

Chapter 8

Legal Obligation and the Criminal Law

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Abstract: Antony Duff's contribution is concerned with the obligations that we might be held to have in relation to the criminal law. In this context, Duff makes two main arguments. First, criminal law theorists often describe the criminal law's offence definitions as 'prohibitions' that citizens are obligated to obey: though this way of talking fits naturally with talk of the criminal law as imposing obligations, it is at best misleading: these offence definitions should not, typically, be understood as imposing obligations to refrain from the conduct they define as criminal, or as consisting in prohibitions that we are to obey. Second, theorists of political obligation also commonly take it that that obligation is an obligation to obey the law. Duff notices that this implies an overly deferential attitude towards the law on the part of citizens; we should instead talk of the responsibility of citizens of a democratic republic to play an active role in the enterprise of criminal law, as part of the larger civic enterprise of self-government under the rule of law.

Introduction

This chapter is concerned not with legal obligation in general, but with the obligations that we might be held to have in relation to the criminal law. Two preliminary comments should help to clarify the chapter's aims.

First, as to the 'we' whose obligations are to be discussed, I take 'us' to be lay citizens of a polity by whose criminal law we are supposedly bound. Thus I am not concerned with the distinctive obligations of officials—legislators, police officers, lawyers, judges, correctional officers, and so on; that is a topic for another paper (or book).¹ Nor am I concerned here with the obligations (and rights) of the many non-citizens who, as temporary visitors or long-term residents in a polity are also bound (and should be protected) by its law, including its criminal law: my focus is on the distinctive relationship that obtains between a citizen and the criminal law of her polity.²

Second, in talking of our obligations 'in relation to the criminal law', I refer to two kinds of obligation. One, which can strictly be called 'legal obligation', is a kind of obligation that is created or imposed by a criminal law: if a statute authorises a police constable to 'require a person to co-operate with' a breath test under certain circumstances (Road Traffic Act 1988, s. 6), I have a legal obligation so to co-operate if required to do so under such circumstances. The other kind of obligation is typically labelled 'political obligation':³ it is the kind of obligation that citizens are supposed to have towards the law, including the criminal law, of their polity. That obligation is typically described as an obligation to obey the law: but part of my argument will be that, at least in relation to criminal law, that is a misleading description.

I will make two arguments in this chapter. First, criminal law theorists often describe the criminal law's offence definitions as 'prohibitions' that citizens are obligated to obey: though this way of talking fits naturally with talk of the criminal law as imposing obligations, I will argue in Section 1 that it is at best misleading: these offence definitions should not, typically, be understood as imposing obligations to refrain from the conduct they define as criminal, or as consisting in prohibitions that we are to obey. Second, theorists of political obligation also

commonly take it that that obligation is an obligation to obey the law: I will argue in Section 2 that this implies an overly deferential attitude towards the law on the part of citizens; we should instead talk of the responsibility of citizens of a democratic republic to play an active role in the enterprise of criminal law, as part of the larger civic enterprise of self-government under the rule of law.

1. Does the Criminal Law Prohibit the Conduct it Defines as Criminal?

For many theorists, a central dimension of our political obligation towards the law of our polity is an obligation to obey it. Of course many laws do not seek obedience: as Hart pointed out in his critique of Austin, many confer powers (on private citizens as well as on officials) rather than imposing obligations (Hart 2012, ch. 3). Our political obligations as members of a polity also extend far beyond obedience to its laws: we have larger obligations to contribute to the well-being and security of the polity and its members.⁴ Obligation-imposing laws are, however, taken to be central to law, and an obligation to obey them to be central to political obligation; and this is especially true of criminal law as many theorists conceive it. Thus Hart takes it as obvious that ‘criminal law is something which we either obey or disobey, and what its rules require is spoken of as a “duty”’ (Hart 2012, 27).⁵ Other theorists too give examples of the criminal law’s offence definitions as obvious instances of the kinds of obligation that the law imposes: as ‘a realm of obligations and duties’, the law ‘may require us … to refrain from assault’ (Green 2002, 514), or ‘impose[] an obligation not to advocate genocide’ (Green 2012, 2); although we of course have a ‘moral obligation’ to ‘forbear[] from murder’, the fact that it is legally ‘proscribed’ gives us a distinctive reason to forbear—a ‘political obligation’ to obey the law that proscribes it (Dagger and Lefkowitz 2014, 17).

