state's role, and a justification for its authority in the

[54] See, for example, Seibert-Fohr, A., *Prosecuting Serious Human Rights Violations* (2009) Oxford: Oxford University Press.

[55] ECHR Article 33 provides that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

[56] ECHR Article 34 provides that the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.

criminal law, cannot be posited in isolation. A dual polity model offers a way of defining, as demanded by Ryan Liss, the place of the state in the world (or at least, here, within one wider supra-national polity), as well as a system that directly integrates at least one defining principle (here, recognition of the same set of international human rights) for the *sort* of state that Duff has in mind in public wrongs theory.[57] The model starts to account for the missing international influence on national criminal law in Duff's theory. In addition to integrating the external standard of international human rights, however, this has an important further result: the national polity and the decisions that it takes about its civil order and criminal law is no longer *alone*. It rather sits in such a theory alongside *other national polities* that are also members of the ECHR supra-national polity. In the same way that Duff allows a pluralist, liberal national polity to have a degree of diversity without undermining the polity's shared conception of its public realm, so national polities will hold a diversity of views as to the meaning, demands, and obligations of the supra-national polity of which they are members that holds international human rights as central to its civil order.

Indeed, for the ECHR system, the criminalization requirements that it places on its members are themselves dependent, to some extent, on the very degree of commonality or divergence of the criminal law between its members; a concept which is given practical effect through the ECtHR's application of its doctrine of 'European consensus' and the resultant size of the margin of appreciation accorded to states in securing Convention rights, in particular as regards permitted restrictions on rights.[58] An ECHR supra-national polity thus introduces a *comparative standard* as between national polities, when it comes to the reasonable disagreement that national polities may have on questions of criminalization, arising from their cultural, social, and normative differences. As Ryan Long argues, "the international case relies upon the domestic case… But the domestic case has more to do with the [international] community than [Duff] claims, and the international case has more to do with particular polities than he claims".[59] A public wrongs theory that includes the national polity and supra-national polity therefore sets *boundary conditions* on criminalization, with reference to the values and aims of the international (ECHR) civil order and the way in which that order is applied and interpreted by national polities as members of the supra-national polity. In short, it gives teeth to Duff's idea of a minimally decent polity as staying within a certain *range* of civil order, and hence criminalization, choices.

[57] Duff, *supra* note 3 at 192–201.

[58] See for example, Council of Europe, *The Margin of Appreciation*. Available at: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (Accessed 1 June 2024).

[59] Long, R., Responsibility, Authority and the Community of Moral Agents in Domestic and International Criminal Law, (2014) *International Criminal Law Review* 14, 4–5 at 852.

3.3 An International Human Rights Addition to Duff's Theory

Exactly how then might the notion of an ECHR polity be expressed as an addition to Duff's criminalization theory? Not every possible act, or even public ordering-related act, that might be considered for criminalization will engage international human rights, and of those that do, human rights will not demand a clear (de)criminalization requirement for each. We might therefore make a specific addition to Duff's formula to say that there is reason, in principle, to criminalize a certain type of conduct if, and only if, the conduct:

> (i) falls within the public realm, and (ii) is wrongful in that it violates or threatens the polity's civil order (Duff's formulation); *and*
> (the proposed addition) (iii) criminalization does *not* fall outside the range of reasonable restrictions on human rights constituting a relevant supra-national civil order.

We might also add that (irrespective of (i) and (ii)) conduct *should* be criminalized where to not do so would result in a serious violation of human rights constituting a relevant supra-national civil order. Such a formulation would retain recognition of the key role of the national polity in defining the scope and content of the public realm but would formally introduce the standards and principles of international human rights to this decision. International human rights would effectively act as an extra filter for conduct that touches on essential aspects of human agency and life. The rights would be those from a 'relevant' supra-national civil order as the national polity must be committed to those rights through membership of the supra-national polity.[60] What is 'reasonable' in the proposed addition would carry its usual meaning of ensuring that rights are not interfered with unnecessarily by criminalization, with a proportionate relationship between the means employed and the aim sought to be realized. This would be assessed, in part, however, with reference to the existence or non-existence of common ground amongst all national polity members of the relevant supra-national polity. This would introduce a formal notion of considering where a particular criminalization position sits within the range of possible choices that a polity committed to the same international human rights framework might make.

