



# Punishing Non-citizens

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## Abstract

This paper considers the question of why the non-citizenship of offenders poses an obstacle to their criminal punishment. Several proposals are rejected, including Antony Duff’s proposal. It is proposed, instead, that governments are not authorized to punish any offender who cannot be attributed with the norm he violates. The government cannot attribute the norm that a non-citizen violates to him, if the non-citizen can raise in his favor the fact that he has no say over the law. Under certain circumstances, such as when they are visiting, non-citizens cannot raise this point, and so can be attributed with the norms they violate.

**Keywords** Punishment · Citizenship · Crime · Antony Duff · Civil Order

## 1 Introduction

On October 2, 2018, Jamal Khashoggi, a Saudi citizen and prominent dissident, was lured to the Saudi consulate in Istanbul and murdered by agents of the Saudi government. The United States’ Central Intelligence Agency concluded that the murder was ordered by Mohammad Bin Salman, also known as “MBS”, a member of the Saudi royal family.<sup>1</sup> The United States decidedly has the power to bring MBS to trial in the United States for this crime. An attack team could be sent to snatch him. He could be given a fair trial in a US courtroom and he could be sent to an American prison for murder. The United States government has the power to make these things happen. Of course, it would destroy our relations with Saudi Arabia. And it would be a diplomatic nightmare in other respects too. Many other countries would fear that their citizens would also become our punitive targets and would take steps to protect them. Overall, it probably would not be in our interests to bring MBS to justice. There are prudential objections. But we could do it.

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<sup>1</sup> Mark Mazetti and Ben Hubbard, “It Wasn’t Just Khashoggi: A Saudi Prince’s Brutal Drive to Crush Dissent” in *The New York Times*, March 17, 2019, <https://nyti.ms/2W5YDKY>.

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The topic of this paper, however, is a decisive *non-prudential* objection to our punishing MBS: MBS is not a US citizen. For this reason, and in a sense that matters, the crime is not our business. It would be perfectly just to punish this grievous wrong, which meets the United States' statutory definition of murder. But our laws do not govern MBS's behavior. It is not our job to make the world just to the degree that it would be were MBS punished. What all of this implies is that we lack the *authority* to do it, despite possessing the power.

On the surface, what was just offered appears to be an instance of the following type of argument:

1. Punishment-Authority: Government G is justified in punishing person D for crime C only if G has authority over D.
2. Authority-Citizenship: G has authority over D only if D is a citizen of the state, S, over which G is the government.
3. So: Governments are not justified in punishing non-citizens for their crimes.

(From here forward, I'll be using the letters G, D, S and C in the ways they are defined here.) The problem is that the conclusion of this attractive argument is clearly false. We are perfectly justified in punishing many non-citizens for their crimes; not MBS, but many others. In fact, every mature country on the planet is doing so right now; literally millions worldwide are currently imprisoned in countries of which they are not citizens for violating laws that are not theirs. And much of that punishment is no less justified than the punishments of their citizen prison-mates. The solution, of course, is that at least one of the premises in the argument is false. The question is which one? Are governments justified sometimes in punishing those over whom they have no authority? Or do governments have authority over non-citizens sometimes? And, more importantly: what can we learn from the answer about the bearing of citizenship on the government's authority to punish?

In his brilliant and profound book, *The Realm of Criminal Law*, R. A. Duff puts the issue I raise like this:

Very many of those who suffer or commit offences, many of those who look to our criminal justice institutions for help or who appear in our criminal courts, are not citizens: they might live in the country, but not as citizens, or be temporary visitors. A criminal law for citizens cannot, it seems, be their criminal law: how then can it address them, and how can they hear it? (p. 119)

Duff is exceptionally sensitive to the import of ownership of the law—of its being *my* law—to the law's authoritative application to the behavior of particular people. In the first instance, laws are addressed to citizens and this fact about them is an important part of the explanation for why governments are justified in punishing those citizens who violate the law. Duff is also aware, as is clear in this passage, that the problem of interest survives the following obvious observation: when G is justified in punishing D for C, despite the fact that D is not a citizen of S, the crime is in some way what I will call "citizen-involving". The crime was committed on S's soil, or its victim was a citizen, or something like that. The citizen-involving nature of the

crime can make it the case that the perpetrator is in the law's purview. But, still, citizenship matters to the question of whether the government can permissibly punish; absence of citizenship is an obstacle to justified, authoritative punishment, even if the obstacle is overcome thanks to the citizen-involving nature of the crime.

We could put this observation in the framework of our short argument by saying that either Punishment-Authority, or Authority-Citizenship is false when C is citizen-involving. Either G is justified in punishing people over whom it has no authority when their crimes are citizen-involving, or else G has authority over non-citizens when their crimes are citizen-involving. But even granting that one of these two things is probably true, we are nonetheless left with the observation that while other ways in which a crime is related to citizens might override or outweigh the obstacle to justified punishment imposed by the perpetrator's lack of citizenship, *lack of citizenship is an obstacle to justified punishment*. The question is what we can learn about the authority to punish from this fact.