If we see the criminal law’s offence definitions as obligation-imposing, it is natural to see them as constituting prohibitions (or as positive requirements, which ‘prohibit’ the failure to undertake the required action): a law that imposes an obligation not to Φ can be read as a law that prohibits Φ -ing. Thus the first of the ‘general purposes of the provisions governing the definition of offenses’, according to the Model Penal Code, is ‘to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests’ (§ 1.02(1)), and theorists and textbook writers find it natural to talk of the criminal law in terms of prohibitions: so ‘a crime is an event that is prohibited by law’ (Simester et al 2016, 1).⁶ This might seem an unproblematic *façon de parler*: after all, we talk naturally of morality as ‘prohibiting’ certain kinds of action, and of ‘obeying’ those prohibitions. But we can see why this way of describing the criminal law’s demands is problematic if we note that the law, understood as obligation-imposing, is also then understood as a source of ‘content-independent’ reasons for action. The meaning of ‘content-independent’ is far from clear (see e.g. Markwick 2000) but it at least involves the idea that an obligation-imposing law purports to give us a new reason for action—a reason that we did not already have: ‘because the law requires it’ is meant to form at least part of our reason for acting in accordance with the law. That is intrinsic to the very idea of obedience. The mere fact that my conduct matches what is required by some law does not make it the case that in acting thus I am obeying that law: for my conduct to count as obedience I must act thus at least in part *because* that is what the law requires; at least part of my reason for acting thus must be that that is what the law requires.

Often that is how things rightly go in our dealings with the law. If you ask me why I stop my car at this road junction, my answer is that the traffic light is at red, and I can if necessary explain that I stop at the red light because the law prohibits driving through a red light, and I obey that prohibition because it is the law. Had there been there no traffic lights there, I might or might not, depending on the traffic conditions, have had good reason to stop. The presence of the lights, and the fact that they are at red, gives me a new reason, which I did not already

have, to stop. The law requiring me to stop might not give me a *wholly* content-independent reason for action: it might matter that I can see the point of having a system of traffic lights (though I plausibly have reason to stop even if I can see no good safety-related reason to have *this* set of lights just here). But we can in this context properly talk of the law as prohibiting a type of conduct, and requiring our obedience to that prohibition; of the legal obligation that I therefore have to obey that regulation; and of the political obligation that I can be said to have to obey this law.⁷ It is psychologically plausible that ‘because it’s the law’ should be part of my reason for stopping; it is normatively plausible to claim that I have a legal and a political obligation to obey this law.

Now consider a different example. My neighbour Jones has done me a serious wrong; I am filled with (what I take to be) justified anger at him. He has parked his expensive new car in the road; I walk past it on my way home one night, carrying the tin of red paint that I have just bought; I could pour the paint over his car, thus causing him distress and expense. Now we might hope that, if I am someone of even modest moral character, it would not occur to me to do this (as anything other than a fantasy): but suppose I am tempted, in my anger, to do so. What might, and what should, dissuade me? We might hope that what would dissuade me is the thought of the moral wrong I would be doing to him (a wrong that is not justified by the wrong that he did to me): but could an obligation to obey the law that defines such conduct as ‘criminal damage’, play a psychologically or normatively plausible part in my reasons for not pouring the paint over his car?⁸ Can we say that the criminal law, in defining such conduct as criminal, gives me a new and to some degree content-independent reason not to engage in it, since it thereby prohibits such conduct, and I have an obligation to obey that prohibition? We need not suppose that this reason should replace the moral reason I already had not to damage my neighbour’s property: but if we are to say that the criminal law imposes an obligation not to damage it, and that I have an obligation to obey that law, we must also be able to say that it gives me a new reason, separate from that moral reason, to refrain from such conduct.⁹

The criminal law does offer one kind of new reason to refrain from conduct it defines as criminal. To criminalize a type of conduct is to make those who engage in it liable to criminal prosecution and punishment; if I am tempted to pour paint over my neighbour’s car I might be deterred from doing so by the thought that I might be caught, and exposed to the shame of prosecution and the burden of punishment—a reason for action that is distinct from the moral reasons that should have dissuaded me. However, if we are to make sense of an obligation to obey the law, as a reason for refraining from damaging my neighbour’s car, we cannot appeal to this kind of prudential reason. For, first, obligation-imposing laws must purport to give us normative reasons for action concerning what we ought (not) to do, but the prudential reasons offered by the law in its deterrent mode are not normative reasons. The criminal law does not tell us that we ought to refrain from what it defines as crimes in order to avoid punishment; rather, it offers such prudential reasons as reasons that might actually motivate those who are not sufficiently moved by the normative reasons on which it rests. Second, the legitimacy of deterrence depends on there already being sufficient, non-deterrent, normative reasons for us not to do what the law seeks to deter us from doing: if the law is to have any more normative authority than the gunman who coerces us to act as he wishes, what it seeks to deter us from must be something that we already have good normative reason not to do, independently of its deterrent threats.

So we are to imagine someone who refrains from criminally damaging his neighbour’s car, or who refrains from such criminal wrongs as murder or rape, not because he recognises the moral wrongfulness of such conduct, but because he recognises an obligation to obey the law that prohibits them: he acts from respect for the law’s authority, rather than for the moral values that explain the wrongness of his conduct, or for the interests of the potential victim.