In order to test what this might bring in terms of criminalization results, we turn next to examine some of the *content* of international human rights law in practice by looking at ECtHR public ordering criminalization cases. A short review of relevant cases identifies criminalization outcomes under ECtHR decisions, as well as principles developed by the Court that are relevant to criminalization. The implications of these findings are then considered for the proposed international human rights addition to Duff's theory.

[60] This would also account for the fact that different international human rights systems (such as the ECHR and the Inter-American human rights system) will come to slightly different conclusions on the content and meaning of some rights. See for example, Bantekas, I., and Oette, L. *International Human Rights Law and Practice* (2016) Cambridge: Cambridge University Press at 235–292.

4 ECHR Public Ordering Criminalization Cases

The ECtHR rarely partakes in *in abstracto* reasoning on the criminal law directly.[61] However, it is possible to identify general principles that the Court applies to questions of criminalization by looking across a range of cases in which the applicant challenges a criminal conviction or submits that a specific criminal law is incompatible with the ECHR, or that the ECHR requires a specific act to be a criminal offence. For offences that concern the broad area of public ordering, ECtHR cases cover a continuum from classic 'public order' type acts, to wider 'societal order' offences. Classic 'public order' cases include acts usually carried out clearly in the physical public space, such as breach of the peace, breach of public order, refusal to obey the police, hooliganism, and organizing and participating in an unauthorized demonstration.[62] 'Societal order' offences relate to broader public or societal ordering aims, that may or not take place 'in public', but nonetheless relate to conduct that is not solely a matter of interpersonal harm or offence. Here the ECtHR has considered criminalization of acts such as wearing of clothing designed to conceal the face, nudity in public, incest, begging, failure to comply with building planning regulations, conscientious objection, desecrating a tomb, denial of genocide, denigrating the nation, and publishing secret official deliberations.[63] Cases show that the ECtHR grants a high degree of latitude for states in use of the criminal law for public ordering. It is common for the ECtHR to find that conduct *can* legitimately be a criminal offence for use of the criminal law for public ordering purposes. Indeed, in its jurisprudence, the ECtHR explicitly endorses a conception of the overall function of the criminal law as to "preserve *public order* and decency", in addition to protecting the citizen from what is offensive or injurious.[64] Protection of interests beyond those held by the individual is certainly therefore within the aims of the criminal law as far as the ECtHR is concerned.[65]

For public ordering in its most common 'public order' sense, a broad public order-type offence in law targeting serious societal disruption and/or offence or alarm is acceptable to the ECtHR. The Court acknowledges that, by its very nature, a concept of "breach of public order" is vague. As ordinary life can be disrupted in a potentially endless number of ways however, the ECtHR holds that it would be

[61] See, for example, *Niculescu v. Romania* (Appl no. 25333/03), ECHR. 25 September 2013 at para 70.

[62] ECHR cases *Kudrevičius v. Lithuania* (Appl no. 37553/05), *Lucas v. UK* (39,013/02), *Rai and Evans v. UK* (Appl no. 26258/07), *Navalnny v. Russia* (Appl no. 29580/12), *Mariya Alekhina v. Russia* (Appl no. 38004/12), *Shvydka v. Ukraine* (Appl no. 17888/12).

[63] ECHR cases *S.A.S. v. France* (Appl no. 43835/11), *Dakir v. Belgium* (Appl no. 4619/12), *Gough v. UK* (Appl no. 49327/11), *Ehrmann v. France* (Appl no. 27777/10), *Stübing v. Germany* (Appl no. 43547/08), *Acmanne v. Belgium* (Appl no. 10435/83), *Sinkova v. Ukraine* (Appl no. 39496/11), *Stoll v. Switzerland* (Appl no. 69698/01), *Dudgeon v. UK* (Appl no. 7525/76), *Ahmet v. Turkey* (Appl no. 41135/98), *Bayatyan v. Armenia* (Appl no. 23459/03), *Lacatus v. Switzerland* (Appl no. 14065/05), *Perinçek v. Switzerland* (Appl no. 27510/08), *Sükran v. Turkey* (Appl no. 49197/06), *Akçam v. Turkey* (Appl no. 27520/07).

[64] *Dudgeon v. United Kingdom* (Appl no. 7525/76), ECHR. 22 October 1981 at para 49.