Note that the issue here is not just the abstract one just identified; there is also, in the neighborhood, an issue of immediate practical importance. The reason is that *every* crime, no matter where it is committed or by whom, bears *some* relation to S's citizens. States do not live in alternate universes. Khashoggi wrote regularly for the *Washington Post*, an American publication. Many American citizens were deprived of the opportunity to read the essays he would have written, thanks to his murder. That fact does not make his murder America's business, however; it does not make MBS's crime citizen-involving in the sense of relevance. Why not? Without an answer, we do not know why MBS is out of reach, while those non-citizens in American prisons are not. Similarly, if the weapon used in Khashoggi's murder were American-made, or even gifted to the Saudis by the US government, that would not bring the crime under the purview of American law. Again, why not? Why could the US government not, on those grounds, snatch up MBS and throw him in an American prison? In order to know what relations between D's crime and S's citizens outweigh or override the obstacle to justified punishment posed by the fact that D is not a citizen we need to know what kind of obstacle non-citizenship poses. We need to know why lack of citizenship provides a pro tanto reason against authoritative punishment.

It is important right here, at the outset, to forestall a certain way of thinking of this issue that, I believe, hides the matters of central philosophical importance. One might think that the entire issue is exhausted by the concept of territoriality and its link to sovereignty. One might think, that is, that our law can reach non-citizens to the extent that those non-citizens, or their behavior, is not *citizen-involving*, but *territory-involving*. And one might further think that territory sets boundaries to authority not for reasons that are linked to the authority to *punish*, in particular, but merely through the need to respect sovereign boundaries in order to have one's own sovereignty respected. That is, to claim sovereignty is to commit oneself to respect the sovereignty of others who also make the claim. One might think that reciprocal respect among sovereigns is a principle of prudence: we leave MBS alone because we want our citizens to be left alone by Saudi Arabia—and not just when it comes to criminal punishment, but when it comes to anything else that the Saudi government might find it useful to do to our citizens. We do not want the Saudi's to make

demands—not even ineffectual demands—about how our citizens should live, and so we let Saudi citizens live as they choose, even when we vehemently object to how they live. Or one might think that the principle of reciprocal respect is built into the very idea of sovereignty. Perhaps the act of claiming sovereignty is effective only if accompanied by respect for sovereignty, which in turn brings with it a need to see the claims of other sovereigns as setting bounds to one's own sovereign authority. But whether the principle is one of prudence or has deeper roots, territory becomes a convenient conventional way to delineate boundaries among sovereign authorities—boundaries that are required to give practical effect to the principle of reciprocal respect.

I do not want to deny the need for each sovereign to respect the authority of other sovereigns, or the usefulness of territorial connection to helping us fulfill that need in a world, like ours, with multiple sovereigns. In fact, this might provide sufficient reason not to take steps to bring MBS to justice. But it does not exhaust the relevance of citizenship to the legitimacy of criminal punishment. That is, the power to punish, I claim, and hope to demonstrate, is special: there are additional reasons for governments not to *punish* non-citizens that are not exhausted by the need to respect the authority of other sovereigns outside of our territory.

It will be useful going forward to have in hand another example illustrative of the phenomenon I am aiming to understand. It is a crime in North Korea, defined by statute, let's imagine, to speak ill of Kim Jong-Un. An American and a North Korean each speak ill of Kim Jong-Un, and they do so in their respective countries, the North Korean in North Korea, the American in the United States. The North Koreans bring both to trial. Both are convicted on sufficient evidence and placed in a North Korean prison. There is much wrong with both punishments: most notably, this kind of behavior shouldn't be a crime and North Korean trials probably aren't fair. And North Korea violates the sovereignty of the United States in bringing the American to trial. But isn't there a further problem with the punishment of the American that does not attend the punishment of the North Korean? Isn't the fact that the American is not North Korean an objection to North Korea's punishment of him that has its own independent weight? The American ought to be able to defend himself by noting that he is not a North Korean citizen, while the North Korean is not owed any such avenue of defense. In saying this in his defense, the American is not simply speaking up for his country's sovereignty; he is speaking for himself. Even if his country were disinclined to object on his behalf—even if America is happy to tolerate this failure to respect its sovereign authority—he would still have an objection. The problem is not that he is an American; the problem is that he is *not* a North Korean. While this example offers little more than an intuition pull, I think it pulls powerfully. What we need to explain is why the offender's lack of citizenship provides a *pro tanto* reason in favor of the claim that the punishment is unjustified, a reason that is sometimes outweighed or overridden.

Section 2 explains why those who hold the plausible view that moral desert is at least part of what justifies punishment cannot productively use that fact to provide an account of citizenship's bearing on justified punishment. The basic problem is that moral desert is insensitive to political arrangements of the kind that determine who is and who is not a citizen. Section 3 explains why Duff's account,

offered in *The Realm of Criminal Law*, despite its attraction, also falls short. The problem is that the content of what Duff calls “the civil order” is not sufficiently restricted to explain how non-citizenship is a prima facie obstacle to its violation. It would be perfectly possible for a country to adopt a conception of the civil order under which crimes by non-citizens are in violation of the civil order, even when they are not citizen-involving. And yet, still, non-citizenship provides an obstacle to punishment, even by such states. Section 4 propose an alternative account. Under the view I propose, D’s lack of citizenship is a decisive objection to G’s punishment of him, even if the crime is citizen-involving, *provided that D can raise the objection*. Non-citizenship status is a decisive objection, when it can be raised, but there are circumstances in which non-citizens cannot raise it. In fact, there are various ways in which the fact that a crime is citizen-involving undermines a non-citizen’s right to use his non-citizenship in his defense. As we will see in the conclusion, this view brings with it a conception of government authority under which governments are authorized to act as if real and present obstacles to their authority were absent, provided no one has a right to bring those obstacles to their attention.