We are also to imagine offering a potential criminal wrongdoer this kind of normative reason to refrain from crime: you ought not to commit criminal damage, or murder, or rape, because the law prohibits such conduct—and you have an obligation to obey the law. One question is whether this is a psychologically plausible picture of an agent's motivation: 'I was tempted to damage [murder, rape], but refrained from respect for the criminal law's obligation-imposing prohibition'. Another question is whether this is a normatively plausible account of the terms in which the criminal law should address those whom it claims to bind. A good citizen is one who, *inter alia*, respects and fulfils the obligations the law imposes on her (legal obligations and, if we have an obligation to obey the law, that political obligation); would a good citizen refrain from crimes such as these out of respect for the legal obligation not to commit them? Surely not: the practical reasoning that would inform the conduct of such a person would be both psychologically strange and—more importantly—normatively defective.

What should we make the oddity of suggesting that we might refrain from such crimes from respect for an obligation to obey the criminal law that prohibits them? One response is Raz's: that this supports his argument that there is no general obligation to obey the law. In refraining from murder we should not 'be obeying the law' that prohibits it, or 'conforming because that is what the law requires'; 'the legal prohibition of murder neither imposes an independent moral obligation nor makes the duty not to murder stricter or weightier than it was without the law' (Raz 1995, 343). Raz draws this conclusion because he assumes that the law defining murder as a crime 'prohibits' murder, and therefore seeks our obedience to this prohibition: for the role that prohibitions are supposed (by the prohibitor) to play in our lives is that we are to obey them. However, there is an alternative explanation of the oddity: that the criminal law's offence definitions do not prohibit the conduct that they define as criminal; they therefore do not seek our obedience, or impose obligations to refrain from such conduct.

The law rather presupposes that we already had good, normally conclusive moral reasons to refrain from such wrongs—reasons to which it does not purport to add.¹⁰ Its definitions of such wrongs as crimes constitute not prohibitions, but declarations: not that these are wrongs, since that is presupposed, but that these are public wrongs—wrongs that properly concern the whole polity, for which we will be called to public account through the polity's courts. The substantive criminal law draws a boundary between public and private realms of wrongdoing—between wrongs that are, and wrongs that are not, the polity's business: it marks out those pre-criminal wrongs of which the polity will take formal notice through its criminal courts, as public wrongs.¹¹ This shows us the element of truth in Kelsen's claim that law is addressed to courts, as 'the primary norm which stipulates the sanction' (Kelsen 1925, 63; see Hart 2012, 35–42). The point is not that the criminal law is addressed to courts rather than to citizens: it is that the central point of criminal law lies in its procedural, not its substantive, dimension; the substantive criminal law marks out those kinds of conduct to which the criminal law's procedural provisions will be applied. The Criminal Damage Act 1971 does not forbid us to damage others' property, or prohibit such damaging: that would be otiose, since we already have (in the law's eyes) sufficient reason not to engage in such conduct. It rather declares that this kind of conduct constitutes a public wrong of which the polity takes this formal notice; it thus warns us that if we commit this wrong, we will become liable to the criminal process of trial and punishment—we will be held publicly accountable for it.¹²

This claim—that we should see the criminal law's offence definitions not as prohibitions, but as declarations—is in various ways oversimplified: three points should be noted here.

First, it might seem that even if it is true of laws that define so-called '*mala in se*', crimes consisting in conduct that is supposedly wrongful prior to its criminalization, it is not true of '*mala prohibita*', which consist in conduct that is wrongful (if at all) only because it is legally prohibited: the offence of driving through a red light is a *malum prohibitum*, and in stopping

at the red light I am surely obeying the law that prohibits driving through it, in virtue of the obligation to obey the road traffic laws. This is true: but the law that I am now obeying, as a matter of obligation, is not the *criminal* law. There is a legal regulation, as part of the system of road traffic regulation, which provides for traffic lights and prohibits driving through a red light: the *criminal* law comes into the picture to support that regulatory system, as a response to breaches of its requirements and prohibitions; it criminalizes breaches of those regulations—regulations that we have a duty to obey, and thus do wrong in disobeying. More generally, what we find in the realm of *mala prohibita* is a two-stage route to criminalization. First, the legislature (or a regulatory body) creates a regulation or set of regulations to coordinate and control an important sphere of human activity: for instance, it creates regulations concerning road traffic, which aim to ensure the safety of road users (compare the various Road Traffic Acts in English law). These regulations seek our obedience; they offer us reasons for action that are to a significant extent content-independent, and depend on the fact that this is what the law requires; if they have a legitimate claim on us (in virtue of their pedigree as emerging from an appropriate democratic process, and of their character as making a good faith attempt to serve this important aspect of the common good), we can say that we have an obligation (a political obligation) to obey them. But these regulations are not yet criminal laws; in obeying them, we are not obeying the criminal law. Criminal law appears only when the legislature decides to criminalize breaches of these regulations. In doing so, it does not impose a new obligation to obey the regulations: that obligation was already created by the creation of the regulation. Nor does it impose an obligation to obey the law that criminalizes their breach: such an obligation would, if it made sense at all, be otiose, given the pre-existing obligation to obey the regulations. Instead, as in the case of *mala in se*, in criminalizing breaches of the regulations it declares such conduct to constitute a public wrong for which those who commit it will be liable to be called to public, penal account through the criminal process.¹³