[65] See also *Garyfallou Aebe v. Greece* (Appl no. 93/1996/712/909), ECHR. 24 September 1997 at para 31.

unrealistic to expect legislators to enumerate an exhaustive list of illegitimate means to this end. As such, it does accept broad criminal offences such as 'breach of the peace' as compatible in principle with the Convention.[66] For criminal sanctions arising from demonstrations and protests, the ECtHR builds a key threshold for use of the criminal law around the *level of disruption* to ordinary life. The Court emphasizes that public authorities must show a certain degree of tolerance in this regard.[67] This can turn on factors such as an intentional failure to abide by rules governing demonstrations, as well as the *intent* to create inconvenience, chaos, or physically block an activity such as the use of highways, or the location of the act in a security sensitive area.[68] In these circumstances, the ECtHR has held "intentional serious disruption" to be a reprehensible act, justifying the imposition of penalties "even of a criminal nature".[69] Obstructing traffic by blocking a motorway for a period of five hours constitutes sufficient disruption for a resulting criminal conviction to be compatible with the Convention.[70] In contrast, a conviction for merely breaching procedure for the conduct of public events that did not create any real risk of public disorder has been held to constitute a violation of the right to freedom of expression.[71] Within the comparatively highly ordered societies of Council of Europe Member States, acts that intentionally create a *significant inconvenience* to ordinary life and the activities lawfully carried out by others, including usual patterns of pedestrian or vehicle movement, are likely to be held by the ECtHR to be legitimately subject to criminal measures.[72]

For acts constituting a breach of the peace more broadly, in addition to the notion of disruption, the ECtHR focuses on the potential of acts to *disturb*, *upset*, *annoy*, *or alarm* those who witness them. In *Lucas*, the ECtHR held that the definition of the Scottish offence of 'breach of the peace'—conduct which is genuinely alarming and disturbing in its context to any reasonable person—was sufficiently precise to allow citizens to foresee the consequences that a given action may entail.[73] In *Gough*, the ECtHR held that convictions under this same Scottish offence for (repeated) nudity in public did not give rise to a violation, being designed to prevent the applicant causing *offence and alarm* to other members of the public.[74] It highlighted that the offender was under a duty to demonstrate tolerance of and sensibility to the views of other members of the public, and agreed that public nudity went against the 'standards of accepted public behaviour' in any modern democratic society; effectively

[66] *Kudrevičius and Others v. Lithuania* (Appl no. 37553/05), ECHR. 15 October 2015 at para 113.

[67] *Navalnny v. Russia* (Appl no. 29580/12), ECHR. 15 November 2018 at para 155.

[68] *Kudrevičius v. Lithuania* (Appl no. 37553/05), ECHR. 15 October 2015 at paras 164–172. See also *Lucas v. UK* (Appl no. 39013/02), ECHR. 18 March 2003. *Rai and Evans v. UK* (Appl no. 26258/07), ECHR. 17 November 2009.

[69] *Kudrevičius* at para 173.

[70] *Barraco v. France* (Appl no. 31684/05), ECHR. 5 March 2009.

[71] In this instance, posting a call on the Internet to participate in a public event that had not been approved. *Elvira Dmitriyeva v. Russia* (Appl no. 60921/17), ECHR. 9 September 2019.

[72] *Kudrevičius* at para 172.

[73] *Lucas v. UK* at 6.

[74] *Gough v. United Kingdom* (Appl no. 49327/11), ECHR. 28 October 2014 at para 158.

drawing a link between what might reasonably cause offence or alarm, and the usual nature of conduct in public.[75] In *Shvydka*, the Court accepted an offence of 'petty hooliganism' (swearing in public, offensive behaviour, or other similar actions which disturb public order) as pursuing a legitimate aim of protecting public order and the rights of others.[76]