## 2 Moral Desert and Citizenship

Retributivists hold that, all else equal, wherever we find a difference in the degree to which we are justified in inflicting a given punishment on D1 and on D2 we also find a difference in what punishments they deserve. If we are on firmer ground in sending D1 to prison for a year than we are in sending D2, and all else is equal, it is because D1 is more deserving of this punishment than D2. Seeming counterexamples to this claim are to be accommodated, thinks the retributivist, by asserting one of three things: (1) the two agents do not actually, despite appearances, differ in the degree to which they are justifiably punished, or (2) all is not equal in the putative counterexample, or (3) the two agents are not actually equivalent in desert, despite appearances. For instance: Say D1 and D2 are equally responsible for committing the same heinous crime, but D1 leaves behind copious evidence while D2 leaves none. So they differ only in the degree to which they can be *proven* to have committed the crime. The retributivist might say that they are equally justifiably punished by government G; after all, the quantum of retributive justice that is produced by punishing D1 is also produced by punishing D2. But if the retributivist grants that it will be more justifiable to punish D1 than D2—since we are justified in punishing only those who can be proven to have done something worthy of punishment—the retributivist might assert that this is no counterexample to his claim since all else is not equal. For all else to be equal, there must be equal evidence of D1’s and D2’s crimes. Or, alternatively, the retributivist might adopt an evidence-relative conception of desert under which D1 deserves the punishment more than D2 does since there is more evidence of his crime.

Can the retributivist employ this strategy to accommodate the case of the American and the North Korean both of whom are punished by the North Korean government for speaking ill of Kim Jong-Un? The retributivist cannot plausibly say that the

North Korean government is on equally firm justificatory ground in the two cases. I take it, anyway, as a datum to be explained that the punishment of the North Korean is more defensible (or, anyway, less indefensible) than that of the American in this case. So the first approach is out. What about the second? If the retributivists insists that all else is not equal when D1 and D2 are not both citizens of S, she gives up any effort to explain how citizenship bears on the justification of punishment. This has to be explained through the use of some resource other than desert. There's no objection to retributivism in this observation, of course. The retributivist need not hold that *the only* thing that bears on the justification of punishment is offender desert. The retributivist can grant, for instance, that when many innocents would suffer in order to give someone what he deserves, it's impermissible to do so. What the retributivist cannot avoid saying—what is essential to retributivism as such—is only that desert supplies the justificatory reason for punishment, when punishment is justified. That point is compatible with granting that some unjustified punishments, punishments that it would be wrong to issue, are deserved. Still, if we are seeking from the retributivist an illuminating description of citizenship's bearing on the justification of punishment, this leaves the third option. That is, the retributivist's best bet is to insist that the American and the North Korean are not equally deserving of the punishment inflicted by the North Korean government. But why would that be? Why would citizenship make a difference to desert?

It seems to me that the best hope for supporting this idea is to assert that the American and North Korean have not committed the same *wrong*; the North Korean's is more grievous, and so more deserving of punishment. Put intuitively, we might say that the North Korean has done something contrary to the behavioral demands of *his own nation*, he has engaged in *betrayal*, while the American has not. Only where there is an expectation of loyalty can there be betrayal, but North Korea can have no legitimate expectation of loyalty from the American. So, on this view, citizenship matters because there is a moral reason to be loyal to one's nation—to the nation, that is, of which one is a citizen.

While I find it implausible, on its face, that there is a *moral* reason to do what one's country demands, even when it demands that one refrain from morally permissible or even morally required behavior, like speaking ill of Kim Jong-Un, the more important point is that the position is as exactly as defensible as the claim that there is a moral obligation to obey the law as such, rooted in something like gratitude. This claim has been thoroughly debunked.<sup>2</sup> While we might have obligations of loyalty to those who are loyal to us, or who have protected our interests, it does not follow that we have an obligation of loyalty to our country. A despotic and exploitative regime like that in North Korea has not earned loyalty from its citizens. But, for all that, the North Korean government is on firmer ground in punishing its own citizens than in punishing Americans for the same behavior.

Perhaps, instead, the North Korean's disloyalty does not derive from a putative general moral obligation to be loyal to one's country but, instead, from something

<sup>2</sup> See, for instance, M. B. E. Smith (1972) "Is There a Prima Facie Obligation to Obey the Law?" in *Yale Law Journal*, v. 82, pp. 950–76.

specific about what North Korea demands of its citizens. The North Korean government defines legal wrongdoing through its statutes. Perhaps it defines the relevant form of wrongdoing in such a way as to require more of its own citizens than it requires of others. Ultimately, it seems to me, this amounts to the claim that the (imagined) North Korean statute expresses the norm, “North Koreans should not speak ill of Kim Jong-Un.” If this is the only norm that the statute expresses, then the American is not in violation of the norm; that is, he has not violated the North Korean law that he is charged with violating. Of course, the statute might express more than one norm. It might say, “No one should speak ill of Kim Jong-Un, but especially not North Koreans!” Either way, since the North Korean has acted contrary to a norm of North Korean law, and the American has not, we might on those grounds hold that the North Korean is more deserving of punishment than the American.

It strains credulity to suggest that the American laws against murder demand not just that no one should kill anyone else, but also, or even exclusively, that *Americans* should not. And so it strains credibility to suggest that the obstacle to our punishment of MBS comes from our own statutes. It also appears that if this story were correct, the obstacle to justified punishment that non-citizenship imposes could never be overcome by the citizen-involving nature of the crime. After all, if the law only prohibits Americans from killing other people, then a non-American who kills someone on Fifth Avenue in New York has violated no American law and so would seem to be unpunishable by the American government which has authority only to enforce its own law.