Second, I have been talking so far about the substantive criminal law and its definitions of offences. But part of my argument is that a central aspect of the substantive criminal law's function is as a gateway to the criminal process: it identifies and defines those wrongs whose perpetrators are to be liable to be called to public account through the criminal process. That process is part of the institutional practice of criminal law; and in that context we can make plausible sense of prohibitions and requirements that we have obligations to obey. So if I am charged with a criminal offence, I may be summoned to attend trial on a specified date; if released on bail pending trial, I may be prohibited from approaching the complainant or any witnesses; if convicted, I may be ordered to pay a fine, or to undertake community service. Here again, the law claims, implicitly or explicitly, that I ought to obey these requirements or prohibitions; here too we can talk of a legal and a political obligation to obey them, grounded in my civic duty to play my part in the criminal process, and to be ready to answer charges of public wrongdoing in this public forum. Thus my claim is not that we have no obligations of obedience in relation to the criminal law: only that we do not have an obligation—either legal or political—to obey the substantive criminal law's offence definitions; those definitions are not prohibitions that we are supposed to obey and might disobey.

Third, I have argued that the criminal law's offence definitions declare the conduct that they criminalize to constitute a public wrong for which we will be liable to be called to penal account. Sometimes (often, we must hope) the wrongfulness of that conduct, and its public character as a wrong that concerns the polity, will be generally recognised as unarguable. But sometimes there will be disagreement, of a kind that cannot be dismissed as unreasonable. It might be disagreement about whether the criminalized conduct is wrong; or about whether it is a public matter. The former kind of disagreement can be illustrated by arguments about the criminalization of fox hunting,¹⁴ the second by arguments about the criminality of consensual

sado-masochism:¹⁵ while some argue that such conduct should not be criminalized because it is not wrong, others argue that so long as it is truly consensual it should be seen as a private, not a public affair—in which case the question of whether it is morally permissible is not one on which the polity need or should take a collective view. What can those who support such laws say to someone who objects to them: is it plausible to talk here of an obligation to obey the criminal law? I support the criminalization of hunting, and try in vain to persuade a hunter that she too should recognise that it is wrong, and refrain from it for that reason: could I now properly argue that she ought nonetheless to obey the law against hunting? I might not claim that she ought to defer to the collective judgment of her fellow citizens that hunting is wrong: I respect her conscience, her right to continue to believe that that judgment is wrong. But as a citizen, I argue, she ought to respect the law's democratic credentials, and obey it even when she thinks it misguided.¹⁶ However, even if we should in such contexts talk of an obligation to obey the substantive criminal law (and even if the law's offence definitions can then be properly seen as prohibitions that demand obedience), this is a secondary dimension of the criminal law, which it depends on its primary function—that of defining and declaring public wrongs: for the prohibition that we expect the dissenter to obey is derived from, as a radically imperfect translation of, the law's definition of the conduct in question as a public wrong.¹⁷

With these qualifications and explanations made, I think I can sustain my claim that the substantive criminal law's offence definitions (of both *mala in se* and *mala prohibita*) should be understood paradigmatically not as prohibitions, but as declarations. It follows from this that our primary normative relationship to the substantive criminal law does not consist in an obligation to obey it: for whilst prohibitions do seek obedience, declarations of the kind that I have ascribed to the criminal law do not. This is not to say that we have no obligations (legal or political) in relation to the criminal law; only that they do not include an obligation to obey the substantive criminal law as a source of prohibitions.

However, there is a further objection to making a supposed obligation to obey central to an account of a citizen's relationship to the criminal law: that it portrays her status as overly passive and deferential. It is to this objection that we must now turn.

2. Civic Obligations and Civic Responsibilities

Hart argued that we find a legal system wherever we can find a functioning structure of appropriate kinds of 'primary' and 'secondary' rule: such a structure exists just so long as a sufficient proportion of the officials whose activities the secondary rules authorise accept those rules as normative standards, and citizens for the most part obey the primary rules that apply to them (Hart 2012, chs 5-6). Hart did not suggest that such a system, in which only officials accept its rules while its lay citizens merely obey, would be a healthy or flourishing system of law: his concern was with the minimal necessary and sufficient conditions for the existence of a legal system. But discussions of our relationship to the criminal law (or to the law generally, in its duty-imposing modes) often proceed as if a system that satisfies Hart's minimal conditions is a normal, satisfactory system of law. They portray the law as created and controlled by officials (in relation to criminal law, legislators, police, prosecutors, judges, correctional officers): it is for them to make the law, to interpret and administer it, to enforce it against those who break it. Lay citizens then have an essentially passive role in relation to the criminal law: they are to obey it—or to disobey it and accept the penal consequences.¹⁸ This conception is revealed with particular clarity in discussions of criminal punishment: the convicted offender (a citizen who has been proved guilty of a crime) is portrayed as the passive recipient of the penal burdens that officials impose on him; the normative questions about punishment are then understood as being about what the state can justifiably do to, or impose on, the offender. But it is also at work more generally (if implicitly) in discussions of

criminal law—not just of the substantive criminal law, but also of the criminal process of investigation and prosecution: we, as lay citizens, are subject to the law—a law administered to us by its officials; the officials are the agents of the law, we are its subjects.