Case law of the ECtHR also confirms that the criminal law may in principle be used in a *mala prohibita* sense to enforce a system of regulatory law that has societal order aims. In *Ehrmann,* for example, the Court considered a conviction for placing, without planning permission, paintings and drawings on the outer walls of a property.[77] The ECtHR concluded that the interference pursued a legitimate aim of the prevention of disorder in order to protect the quality of environment.[78] The interference was found to be proportionate to that aim as the regulations ensured the *protection of the common good* as expressed in planning choices. The Court emphasized that individual freedom could be subject to a decision by a public authority in the *general interest* of the community.[79] One (much criticized) line of ECtHR case law suggests that the margin can include criminalization to protect not only a common good or interest of the community (suggesting the need for at least some objective standard) but, more broadly, a collective *intent* or *choice* of society in the way that it organizes its communal life. In the cases of *S.A.S.* and *Dakir* for example, the ECtHR considered French and Belgian laws that made wearing clothing designed to conceal the face in a public place subject to a criminal sanction.[80] The Court accepted that "respect for the minimum requirements of life in society" or of "living together" included a principle that the face plays an important role in social interaction, and could be linked to the legitimate Convention aim of the "rights and freedoms of others". It held that "the barrier raised against others" by a veil concealing the face could be perceived as breaching the right of others to live in a *space of socialization* which makes living together easier.[81] The ECtHR decided that this principle of face-to-face interaction constituted a "choice of society". In the context of a wide margin of appreciation, the Court held, as a result, that the ban and its criminal sanctions were proportionate.[82] Such cases indicate a wide acceptability of use of the criminal law under the ECHR for societal ordering, allowing national authorities latitude to determine the general interest of communities and the state, and to deploy the criminal law to secure compliance, including for communal interests, such as the quality of the environment, and a broad notion of "living together" as part of the public realm.

[75] *Ibid*. at para 176.
[76] *Shvydka v. Ukraine* (Appl no. 17888/12), ECHR. 30 October 2014 at paras 39–42.
[77] *Ehrmann v. France* (Appl no. 27777/10), ECHR. 7 June 2011.
[78] *Ibid*. at 11.
[79] *Ibid*. at 11–12.
[80] *S.A.S. v. France* (Appl no. 43835/11), ECHR. 1 July 2014. *Dakir v. Belgium* (Appl no. 4619/12), ECHR. 11 December 2017.
[81] *Ibid*. at para 122.
[82] *Ibid*. at para 152.

In a small number of ECHR public ordering criminalization cases the ECtHR has found that the act *should not* be a criminal offence. Key acts falling in this category include the criminalization of same sex relations, wearing religious garments in public, conscientious objection, begging, and denigrating the nation.[83] The majority of these cases are conviction cases, and thus dependent to a large extent on the facts at hand. Across such cases, a first identifiable principle though is a counterpart to the reasoning of the ECtHR in public order cases that *permit* criminalization; that if there is no real serious threat to public order, then the public ordering offence (in the absence of any other justification) may violate Convention rights. In *Ahmet*, for example, in respect of a criminal prohibition on the wearing of religious habits outside of places of worship and religious ceremonies, the ECtHR highlighted that the wearing of such clothing "did not constitute or risk constituting a threat to public order or pressure on others".[84] A second key constraining principle for use of public ordering criminalization is the weighing of interests in order to achieve a *fair balance* between the interests of society as a whole and those of the applicant. In *Dudgeon* (criminalization of private consensual homosexual acts), the ECtHR found that although members of the public who regarded homosexuality as immoral may be shocked, offended, or disturbed by private homosexual acts, this could not "*on its own* warrant the application of penal sanctions when it is consenting adults alone who are involved".[85] The Court found that such justifications as there were for the law were *outweighed* by the detrimental effects of the very existence of the legislative provisions on the life of a person of homosexual orientation.[86] Criminalization of individual action in favour of the community was also held to be outside of the margin in *Bayatyan*; concerning criminalization of evasion of call-up to active military service in the context of conscientious objection.[87] In that case, the Court was highly influenced by the fact that almost all the member States of the Council of Europe had introduced alternatives to compulsory military service. This considerably narrowed the margin of appreciation, requiring particularly compelling reasons to justify the interference. The Court took a similar approach in *Lacatus*, concerning a criminal conviction for begging. The ECtHR highlighted that the criminal law (which simply stated "[he] who begs will be punished by a fine") did "not allow a *real balancing*" of the interests at stake.[88] It noted that a general prohibition on begging provided for by a penal provision tended to be the exception in Council of Europe states, resulting in a limited margin of appreciation. Within this limited margin, the ECtHR found that the sanction imposed on the applicant was disproportionate. The applicant had not engaged in aggressive or intrusive forms of begging and

[83] ECHR cases *Dudgeon v. United Kingdom* (Appl no. 7525/76), *Ahmet v. Turkey* (Appl no. 41135/98), *Altuğ Taner Akçam v. Turkey* (Appl no. 27520/07), *Bayatyan v. Armenia* (Appl no. 23459/03), *Lacatus v. Switzerland* (Appl no. 14065/15), *Sükran v. Turkey* (Appl no. 49197/06).