A further and pressing question—pressing even if these other problems can be overcome—is whether the proposed story explains what we sought to explain. What we wanted to know was why non-citizenship provides a pro tanto reason against punishment; it speaks against punishment’s legitimacy, even if, in the end, the voices in favor are louder. The proposal we have been reduced to is that this is because laws make demands of citizens that they don’t make of non-citizens. The problem is that this is contingent in a way that the obstacle to punishment posed by citizenship is not. The fact that the American is not a citizen of North Korea also speaks against the legitimacy of punishment for his violation of the demand that no one, no matter what their citizenship, should speak ill of Kim Jong-Un. While the North Korean may also have violated *other* demands made by North Korean law, demands that only citizens can violate, we can set those aside and narrow our gaze to the demand that both the American and the North Korean violate. With respect to *that* violation alone, North Korea is on weaker ground in punishing the American than the North Korean. We still do not know why. What we can conclude, at this stage, is that the bearing of moral desert on the justification of punishment—which is the fact emphasized by every form of retributivist theory—cannot help us to explain why citizenship matters to the justification of punishment.

### 3 Citizenship and the Civil Order

In *The Realm of Criminal Law*, Duff also reaches the conclusion that retributivists cannot provide an adequate explanation for the bearing of citizenship on punishments imposed through the exercise of legitimate state authority. Duff's own alternative position is rooted in his idea of the "civil order". Duff describes what he means by this term in many places in the book. Here is one typical statement, taken from the very beginning of the book:

[A] polity's civil order consists in the normative ordering of its civic life— of its existence as a polity. That normative ordering is structured by the set of goals and values through which a polity constitutes itself (its members constitute themselves) as a political community (p. 7).

As I see it, the crucial idea here is that of a *normative* ordering. Imagine that you had a sequence of token events, E1, E2...En. A *descriptive* ordering of that sequence would consist of general principles identifying patterns in which these events in fact unfold. So, for instance, it might be part of the descriptive order that no mammal eats its young. If that is indeed part of the descriptive ordering, then for each Ei which is an instance of an animal eating its young, if there are any, it would also be true that the animal in question is not a mammal. By contrast, a *normative* ordering is, similarly, a set of principles of this kind, but they do not purport to describe how the sequence of events in fact unfolds, but instead how it *should*. These principles thus provide grounds for a certain form of criticism of the sequence of events to the extent that it fails to conform to the principles of the normative order. If it were a principle of the *normative* order that no mammal eats its young, then if there is an Ei which is an instance of a mammal eating its young, the sequence falls short of a normative standard; and to the extent that there are, for instance, events that prevent a mammal from eating its young, or in some other way rectify instances of mammals eating their young, the sequence exhibits norm compliance, or adherence. It gets closer, in such cases, to exemplifying the normative order.

Notice that the question of whether there is conformity or disconformity with a normative order is always raised about a given sequence of events. So there are in general two ways for an event Ei to be shielded from the criticism that it discords with a normative order: either it complies, or else it is not legitimately included among the events that are to be assessed for compliance with the normative order. A glass breaks. Is that event in discordance with the norm that no mammal shall eat its young? We can either say "no" because it not an instance of a mammal eating its young, or because it's not the kind of event that is to be assessed with this norm.

Duff's idea of the civil order, I take it, is the set of normative principles of a group of people that has the further and important feature of *constituting* them as a polity. That is, at least part of what it is for that group of people to be a polity is that that set of normative principles applies to them; their behavior is part of the sequence of events that is to be assessed for conformity or disconformity with the included normative principles. The civil order thus both claims people and excludes people. It claims them to the extent that under the norms included in the civil order,

their behavior matters to the question of whether the world is in accordance or discordance with the civil order; and it excludes people to the extent their behavior is irrelevant to the question. People who are claimed in certain domains of behavior, and so are on those grounds members of the polity, are not claimed in others; only some of their behavior is relevant to the question of whether there is conformity with the set of normative principles that make up the civil order. The distinction between these two types of behavior is the distinction between the private and the public. Private behavior is behavior performed by a member of the polity that is irrelevant to the question of whether the totality of behavior conforms to or violates the civil order. If the civil order includes no norms about consensual sexual practices occurring behind closed doors, then such behavior, when performed by someone whose behavior is relevant to the civil order in another domain, is private.

Duff outlines in detail the huge variety of norms that can be included in the civil order—legal, moral, formal, informal, and so on. He also describes the mechanisms through which they become part of the civil order—through the adoption of constitutions, the passing of statutes, through ordinary daily practice, through convention, and so on.

From the idea of the civil order it is a very short step to Duff's explanation for how citizenship matters to the legitimacy of punishment. The civil order claims the behavior of citizens, and claims the behavior of those who commit citizen-involving offenses. It does not claim the behavior of non-citizens who commit non-citizen involving offenses, like MBS's murder of Khashoggi. It is that simple. Put with reference to the short, challenging argument with which this paper began, Authority-Citizenship is false, Duff thinks. G has authority over a person if that person's conduct was in violation of the civil order. Citizenship is sufficient to meet this condition, but the condition is also met when C is citizen-involving. Here's Duff offering an illustrative example:

If a wife-beater or 'honour' killer is visiting from a country where such conduct is morally and legally sanctioned, we should not say to him that he should respect our local conventions and obey our local laws whilst he is here; we should rather say that his conduct constitutes a public wrong for which we will call him to account if he commits it in our country. We do not call him to public legal account for that conduct if he commits it outside the ambit of our criminal law, since wife-beating or 'honour' killing committed abroad is not the business of our courts (p. 132).