On this view the criminal law figures in our lives as an external imposition, which seeks obedience to its demands. Those demands might figure in our practical reasoning as they do in that of Holmes' ‘bad man’:¹⁹ what matters is that if I fail to obey the law’s demands, I am liable to be arrested and punished; such prospects might, depending on the probabilities, give me prudential reason to obey. Now that might be how the criminal law actually figures in the practical reasoning of some who are subjected to it—and reasonably so for those living under sufficiently unjust regimes. But it is not how the law should aspire to figure in the practical reasoning of the citizens of a decent society: the law claims normative authority, not merely effective power. Nor is it how the law figures in the practical reasoning of good citizens: the good citizen is not Holmes’ bad man. But if the law is seen as something external to us, the obvious alternative to Holmes’ view is to see the law as having not (merely) coercive power, but authority as a source of peremptory (‘content-independent’), reasons for action: ‘that is the law’ is to give us reason to act, not as a hypothetical imperative contingent on our desires, but as a categorical imperative. This too seems inadequate, however, as a conception of how (criminal) law should figure in the lives of the citizens of a democratic polity.

To understand why it is inadequate, we can think about the implications of seeing law as (in aspiration if not in fact) a common law—‘common’ not in contrast to codified, but in that it is the law of the community (see Postema 1986, chs 1-2; Cotterrell 1995, ch. 11; Duff 2018, chs 3, 5). A common law is *our* law as citizens of the polity: it is a law we have made for ourselves (there is much more to be said about what this involves), a law that reflects the values by which we collectively define ourselves as a political community, a law to which we subject ourselves (rather than one to which we are subjected by a sovereign). And, crucially for present purposes, the common law of a democratic polity is a law in relation to which the polity’s citizens are agents, not merely patients: law helps to structure the civic enterprise of living together as citizens; and in a democratic polity, that enterprise is one of which we must be the authors, one in which we must be agents.

What forms such authorship can take, how it should be structured, is the subject matter of democratic political theory, but my concern here is only with the implications of this view for our relationship to the criminal law: not—important though this is—the roles we can play as citizens in making the law, but our relationship to the criminal law that already exists.²⁰ If we take our normative relationship to the criminal law to consist essentially in an obligation to obey it, we portray ourselves as passive recipients or subjects of the law. But what is it to be an agent of the law, as a lay citizen? Part of the answer to this question will lie in an account of the active roles that citizens can play in the enterprise of criminal law—the ways in which we can be expected not merely to accept and obey, but to assist in the law’s enterprise: I have space here to discuss only one such role—that of a witness to crime, and the responsibility to report crime that belongs to that role.²¹ (I am talking now about the roles we can be expected to play, the responsibilities we can be expected to acknowledge, in a tolerably just democratic society with a tolerably just criminal law: a different account will be needed for societies that are less than tolerably just.)

The criminal law does not typically include a general legal duty to report crimes of which one is aware: it might include a duty to report serious crimes,²² or particular kinds of crime, or ascribe reporting duties to people in positions of special authority or trust (especially in relation to child abuse and to financial crimes); but it does not typically criminalize every kind of non-reporting of crime.²³ However, it is often said that citizens have a civic duty to

report crime. Thus the ‘Ask the Police’, ‘the official police resource for England and Wales’, declares that

Whilst there is no legal requirement to report a crime, there is a moral duty on everyone of us to report to the police any crime or anything we suspect may be a crime’.²⁴

Now on the one hand, if I insist that the criminal law should be our common law, so that we ought as citizens to be willing to play an active role in its enterprise (an enterprise that must include bringing criminal offenders to justice), I must surely agree that we have a civic duty, or obligation, to report offences of which we become aware or have evidence.²⁵ On the other hand, this might conjure up an unattractive picture of a society of busybodies always on the lookout for crimes to report: is this a plausible conception of how the citizens of a democratic polity should behave?