[84] *Ahmet v. Turkey* (Appl no. 41135/98), ECHR. 4 October 2010 at para 50.

[85] *Dudgeon v. United Kingdom* (Appl no. 7525/76), ECHR. 22 October 1981 at para 60.

[86] *Ibid*.

[87] *Bayatyan v. Armenia* (Appl no. 23459/03), ECHR. 7 May 2011.

[88] *Lacatus v. Switzerland* (Appl no. 14065/15), ECHR. 19 January 2021 at paras 101–102.

was in a situation of "obvious vulnerability".[89] The Court viewed such a restriction as affecting *human dignity* and the very essence of Convention rights.

Overall, the ECtHR shows a high level of permissiveness for public ordering criminalization, with only a few acts of those considered here, such as same sex relations, conscientious objection, and a wide begging offence, being held to be inconsistent with the Convention. No ECHR public ordering criminalization cases were identified where the act *should* be a criminal offence.[90] Its jurisprudence does reveal, though, a number of emerging constraining (sub)-principles. These include, for example, that an act (related to public ordering) intentionally causes 'serious disruption' to ordinary life; and/or that an act is 'genuinely alarming or disturbing' to any reasonable person. ECHR jurisprudence also includes the principles that (public ordering) criminalization requires a 'fair balance' between the interests of society and the individual, and must not undermine opportunities to participate in the civil order or target the very survival of vulnerable individuals.

5 Assessing the Contribution of International Human Rights Law

What do these findings suggest about the contribution that an international human rights addition to Duff's theory might make? This discussion suggests three key points: Firstly, that whilst international human rights will generally be permissive of public ordering criminalization, it will also suggest principles that can guide the national polity in criminalization decisions. In many cases, these may be fairly limited in terms of the substantive work they can do and/or already be implied by Duff's theory. But the supra-national human rights polity means that *any* national polity member must apply its human rights (sub)-principles, providing a consistent rights-based approach that formalizes aspects of Duff's idea of a liberal polity. Secondly, international human rights law is seen to be quite limited when it comes to the question of whether it could provide further detail on the core notions of public wrongs theory, such as how the public realm should be defined. And thirdly, international human rights will function to constrain criminalization of at least some public ordering-related conduct. Again, these may be instances where Duff is already inclined to argue that a liberal polity should not use criminal law, but an international human rights addition provides a formal argument against criminalization based on protection of individual rights.

5.1 Permissiveness and Public Ordering Principles

The brief review of ECtHR public ordering criminalization cases shows that the range of permitted restrictions on rights is likely to be wide. This has the result that a

[89] *Ibid*. at para 107.

[90] Although the ECHR has developed positive criminalization jurisprudence for acts other than those of a public ordering nature, including in respect of interpersonal acts, including rape, domestic violence, servitude, human trafficking, intentional taking of life, and sexual offences against children.

relatively small number of offences in practice may ultimately fall short of a human rights constraint. A supra-national polity dedicated to ensuring implementation of international human rights can be expected to leave significant room for manoeuvre for its national polity members where the supra-national polity decides that criminalization does not represent an unreasonable restriction on rights. To take just one example from ECtHR public ordering criminalization cases: in the area of *mala prohibita* offences attaching to public health rules for instance, the ECtHR confirmed in *Acmanne* that criminalizing the refusal to undergo screening for an infectious disease (tuberculosis in that case) did not, at least in some circumstances, constitute a violation of Article 8 of the ECHR (right to respect for private and family life).[91] A national polity member of the ECHR polity that values a conception of the private realm as described by the ECHR and its associated Article 8 jurisprudence could therefore equally decide that refusal to screen (even though of public interest) either did or did not amount to an actual violation of the civil order (was not wrongful) or, if the former, that, although criminalization was *an* appropriate response to any violation, that it was not *the* appropriate response.[92] As such, under *Acmanne*, all of criminal sanctions, other sanctions, and indeed no sanctions at all for the act of refusing screening for an infectious disease could be compatible with the national civil order that valued ECHR rights and freedoms, as well as with the requirements of the supra-national ECHR polity.