For Duff "not our business" means "not in violation of the civil order". So the point is that the civil order does not just claim the behavior of citizens, but also behavior committed within the state's borders. Without a violation of the civil order, there is no behavior that the state is authorized to respond to with punishment; but citizenship is only required for violations of civil order to the extent to which the civil order is constituted so as to require it.

Chapter 4 of *The Realm of Criminal Law*, where Duff describes many of the most important contours to his idea of the civil order, is, as I see it, the book's most important contribution. I believe that there is such a thing as the civil order; I think it is essential to understanding the divide between the private and the public; and I've

learned an enormous amount from Duff's writings about what it is and how it comes to be. But I also think that it cannot do the work of explaining how non-citizenship provides a pro tanto reason against legitimate punishment.

There is a powerful objection to the view. To see it, return to the position canvassed at the end of the last section according to which citizenship matters to legitimate punishment because the norms expressed by statutes appeal to it—the North Korean statute bans *North Koreans* speaking ill of Kim Jong-Un. Recall that this position represented citizenship as relevant to the justification of criminal punishment only to the extent that positive law made it relevant. I claimed that this made it too contingent a matter. Non-citizenship is a pro tanto reason against punishment even for the violation of legally expressed norms that do not require it for violation, such as the norm that no one is to speak ill of Kim Jong-Un. How does Duff's position differ from this position? And do the differences make Duff immune to this sort of criticism?

While there are differences, I do not think they serve to protect Duff's position from this criticism. To the extent that the civil order includes norms that one can violate whatever one's citizenship, D's non-citizenship will be no obstacle to violating the civil order, and so will be no obstacle to G's punishing him for violations of S's laws. If polities face no constraints on the construction of their civil order—if any set of norms could potentially constitute the civil order of a polity—then it will follow that there may be polities that place no particular emphasis on citizenship and so, for them, non-citizenship is no obstacle to justified punishment. But, again, this is to represent the bearing of citizenship on the issue as uncomfortably contingent. If the United States takes any murder anywhere to be a violation of its civil order—if it constructs its civil order so that a *universal* norm against murder is included in it—then the fact that MBS is not a citizen is no obstacle whatsoever to the United States' authority to snatch him from his home in Saudi Arabia and bring him to justice in a US prison. But we simply do not have the authority do that, and we cannot gain it by including citizenship-neutral norms against murder in our civil order.

One important difference between Duff's view and the view rejected on these grounds at the end of the last section, is that Duff is not focused, narrowly, on positive law. Positive law is one source of norms included within the polity's civil order, but there are several other potential such sources. But this difference does not shield Duff's position from the criticism. A polity could be wholeheartedly committed to bringing murderers to justice whoever they are, and where-ever they be—it could conceptualize all murders everywhere as breaches to its civil order—whether the source of that commitment is a practice, or a deeply held value, or a joint commitment, rather than a statute.

Perhaps Duff could appeal to the role that the civil order plays not just in regulating, but in *constituting* the polity in his defense of the proposed explanation for citizenship's bearing on justified punishment. A polity is a collection of people bound by the fact that they are governed by the norms that make up the civil order. Anyone, therefore, whose conduct is so governed is part of the polity. That, it seems to me, is the force of Duff's constitutive claim. But this still does not help. Of all the various grades or types of membership in the polity, citizenship is special and serves to silence a form of criticism of being subjected to punishment—"The law I violated

isn't *my* law!" That complaint, voiced by a non-citizen, serves to weaken the grounds for the government's punishment of him, even if his conduct involves civil disorder. Even if they are included in the polity in the limited sense that their conduct is an instance of civil discord, non-citizens are not included in it as *citizens* are, and that fact provides a pro tanto reason against punishing them. If the United States' civil order is such that all murders everywhere are violations of it, then, in virtue of his violation of the civil order, MBS is part of the United States' polity. But so what? Even granting that, would the United States be exercising its legitimate authority in punishing him? It would not, but would, instead, be exerting pure power.

I conclude that Duff's concept of the civil order, as powerful and compelling a concept as it is, does not help us to explain why non-citizenship is an obstacle to justified punishment.

#### 4 Having a Complaint that You Aren't Permitted to Voice

Up to this point, we have seen two appealing ways to explain the sense in which there is some explaining to do when the government punishes a non-citizen: the content of the law makes reference to citizenship, or the content of the civil order does. As we've seen, both approaches have a serious flaw: they make the shielding power of non-citizenship as contingent as the content of either positive law, or the civil order. But since both of those things are contingent—either positive law or the civil order could include norms that are entirely universal in both what they prohibit and by whom, and so could prohibit the behavior of non-citizens even when their conduct is not citizen-involving—the obstacle to justified punishment of non-citizens cannot come from them.

The temptation at this point to assert that there are moral filters on positive law, or moral filters on the norms included in the civil order, is powerful. Perhaps it's just wrong for the state to prohibit the non-citizen involving behavior of non-citizens; and perhaps when the state does this it fails to make law. But we know from the demise of natural law jurisprudence that this is not the right way to go. There just are no moral filters on the law. States can behave impermissibly in prohibiting certain types of behavior and, still, those behaviors become illegal. This can be true even if the state thereby prohibits morally permissible behavior, or even if the state thereby prohibits behavior that it would be morally wrongful for it to punish, or to respond to with any other form of coercive force. Law is one thing, morality another.