A strict duty ‘to report to the police any crime’ would indeed be a nightmare: even if it is not a duty to seek out crime, but only a duty to report crimes of which we happen to become aware (and ‘anything we suspect may be a crime’), it is not a duty we should have as citizens of a democratic polity. A parking motorist hits and damages my car, and I am certain that this was ‘reckless’, in that he consciously took an unreasonable risk of causing such damage: do I fail to discharge a civic duty if I do not report this suspected crime to the police,²⁶ but instead talk to the motorist and agree that and how he will pay for the damage? Two men are arguing outside my window, and strike each other—but then make their peace and walk off: do I fail to discharge a civic duty if I do not report this crime to the police? I see a neighbour’s fifteen year old daughter kissing her fifteen year old boyfriend; I know them, and know that there is nothing exploitative or coercive in their modestly sexual relationship; I also know that their conduct constitutes a criminal offence:²⁷ do I fail to discharge a civic duty if I do not report them to the police? It will not do to say that I fail to discharge a duty, but that such a failure is in these cases justified, or that the duty is in such cases is not weighty—that its breach is not serious: if I did report the crime to the police, they could reasonably criticise me for wasting their time, and the ‘offenders’ could reasonably complain that my response was unwarranted.

In a decent, rational society, we expect the police to exercise their discretion in deciding which cases of (alleged) crime to investigate, and which to treat as crimes—which to refer to the prosecution service to be dealt with through the criminal process. Sometimes, they will be right to decide that an alleged crime, conduct that seems to satisfy the law’s formal definition of an offence, is not serious enough to warrant further investigation; or that it is better dealt with by non-criminal means, such as some kind of informal mediation or ‘restorative justice’. So too, a sane prosecutorial system will not suppose that every offence must be prosecuted—that a prosecution must be pursued whenever there is sufficient evidence to prove a person’s formal guilt in court; prosecutors will rightly exercise discretion in deciding which provable cases they should actually pursue.²⁸ Two reasons for not pursuing something that (provably) satisfies the law’s formal definition of a crime merit attention here. One concerns disposals: the best way to respond to what formally constitutes a crime might not be to prosecute it but, for instance, to deal with it by informal mediation, or to divert the (alleged) offender from the criminal process to a psychiatric or welfare provision. The other concerns the substance of the offence: police and prosecutors can be seen as applying a version of the American Model Penal Code’s *‘De Minimis’* doctrine, under which a court

shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct ... did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction (§ 2.12; see Husak 2010).

This doctrine can equally be used by police and prosecutors. They should not prosecute in the case of minor damage to my car, or that of a brief scuffle, because whilst such conduct does ‘cause … the harm or evil sought to be prevented by the law defining the offense’, it does so ‘only to an extent too trivial to warrant the condemnation of conviction’; and they should not prosecute the fifteen year old kissers because their conduct does not even ‘cause or threaten the harm or evil sought to be prevented’ by those sections of the Sexual Offences 2003.²⁹

Now if we take it that our primary normative relationship to the criminal law, as citizens, is constituted by an obligation to obey, and that we have a civic duty (closely related to that obligation of obedience) to report actual or suspected crime to the police, we must believe that this kind of discretion about whether to treat some formally criminal kind of conduct as substantively criminal, through the criminal process, belongs only to the relevant officials of the law—police and prosecutors. Our role as lay citizens is not to think for ourselves about whether this formally criminal conduct should be prosecuted: it is deferentially to pass such decisions to the officials. No doubt this is sometimes, even often, how a responsible citizen will behave: either it will be obvious that the conduct is of a kind that should (*prima facie*) be treated as criminal, or I should realise that I am not well placed to make that decision. Surely, however, it is sometimes obvious, as in the examples given above, that this conduct—though formally criminal—should not be treated as criminal, either by the relevant officials or by the participants; surely if I am to take seriously my civic responsibility to assist in the enterprise of criminal law, I should be able and willing to recognise that, and to decide not to report the matter to the police.

That seems plausible, but we must note what follows. If I am to be able to decide whether or not to report apparently criminal conduct to the police, I must have an idea of the mischief, the ‘harm or evil’, at which the relevant law is aimed, and of the kinds of reason that count in favour of, or against, treating the conduct as criminal; I must, that is, not only know *that* the law formally defines this conduct as criminal, but *why* it does so. Once I grasp the ‘why’ and its implications, I must also be able and willing to take a more critical perspective on the law: I am a collaborator in its enterprise; and a collaborator must be ready to evaluate critically both the ends that she is to help to pursue and the means by which they are to be pursued. That is not to say that I should refuse to assist whenever I think the ends or means misguided: in any collaborative enterprise we might recognise that we should sometimes, even often, go along with what our colleagues think right even if we disagree. But it is to say that I cannot shrug off my (shared) responsibility for the criminal law that I am to help to administer, by saying that I am simply discharging my obligation to obey; and that responsibility includes a responsibility to evaluate, to argue—and if necessary, in the end, to refuse to act as the law requires. It is also to say that in deciding not to report the young lovers for their activity I would not (even in a polity that criminalized failing to report crimes) be failing to discharge either a civic or a legal responsibility; indeed, if my decision was based on my reasonable judgment that their conduct did not involve the kind of mischief at which the law was aimed, I would be precisely discharging my civic responsibilities.³⁰