Such a result may not be quite as open as it first seems, however. Where criminalization of a particular conduct is permitted by international human rights law (such that the decision effectively remains in the hands of the national polity), the supra-national polity may still nonetheless provide *guidance* for the purposes of Duff's public wrongs formulation. Decisions of a court of the supra-national polity, such as the ECtHR, would not strictly bind non-parties to its judgments. However, by virtue of its membership of the supra-national polity, the national polity will be committed to and help construct the shared conception of how human rights apply to questions of criminalization. As such, the direction and principles developed by the international court will still be relevant to the national polity, notwithstanding the freedom the polity has to decide within the reasonable range of restrictions it can apply to human rights.[93] In the case of public ordering criminalization, following the ECtHR, the human rights addition to Duff's scheme could mean for example that a polity must consider (sub)-principles such as whether (public ordering) conduct presents a 'risk of disorder' due to being 'genuinely alarming or disturbing' to a reasonable person and/or intentionally causes 'serious disruption' to ordinary life, in order to qualify for criminalization.

[91] *Acmanne and others v. Belgium* (Appl no. 10435/83), ECHR. 10 December 1984.

[92] Duff, *supra* note 3 at 278.

[93] Under s.2(1) of the UK Human Rights Act 1998, for example, a court must take into account any judgment or decision of the ECtHR. The Court of Appeal has held that in the absence of special circumstances, courts should generally follow "clear and constant" ECtHR jurisprudence whose effect is not inconsistent with some fundamental substantive or procedural aspect of domestic law. *Manchester CC v. Pinnock* [2011] 2 AC 104 at para. 48.

At least for the ECHR supra-national polity, such (sub)-principles do not (yet), however, represent a clear normative standard. The ECtHR has not, for instance, developed a clear autonomous concept of 'disorder' against which criminal laws could be tested, much beyond the notion of 'level of disruption'. It is also clear that the ECtHR views the concept of disorder as closely related to respect for the law in general.[94] Indeed, the starting point for the Court's consideration of a genuine risk of disorder is almost always the respondent state's own argument on the nature of 'order' protected by the criminal law. Each individual context is likely to recognize some level of insecurity and disorder as 'normal' – whether as regards interruption of day-to-day life, regular movement of persons and vehicles, public commotions, public shock or nuisance, or expectations of public safety.[95] As such, the ECHR boundary requirement for criminal law to target a genuine risk of disorder entailing serious disruption becomes itself, at least in part, defined by the polity's own expectations and conceptions of an orderly society. This means that the contribution of human rights (sub)-principles for public ordering may be quite limited in practice, albeit that they may set some high-level bar beyond which criminalization cannot be said to be reasonably required. Such (sub)-principles for public ordering criminalization as the 'degree of disorder' may not be particularly surprising, and may well be the type of test that we would either intuitively expect, or could even argue for normatively, such as from a harm or offence-based criminalization model. A key normative result of the supra-national international human rights addition though is that the same principles are applied by *any* polity that is also a member of the supra-national polity, when considering the imposition of criminal law. That is, whether human rights principles go beyond what might already reasonably be derived from Duff's theory for an individual polity or not, they will nonetheless provide a framework that any polity must follow. The fact that all polities must ask the same questions concerning serious disruption for certain public ordering conduct at least provides a normative baseline for the extent to which a national polity could agree to impose unprincipled criminalization in the name of public order. As such, the international human rights addition may go some way to reducing the relativism of the polity's particular conception of its civil order.

5.2 Aligning with Public Wrongs

The suggested human rights addition to Duff's public wrongs theory is largely proposed as a separate test from Duff's own formulation. It functions as a parallel criterion that decisions taken by the polity on its public realm and civil order must

[94] *Gough v. United Kingdom* (Appl no. 49327/11), ECHR. 28 October 2014 at para 158. "The applicant's arrest, prosecution, conviction and imprisonment can be seen to have pursued the broader aim of seeking to ensure respect for the law in general, and thereby preventing the crime and *disorder* which would potentially ensue were the applicant permitted to continually and persistently flout the law with impunity.".