But given this strongly positivist stance, and given that non-citizenship *necessarily* provides a pro tanto reason against punishment, what explanatory tools are left? States cannot bypass the obstacle that non-citizenship provides, but its unavoidability does not derive from the fact that morality is unavoidable. So what does it derive from?

The necessity here is, I believe, metaphysical. It derives from the very nature of the act of calling to account. Duff is the most important theorist of criminal law to draw our attention to the fact that the most important activity—the defining activity, in fact—of the practice of criminal law is that of the government of a state calling offenders to account for their offenses. What the criminal law does, first and

foremost, is to demand an explanation for bad behavior, an explanation which the state shows it has the right to demand by providing evidence. But Duff focuses in his work primarily on what offenders are legitimately called to account *for* and tries to use his illuminating views on that topic to explain, also, *who* can be called to account. *Who* can be called to account, Duff holds, is a function of the content of the civil order, which also settles the matter of *what* people can be called to account for. But, I want to suggest, a better approach is to hold that the civil order answers the *what* question, and sets the line between private and public wrongs, but does not entirely answer the *who* question. Granted, it does answer the *who* question *partially*: the civil order can and often does include norms that apply only to particular classes of people who are identified in the content of the relevant norms. The civil order might condemn behavior by legal officials, or doctors, or those who have committed felonies in the past. When it does so, forms of conduct can become public wrongs that are private wrongs (at worst) when engaged in by those who are not members of the relevant group. But citizenship matters even when the norms included in the civil order are not limited in this way in their content. The reason, I suggest, is that to call to account is, necessarily, to claim the authority to condemn any offender who cannot permissibly offer a fact in his defense *even if it is a fact and speaks against his being subject to state power for his offense*. I explain.

To see the point, start by reflecting briefly on the obstacle to punishing the guilty when there is no legally admissible evidence of guilt. One might think that the problem is that *for all the government knows* the person is innocent. But it is possible for the government to know the person is guilty, and still have no legally admissible evidence; it might reach its conclusion on the basis of a coerced, but perfectly reliable confession, for instance. The coercion prevents the confession from being admissible. But it might still be sufficient to support the true belief in the offender's guilt. Why, in such a case, is the government barred from punishing? It is a distortion to say that the government has the authority to punish *the guilty*. Rather, the government has the authority to punish those *whom it is permitted to say* are guilty. The government lacks the permission *to say* this, even when it's true and known by the government, in that instance in which the government lacks admissible evidence that supports guilt.

That is, consider the following chart:

|   |     | Is D guilty? |     |
|---|-----|--------------|-----|
|   |     | Yes          | No  |
| Is there sufficient admissible evidence of D's guilt? | Yes | YES          | YES |
|   | No  | NO           | NO  |

Ceteris paribus, is the government authorized to punish D?

In the four primary boxes in this chart appear the answers to the question of whether the government is authorized (ceteris paribus) to punish D depending on whether he's guilty and whether there's sufficient evidence of his guilt. What we find is that the answer is a function solely of the answer to the question about evidence and not a function of the answer to the question about guilt. Government is not authorized to punish the guilty. If it were, then the answer to the question in the lower left box—where D is guilty but there's insufficient evidence of his guilt—would be YES, but the answer is actually NO. And, if guilt were necessary for the government authorization to punish, then the answer to the question in the upper right box—where D is innocent but there's sufficient evidence of guilt—would be NO instead of YES. What we learn from this, I suggest, is that government authority is predicated on an evidence-relative conception of guilt, and not on guilt itself. Since the difference between what the evidence supports, on the one hand, and what the facts are, on the other, aligns perfectly with the difference between who the government is authorized *to label* guilty, or, equivalently, who the government is authorized *to say* is guilty, I conclude that the government authority of interest is the authority to punish those who the government has a license to label as guilty.

For any fact about a criminal defendant or a crime there are two questions of interest: Does the fact provide a reason not to punish? And, is the fact to be included among those that determine whether the government can label D guilty? My suggestion is that the fact of non-citizenship *always* supplies a reason not to punish. In fact, those who can voice this complaint have established an absolute bar against the legitimacy of punishing. No government is authorized to punish *anyone* who can voice this complaint. But, ceteris paribus, the government enjoys authority to punish anyone who *cannot* voice this complaint including those non-citizens who cannot voice it. Further, the citizen-involving nature of a non-citizen's crime—most typically the mere fact that it was committed in the state's territory—takes away the right to voice the complaint.

There are two questions here that are especially in need of answers. First, why does the legitimate voicing of the complaint, "This is not my law!" provide an absolute bar to the legitimacy of punishing? And, second, why does the citizen-involving nature of the crime take away the right to voice this complaint? The answer to both questions, I will now argue, is that that's how the act of calling to account works.