I have shifted in the last few paragraphs from talking of obligation (such as civic or legal obligations to obey the law) to talking of responsibilities, and in particular of a citizen’s civic responsibility in relation to the criminal law of her polity. This shift is intended to highlight my central claim about our normative relationship to our criminal law, through an admittedly somewhat stipulative distinction between obligations and responsibilities. Talk of obligations in the context of the law naturally invites talk of obedience—obedience either to ‘the law’ in general, or to the requirements of a particular law; it also suggests that we can specify with some precision what it is I must do to discharge my obligation—hence the way in which we can talk of ‘just doing my duty’ by obeying the orders issued by a legitimate authority: mine

‘not to reason why’ this is what the law requires of me; mine ‘but to do’—or to disobey and face the consequences.³¹ By contrast, responsibilities require practical reasoning, not simply about how to do what I am obligated to do, but also about what it is that I ought to do.³² My responsibility is to play my part in the pursuit of some end, or in some coordinated activity or enterprise; to discharge that responsibility, I must be able to understand the end as one that is worth pursuing, or to grasp the purpose of the activity or enterprise, and to see how best I can contribute to it. There is therefore an important distinction between responsible citizens and obedient, obligation-discharging citizens; democratic citizens should be the former.

To suggest that citizens should see themselves as responsible collaborators with their criminal law, exercising discretion (of a kind that officials also exercise) in applying it, rather than simply as obedient recipients of its obligation-imposing demands, might provoke two worries. One has already been implicitly addressed: that citizens should take a more ‘contestatory’,³³ critical stance towards the state and its laws than talk of ‘collaboration’ implies. But I noted above, first, that a responsibility to collaborate requires a state, and a criminal law, that is at least tolerably just, with a legitimate claim on our respect; second, that responsible citizens of such a polity will take a critical stance towards their law—they will constitute a ‘contestatory citizenry’. The second worry is that such discretion is dangerous, and that part of the function of law is to limit the discretion that citizens would otherwise have in deciding how to conduct themselves. Now discretion, for both citizens and officials, must certainly be constrained and limited;³⁴ and we must try to ensure that those who are to exercise discretion are educated about how to do so, and that there are suitable mechanisms of accountability through which they can be held to account for how they exercise it (for responsibility includes accountability as a central dimension). But the crucial point is that, whether we are talking of officials or of citizens, we should not see discretion simply as a dangerous power, or licence, that must be reduced as far as is possible; we should instead see it as a necessary and valuable aspect of democratic life, which must be controlled but not stifled.

That is why—as the message of this section of this chapter—we should talk not so much about the obligations that we might have under or in relation to criminal law (especially not obligations of obedience) as about our civic responsibilities in relation to a criminal law that must, in a democratic polity, claim to be our law. Sometimes, as I noted in s. 1, we can talk of an obligation to obey the law’s requirements or prohibitions: more often, however, in relation to the criminal law, we should talk of the respect that we should have for the values that the law embodies, and of our responsibilities as active collaborators in the law’s enterprise.

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¹ For a useful start, see Brownlee (2010).

² Some argue that we should not treat citizens as the primary addressees of the criminal law—that we should talk in the same terms of all those who come within the ambit and jurisdiction of the criminal law, whether or not they are citizens (see e.g. Zedner 2013). In response to this objection see Duff (2018, ch. 3.3).

³ '[W]hat the western philosophical tradition calls a doctrine of "political obligation": Green (2002, 515).

⁴ Compare Parekh's (1993) discussion of 'civil' and 'political' obligation: political obligation should not, he argues, be identified with an obligation to obey the law; but an obligation to obey the law (modulated by a critical scrutiny of its requirements) is central to our civil obligations.

⁵ We need not for present purposes distinguish 'obligation' from 'duty'.

⁶ See also, e.g., Ormerod and Laird (2018, 12-13); Feinberg (1984, 7; 1985, xiii-xiv) on the criminal law as 'prohibiting' actions or omissions; Simester and von Hirsch (2011, 3) on criminalisation as 'setting out ... a catalogue of specified actions or omissions that are prohibited'.

⁷ Such an obligation to obey this law, or road traffic laws, need not derive from a general obligation 'to obey the law'. A Razian 'normal justification' (see, classically, Raz 1985) seems most plausible in the context of legal regulations such as these—but of course does not justify any general obligation 'to obey the law'.

⁸ See Criminal Damage Act 1971, s. 1. The point is perhaps even more obvious in relation to the reasons we have not to commit such criminal wrongs as murder and rape: but it is useful to work with a less dramatic example, of a kind of crime that (I assume) more of us might be tempted to commit.

⁹ Compare Dagger and Lefkowitz (2014, 17), quoted at the beginning of this section; see also Shapiro (1998) on the 'practical difference' thesis.

¹⁰ Only normally sufficient, because through its specifications of general defences the criminal law recognises that we can exceptionally have good reason to commit a crime.

¹¹ On crimes as public wrongs, see further Marshall and Duff (1998); Duff (2018, chs 1.3, 2.6).