[95] International Council on Human Rights Policy, *Crime, Public Order and Human Rights* (2003) Geneva: ICHRP at 21.

also meet. In practice, however, international human rights form an integral part of the civil order itself. This is modelled normatively here through the argument for recognition of human rights from agency, as well as the national polity's membership of the supra-national human rights polity. Being integrated in the civil order, is it possible then that human rights principles could provide a thicker form of Duff's public wrongs, in a more general sense than the conduct-specific principles already discussed?

The structure of international human rights reasoning is not necessarily easy to align with Duff's construct of the public realm. Whilst the ECHR protects a right to private life in Article 8, not all ECHR criminalization cases engage Article 8 and, for those that do, the ECHR concept of 'private life' is not directly analogous to Duff's public–private distinction. The ECHR Article 8 private sphere is far wider than the private matters Duff has in mind, and a significant proportion of conduct falling within it may be criminalized in any event under ECHR permitted restrictions.[96] As such, it cannot simply be said that infringements or even violations or abuses of Article 8 can define the borders of the polity's public realm—although they may certainly assist in some cases. Rather, we must look deeper at the structure of ECtHR reasoning. On one approach, Duff's notion of the public realm could be argued to align with the ECtHR's requirement for a 'legitimate aim' for restrictions on rights, insofar as the aim represents the initial reasons why a state may restrict individual rights for wider interests. Somewhat circularly for the purposes of criminalization theory, the 'prevention of disorder or crime' is one such aim recognized by the ECHR.[97] In the public ordering criminalization jurisprudence of the ECtHR, whilst the Court almost always identifies a legitimate aim under the Convention, it usually gives short thrift to its reasoning on the aim pursued by the (criminal) restriction.[98] The Court does not often explore, for example, what the aim of 'prevention of disorder or crime' might actually entail, or consider in detail whether the offence in law legitimately pursues such an end, including whether there is a rational connection between criminalization and the legitimate aim it purports to pursue. Rather this tends to be a formulaic step on the way to the Court's consideration of the proportionality of the application of the offence to the facts of the case. Even in cases involving highly private acts, such as consensual homosexual acts in private (*Dudgeon*), the ECtHR has quickly recognized a legitimate aim and proceeded to consider the proportionality of the interference under Article 8 (right to private

[96] See European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights*. Available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng (Accessed 1 June 2024).

[97] Articles 8 (right to respect for private and family life), 10 (freedom of expression) and 11 (freedom of assembly and association) contain the term "prevention of disorder", whereas Article 6 (right to fair trial) and Article 1 of Protocol No.7 (expulsion of aliens) speak of the "interests of public order". Article 9 (freedom of thought, conscience and religion) uses the formula "protection of public order", and Article 2 of Protocol No.4 (freedom of movement) refers to the "maintenance of ordre public".

[98] The ECtHR says that its "practice is to be quite succinct when it verifies the existence of a legitimate aim". *S.A.S. v. France* (Appl no. 43835/11), ECHR. 1 July 2014 at para 114. Although *S.A.S.* is itself an exception to that practice.

and family life). This suggests—in Duff's terms—that even especially personal acts could fall within the public realm with which a polity may be properly concerned.[99]

The lack of reasoning by the ECtHR at the legitimate aim level means that international human rights law, at least in its current state of development, may offer comparatively little guidance in distinguishing what might be important for the structure of society overall (and hence in Duff's public realm) as opposed to merely the moral views of that society (that fall within Duff's private realm and fail to engage the polity). This also means that the human rights (sub)-principles for public ordering criminalization (such as 'intentional serious disruption') discussed above feature in the ECtHR's reasoning most usually at the (subsequent) level of the proportionality test within ECtHR judgments. Within the national polity, such principles might therefore best be viewed as related to Duff's second level of violating or threatening the civil order. To that extent, as discussed above, specific international human rights principles can nonetheless offer guidance in some cases as to conduct that (falling within the public domain) is incompatible with the human rights forming part of the fabric of the civil order.

5.3 International Human Rights Boundaries

Finally, despite such challenges, it is clear that an international human rights addition to Duff's theory through a supra-national polity can do some substantive work on the boundaries of public ordering criminalization. ECtHR jurisprudence suggests that international human rights would restrain public ordering criminalization in at least some cases, such as same sex relations, conscientious objection to compulsory military service, and wide begging offences. For some of these, the same result may well be reached by Duff's liberal national polity alone. Duff holds that a polity valuing human rights will not enact criminal law that clearly violates such rights.[100] He is also clear, for example, that defining same sex sexual conduct as a public rather than a private matter would be the move of an illiberal polity that should not define its civil order in such a way.[101] Locating the national polity in a supra-national polity committed to international human rights, however, provides a clearer normative argument based on recognition of the right to private and family life that homosexual conduct should be, as discussed above, if not a matter not within the public realm in the first place, then at least not viewed as violating the values of that civil order.