Start with an observation: when G calls D to account for the fact that D C'd, a necessary condition for the performance of the act is that the norm "One ought not to C" is attributable to D, in a sense that I will describe. Imagine that someone comes up to you on the street and says, "I hereby call you to account for walking the street with laceless shoes!" This person implies that they believe that there is a norm, "One ought not walk on the street with laceless shoes," and that you are in violation of it. But if the person is not just condemning you for this act, but is *calling you to account*—that is, demanding that you *answer*—then he must attribute you with the norm. The reason is that answers that do not presume the validity of the norm are not of the form that is required for the act of calling to account. If you say, in response to this odd person's demand, "That rule does not apply to me!" you are not giving *an account* of the kind that he asked for. Another way to put it: if that answer is appropriate, and ends the altercation, then you were never called to account. At most, the person *tried* to call you to account, and failed because a condition necessary for the act, namely the attributability of the norm to you, was not met. Calling to account, as Duff emphasizes, is a social act, requiring that the parties to it are under normative pressure to behave in certain ways. Those who are called to account are under normative pressure to give a certain kind of answer. They are to say "But I'm wearing laces!" or "I can't afford laces!", or something else that involves the presumption that the norm in question is valid. They might not comply by this norm, but unless the norm applies to them, there is no act of calling to account. But the norm about how to answer applies only if the person is attributable with the norm the accuser claims he violated (in this example, the norm about laceless shoes).

I use this peculiar term "D is attributable with the norm" in order to capture a variety of different relations between D and the norm that are disjunctively necessary for the performance of G's act of calling D to account for violation of the norm. We attribute a norm to a person, such as the norm that one ought not to C, in many ways. First, and perhaps most frequently, we attribute this to D because (we believe) that he has a particular normative belief: he believes C-ing is wrong, for instance. When such a belief is attributable to D, so is the norm against C-ing. Often, we attribute this belief to D because there's reason to think that he's been behaving in a way that makes sense if D has the relevant belief.

Second, and more importantly for our purposes, we sometimes attribute a norm to D when we think that he had a hand in establishing the norm, and so cannot easily disavow it. This is distinct from the first ground of attribution since people can play their part in establishing a norm of conduct that they do not believe in. One parent plays her part in establishing the curfew even though she really doesn't think that there is anything wrong with the teenager staying out later than that; but she does her part out of deference to her partner, or out of a need to draw an arbitrary line. In such cases, she can be attributed with the norm against the child's staying out past the specified hour. This is why, for instance, her spouse can call her to account for failing to enforce the curfew.

Third, and most subtly, we attribute a norm against C-ing to a person when he can be attributed on other grounds with the following distinct norm: "One ought not to *disavow* the norm against C-ing." For instance, when a person has been living in a

group that is harmonious in part because the members of it do not disavow the norm against C-ing, he is often properly attributed with the belief that one ought not disavow that norm. He can therefore be attributed with the norm against disavowal. And, further, a person who can be attributed with the norm against disavowal can thereby be attributed with the norm against C-ing, *even when he neither believes that one ought not to C, nor had a hand in establishing the norm against C-ing.*

In *The Realm of Criminal Law*, Duff offers a nice discussion of the position of visitors and guests with respect to the rules of the places they visit (pp. 122–127). In that discussion, I take him to be exploring this third sort of attributability of a norm to a person. The visitor is living, for now, among those who live together successfully in part by not disavowing the norm against C-ing, and so he can be attributed with the norm against disavowal. On those grounds, then, he can be attributed, also, with the norm against C-ing. This is a kind of “when in Rome” argument, but with this important difference: it is not that, when in Rome, one should abide by the Roman’s rules; it is, rather, that when in Rome one shouldn’t disavow the Roman’s rules, even though they aren’t one’s own. And when one shouldn’t disavow the Roman’s rules, their rules are rightly treated as if they were one’s own for purposes of being called to account.

To say that a norm is not one’s own is to deny that it is attributable to one. If this is true, then it is not possible to call one to account for violation of the norm. It is not that it would be wrong to do so, or that it would be unfair to do so, or anything like that. It’s not even possible. Various other things are possible even then: it is possible to disapprove, even to condemn. But calling to account requires that there is a demand for an answer with a particular form, a kind of answer that can only be given by someone to whom the norm in question is attributed. The demand for the right kind of answer can only be made of those to whom the norm is attributable, and so the attributability of the norm is necessary for performance of the act of calling to account.

We now have all the conceptual apparatus needed to answer our two questions, namely, why does anyone who can legitimately voice the complaint that the law is not his thereby have a shield to punishment; and why does a non-citizen who commits a citizen-involving crime lack the right to voice this complaint? Citizenship, I suggest, is necessary for the second ground of attributability of a norm. Citizens are authors of the law—not in the causal sense of having written it or having directly contributed to its content, but in the sense that their entitlement to exert influence over the law is part of what accounts for and explains the very existence of the law; it is in part because there are people who have a say over the law, namely citizens, that norms can be of the distinctive, legally authoritative type. So, citizens are always attributable with the norms expressed by the laws of their states. It is this fact—the attributability of legal norms to citizens—that robs them of the complaint, “This is not my law!”.

However, non-citizens are not attributable with legal norms for this reason. Lacking any say over the law, they are not attributable with legal norms thanks to their authorial relationship to those norms. And, in fact, most non-citizens are not attributable with those norms on any other ground either. MBS is simply not attributable with the norms against what he did to Khashoggi, the norm expressed by American

laws against murder. And for this reason, it is simply not possible to call him to account. Any complaint we might make of his behavior will not be the act of calling him to account for the violation of American law. This is why anyone who can legitimately voice the complaint that the law is not his has a full shield to punishment. Justified punishment involves calling to account; calling to account requires attributability of the violated norm; where the complaint can be made, there is no attributability, and so no justified punishment. Non-citizens who commit non-citizen involving crimes are perfectly able to make this complaint and so cannot be justifiably punished.