¹² And criminal codes do not typically express their offence definitions as prohibitions: they instead define the kinds of conduct given which a person is, or 'shall be', guilty of an offence (as in English statutes and the Model Penal Code); or that render a person liable to punishment (as in the German and French Codes).

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- ¹³ Sometimes the distinction between these two stages—of regulation and of criminalization—is explicit in the legislation: thus the Vehicle Excise and Registration Act 1994 enacts, in Parts I-II, requirements for the registration and licensing of motor vehicles, while Part III defines a range of offences that consist in failing to obey those requirements (see also Health and Safety at Work etc. Act 1974, ss 2-7, 15, 33). But even when the distinction is not thus explicit it is implicit in the normative logic of criminal laws defining *mala prohibita*.
- ¹⁴ See Hunting Act 2004, criminalizing ‘[h]unting wild mammals with dogs’.
- ¹⁵ See *R v Brown and Others* [1994] 1 AC 212: participants in consensual sado-masochistic activities were convicted of offences under the Offences Against the Person Act 1861, ss 20, 47.
- ¹⁶ At least so long as the law does not require her to act *against* her conscience (see further Duff [2018, ch. 3.4]); I cannot pursue the question of conscientious disobedience here.
- ¹⁷ Note too that such an obligation to obey is plausibly asserted only to someone whose dissent we can see as reasonable: we should not, for instance, make such an appeal to someone who claims that he is justified in killing his daughter for dating a man of a different religion; our claim to him is that such conduct is wrong.
- ¹⁸ In a democracy officials will also be citizens who are bound by the law, and some citizens will be officials: but the way in which the distinction between officials, or official roles, and ordinary citizens, or the role of ordinary citizen, is typically drawn gives lay citizens, qua citizens, an essentially passive role in relation to the criminal law.
- ¹⁹ ‘If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict’: Holmes (1897, 459).
- ²⁰ But lay citizens, I will argue, have important roles to play in interpreting and applying the law: since what the law is must include not just ‘the law in the books’ but also ‘the law on the street’, as it is actually used and applied, those roles therefore have a law-making dimension.
- ²¹ I use ‘witness’ here in a wide sense, to cover all those who are aware, as a matter of first-hand knowledge, of the commission of a crime. For discussions of other civic roles in relation to criminal law, see Duff and Marshall (2016).
- ²² Compare the old offence of ‘misprision of felony’, abolished in England and Wales by s. 1 of the Criminal Law Act 1967; a version survives in US federal law (18 USCA § 4).
- ²³ For useful general discussions of the law and of normative questions about whether we should recognise either a legal or a civil duty to report crime, see Delmas (2014), Ashworth (2017). There is a related issue about a duty to report, in order to help prevent, planned crimes: see Gur-Arye (2001); § 138 of the German *Strafgesetzbuch*.
- ²⁴ See <https://www.askthe.police.uk/content/Q514.htm>; see also <https://www.cps.gov.uk/reporting-crime>.
- ²⁵ I leave aside here the question of whether we have a duty to report our own crimes—to hand ourselves in to the police: see Duff and Marshall (2016, 40-45).
- ²⁶ See Criminal Damage Act 1971, s.1.
- ²⁷ See Sexual Offences Act 2003, ss 9, 13.
- ²⁸ Thus prosecutors in England and Wales must ask not only whether ‘there is sufficient evidence to provide a realistic prospect of conviction’, but whether it is in ‘the public interest’ to prosecute: see *Code for Crown Prosecutors* (https://www.cps.gov.uk/publications/code_for_crown_prosecutors/) s. 4. In civil law systems in which the ‘legality principle’ supposedly requires prosecutors to prosecute if there is sufficient evidence of guilt, there are also recognised grounds on which prosecutors can, and should, decide not to prosecute (see Perrodet 2002, Boyne 2017).
- ²⁹ As the government made explicit in the debate on the Bill that became the Act: see Paul Goggins, a Home Office Minister, in Hansard vol. 409, 15 July 2003, col. 248.
- ³⁰ Compare Edmundson (2006) on ‘law abidance’. It follows that acts of ‘civil disobedience’ can be exercises of a civic responsibility to respect the law (compare Brownlee 2012); and that jury ‘nullification’, when juries acquit a defendant who is clearly formally guilty, can also be an exercise of civic responsibility when it reflects a judgement that the defendant’s conduct did not involve a mischief at which the law was aimed (see Matravers 2004; Rubenstein 2006).
- ³¹ In Tennyson’s ‘The Charge of the Light Brigade’, theirs was ‘but to do and die’.
- ³² It requires not just ‘cleverness’ but ‘practical wisdom’: Aristotle, *Nicomachean Ethics*, Book VI.

³³ Compare Pettit's conception of a 'contestatory citizenry': Pettit (1997, 183-200), (2012, 215-8, 225-9).

³⁴ It should be a species of Dworkinian 'weak' as opposed to 'strong' discretion: they are bound by standards that are not of their own making; but the application of those standards requires judgment. See Dworkin (1978).