In this way, the supra-national human rights polity addition formalizes positions that Duff comes to by virtue of his liberal conception of the national polity; but in respect of which he must concede a national polity might formally reach a different conclusion.[102] For other conduct, such as conscientious objection, the contribution

[99] Insofar as the Court recognizes a public policy aim that may be pursued through restrictions on the conduct.

[100] Duff, *supra* note 3 at 259.

[101] *Ibid*. at 78 and 279–280.

[102] *Ibid*. at 166.

of international human rights is perhaps even clearer. In respect of those who dissent from the criminal law, Duff suggests that the national polity might distinguish in some way between those who refuse to follow the criminal law merely because they regard a prohibited action as morally permissible, and those whose conscience demands that they "must" act in such a way.[103] The national polity model alone fundamentally demands, though, that if conduct has been criminalized through a process of democratic deliberation, then this is sufficient reason to obey the law that criminalizes it and to refrain from such conduct.[104] In contrast, where the national polity is a member of a supra-national human rights polity, and the dissenter's moral views or values engage an international human right such as to freedom of religion or belief, then criminalization is subject to a test of the reasonableness of its interference with the international human rights standard, taking into account any consensus and common values from other polities. For the ECtHR, in *Bayatyan*, the Court pointed out that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail.[105] Again, international human rights offer a potential solution to challenges that Duff identifies with his theory. In respect of dissenters, Duff notes, for example, that it is important to distinguish 'unreasonable' from 'not unreasonable' views—which would itself require the identification of a set of values. The supra-national human rights polity offers exactly the means to do that, with reference to both an external value (of the internationally recognized right) and the notion of a reasonable range within which it should be interpreted.

6 Conclusion

This article presents a normative argument based on agency for the recognition of international human rights by national polities. It proposes a supra-national human rights polity construct that requires the national polity member to integrate international human rights principles into its criminalization decisions. The first move can be achieved independently of the second, but it is the supra-national polity that provides a normative basis for more detailed theorizing on how human rights principles might permit, require, or constrain criminalization. Testing of the theory against ECtHR criminalization jurisprudence shows that it offers formalization for some of Duff's ideas on a liberal polity, as well as a number of (sub)-principles and boundaries for public ordering criminalization in particular. What international human rights law does *not* yet offer public wrongs theory, however, is a fuller construct for the civil order; such as deeper delineation of Duff's public and private spheres, achievement of a fair balance between the interests of society and the individual,

[103] *Ibid*. at 134.
[104] *Ibid*. at 132.
[105] *Bayatyan v. Armenia* (Appl no. 23459/03), ECHR. 7 May 2011 at para 126.

or the effective weighing of individual rights and collective goals.[106] Nonetheless, the proposal provides a framework for how political theories of criminal law that incorporate human rights might develop and apply such notions within a public wrongs approach, both at the supra-national and national polity levels. Theoretical steps in this direction are beyond the scope of this article, but one clear area for further development is to theorize exactly how a 'reasonable range' of criminalization restrictions on human rights might be modelled and applied within the supra-national community of national polities. In turn, for international human rights law, viewing ECHR public ordering jurisprudence through a criminal theory lens could encourage an approach to ECHR cases that sees them more as a cohesive whole, providing an organizing framework for cases that might otherwise be seen as isolated issues. A cross (sub)-disciplinary approach as used in this article may offer gains for both legal theory and international human rights law, offering stronger safeguards against overcriminalization and a possible route towards a fair and rational use of the criminal law for societal and public ordering ends.

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[106] Although 'balancing' itself is not without controversy. Habermas, for example, argues that balancing reduces debate about the relationship between rights and the pursuit of collective goals to policy arguments, with no rational standard by which judges can reconcile competing policy objectives. Habermas, J., *Between Facts and Norms* (trans. Rehg, W.) (1996) Cambridge: Polity Press at 256–259. See also Greer, S., "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, (2004) *Cambridge Law Journal* 63(2), 412–434.