However, those who commit citizen-involving crimes can be attributed with the norm against disavowal of the norms they transgress, and so can be attributed with the norms they transgress. A citizen D1 of country S1 commits C1 in the territory of S2, where C1 is in violation of S2's laws. Does D1 believe that one ought not to disavow the laws of the countries one visits? Well, would D1 see a reason to criticize D2, a citizen of S2, when D2 commits C2 in S1's territory, where C2 is a crime, and then disavows the law he violates? Yes. And so we can attribute D1 with the norm against disavowal of the laws of the places one visits. This in turn implies that D1 is attributable with S2's norm against C1-ing, when D1 is visiting S2. And so D1 is eligible to be called to account for that behavior when he commits C1 while visiting S2. The citizen-involving nature of a crime, that is, warrants attribution of the norm that it transgresses to anyone who expects protection from crimes committed by non-citizens when at home, or, even less, expects non-citizens of their nations to be unable to disavow the laws they violate.

What about those who are perfectly willing to allow non-citizens to disavow the laws they violate, even when their crimes are citizen involving? What of those who see nothing wrong with such disavowals? Can they too be attributed with the norms they violate when they visit other places? If the norm against disavowal is itself a legal norm of their country of origin, then they can be attributed with the norm against disavowal not on the grounds they believe it, since they do not, but on the grounds that they are implicated in it in the way in which all citizens are implicated as the authors of the laws of their country. This would again make them attributable with the norms of the countries they visit, since they cannot disavow such norms without thereby transgressing the norm against disavowal which is itself attributable to them.

The result is that anyone who either (1) believes that one ought not disavow the norms one transgresses when committing citizen-involving crimes, or (2) those who are citizens of a state that has given legal force to such norms against disavowal, can be attributed with the norms they transgress while visiting elsewhere.

But what about those who are either genuinely stateless, or else are citizens of a state that allows, as a matter of law, non-citizens to disavow their laws even when they transgress them through citizen-involving behaviors? It seems to me that this set of people cannot be legitimately punished when they commit crimes while visiting elsewhere. But it is important to see that this set of people may be empty and is, at the least, vanishingly small. In any event, the breadth of the exception to the rule that non-citizenship is a shield against the justifiability of punishment is no strike against the explanation I propose. What was required was an explanation for why

non-citizenship necessarily provides a pro tanto reason against punishment, and why there is sometimes sufficient reason to punish non-citizens nonetheless. The explanation I offer fulfills this requirement, even if there are a class of non-citizens who can appeal to their non-citizenship in their defense when committing citizen-involving crimes.

And I end this section with a confession: The explanation for why non-citizenship provides a pro tanto reason against punishment offered here is so Duffian, both in spirit and in content, that I wonder if I've gotten Duff wrong in attributing him with the distinct view, discussed in Section 3, appealing to the civil order. Perhaps he had the view proposed here all along. If so, then I consider it a point in the view's favor, for Duff is far more often correct about the nature of criminal law than he is mistaken.

## 5 Conclusion

It is worth reflecting a bit on the conception of government authority animating the view described in the last section. I noted there that governments appear to be authorized to utilize an admissible-evidence relative conception of norms. This is why they are permitted to punish the innocent whose guilt is established by admissible evidence. But the point is not specific to admissible *evidence*. Governments are authorized to punish people even in the face of admissible evidence of their innocence, or some other inviolable shield against punishment, provided that no one is permitted to raise the shield in the person's defense. Governments are authorized to act *as if* the facts are as they are permissibly presented, even when the government knows full well that that is not how the facts are.

This can seem quite odd. How can the government be required to treat the guilty as if they were innocent, and vice versa? Or treat the sane as if they were mentally ill, or vice versa? Or grant self-defense protections to those who didn't defend themselves? Or treat non-citizens as though they were citizens barred from disavowing the law since they have a say over it, despite the fact that non-citizens have no say over the law at all? What we care about, in the first instance, are the substantive facts that matter normatively. Why should we authorize governments to respond not to the facts but, instead, to the often distorted picture of them provided by procedures permitting them to be brought to formal, government attention, only in narrow circumstances?

The peculiarity of this is removed, or at least softened, by the observation that while governments are invested with normative powers—the power to change what people ought and ought not to do, what they are permitted and obligated to do—they are invested with those powers for, essentially, instrumental reasons. By analogy, we achieve various goods by instilling people with promissory powers—powers to change what one is permitted to do with the utterance of a word. By giving people such normative powers, we make mutually beneficial exchange possible and produce other social goods that are hard or even impossible to achieve when people are not invested with this normative power. Similarly, by producing governments with normative powers, we make it possible to achieve goods of security, safety and peace,

among other social goods, that are nigh on impossible to otherwise achieve. But if governments are to be effective, their normative powers must have the scope we find that they have: they must have authority to respond to what they are permissibly told the world is like, and not to what the world is actually like.

In the context of the problem with which this paper has been concerned, namely the problem of explaining citizenship's relevance to the justification of criminal punishment, what this implies is that governments are authorized to punish only as part of the complex act of holding to account, an act that necessarily involves sensitivity not just to the facts about who is subject to the law, but to the facts also about who is allowed to point out that they are not. Non-citizens have a decisive objection to punishment by a foreign government. But governments are nonetheless justified in punishing them in those instances in which they cannot voice it. If this seems peculiar, we should remind ourselves that it is an instance of a pattern in the way in which government authority functions: governments are generally authorized to respond to the picture of the world with which they are permissibly presented, even when it is inaccurate. And this pattern is really no surprise given that a government's normative powers would be for naught if this were not how it can exercise them.

## Reference

Duff, R. A. (2018) *The Realm of Criminal Law*, Oxford: Oxford University Press.

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