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CRIMINALITY AT WORK: USING CRIMINAL LAW TO ENFORCE STATUTORY EMPLOYMENT RIGHTS

David Cabrelli¹

I. Introduction

It is a trite statement that individual and collective employment rights without enforcement are paper tigers. To the labour lawyer whose work has predominantly focused on the amalgam of the private law and statutory regulation of the contract of employment, a seductive, albeit more difficult, claim is one positing that such enforcement should fall within the exclusive province of the civil law. It is ‘seductive’, to the extent that the intuition of such a specialist would tend to suggest that – being rooted in the contract of employment² – the employee-employer relationship is located within the private sphere. This gives rise to the proposition that civil, rather than criminal, proceedings ought to guarantee the vindication of employment rights, i.e. that traditional means of enforcing private law, namely civil enforcement, should take the lead. However, it is at once ‘difficult’ because it clearly dismisses a role for the criminal law without explanation or demur. Hence, despite its simplicity, the claim that compliance with statutory employment rights is a matter for the civil law should be suspended until it has been more intensely scrutinized. This approach is particularly important in light of Lord Reed’s reminder of the public character³ of statutory employment rights in *R (on the application of UNISON) v Lord Chancellor*.⁴ Having a public nature, something more than simply civil enforcement might be demanded.

This chapter represents the first of a series of forays in Part V of this book charting the interplay between labour law and criminal law. The following, and second, section of this chapter is of an expository character, being devoted to a mapping out of the key employment rights with a statutory source where an exclusive or shared role for the criminal law is encountered. Afforded equal status in this process is an account of those statutory employment rights where the

¹ Professor of Labour Law, University of Edinburgh. I am indebted to James Edwards, Andrew Cornford, Anthony Duff and the editors for discussions regarding the content and writing of this chapter.

² See Mark Freedland, *The Personal Employment Contract* (OUP 2003) and Mark Freedland et al (eds), *The Contract of Employment* (OUP 2016).

³ For discussion, see Michael Ford, ‘Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court’ (2018) 47 ILJ 1, 9-15 and 44-45 and Alan Bogg, ‘The Common Law Constitution at Work: *R (on the application of Unison) v Lord Chancellor*’ (2018) 81 MLR 509, 515-516.

⁴ [2017] UKSC 51, [2017] 3 WLR 409, 433C-E (Lord Reed).

criminal law is far removed from debates concerning enforcement. This descriptive exercise will naturally entail a review of the principal labour law statutes.⁵ Having produced such an account, section three takes a theoretical and analytical turn. It assesses whether contemporary theories of criminal law have the capacity to illuminate the regulatory environment. As part of that process, one of the most compelling criminal law theories is probed within the rubric of the descriptive narrative provided in section two. This exercise is intended to determine whether the legislative position in the UK can be justified in terms of this normative theory. The larger enterprise of which this third section forms part will be conducted by pursuing an evaluative framework throughout, taking labour laws with their foundation in legislation – as opposed to the common law – as the primary focus.

II. Charting the Criminal Enforcement of Statutory Employment Rights

A cursory glance at the content of the ERA, TULRCA, EqA, NMWA, etc. would suggest that Parliament has a tendency to prioritise the civil enforcement⁶ of contraventions of labour laws, with a casuistic, individual litigation-driven model generally laid down. Under this framework, compliance and enforcement is channelled principally through the employment tribunal system,⁷ although the courts operate as a subsidiary or supplementary option: ‘[i]n general, statutory employment rights in Britain are enforced by individuals taking cases to the employment tribunals’.⁸ Three simple illustrations suffice. Section 111 of the ERA prescribes that the right not to be unfairly dismissed at work under section 94 of the ERA is enforceable by an employee presenting a complaint to an employment tribunal. Likewise, claims brought in respect of discrimination law in the workplace are to be presented as a complaint to an employment tribunal under section 120 of the EqA. Meanwhile, the enforcement of unlawful

⁵ The Employment Rights Act 1996 (hereafter ERA), the Trade Union and Labour Relations (Consolidation) Act 1992 (hereafter TULRCA), the Equality Act 2010 (hereafter EqA), the National Minimum Wage Act 1998 (hereafter NMWA), the Health and Safety at Work, etc Act 1974 (hereafter HSWA) and the Working Time Regulations 1998, SI 1998/1833 (hereafter WTR).

⁶ See generally, Gillian S Morris, ‘The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms’ in Linda Dickens (ed), *Making Employment Rights Effective* (Hart Publishing 2012) 10-14 and for the negative aspects of this model, see Lizzie Barmes, *Bullying and Behavioural Conflict at Work* (OUP 2016) 38-47 and Dave Renton, *Struck Out* (Pluto Press 2012) 2-21.

⁷ See Linda Dickens, ‘Employment Tribunals and Alternative Dispute Resolution’ in Linda Dickens (ed), *Making Employment Rights Effective* (Hart Publishing 2012) 29.

⁸ Morris, ‘The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms’ (n 6) 10.

deductions from wages claims under Part II of the ERA⁹ and equal pay claims under Chapter 3 of Part 5 of the EqA¹⁰ is shared between the employment tribunal and the courts.

The ubiquity of civil remedies in labour law statutes might suggest a presumption against criminalization in principle, but the most that can be claimed is that the prevailing legislative pattern provides evidence of an underlying political preference in favour of civil enforcement. As noted at the outset, the fact that in practice we encounter such a preference for civil law remedies may also give rise to the normative argument that we ought to eschew a role for criminalization in the field. However, that would be wide of the mark, since it entails the derivation of an ‘ought’ from an ‘is’, i.e. the argument that we should reject the criminalization of statutory employment rights because in practice, their enforcement is predominantly confined to the civil law – is palpably false. Instead, a role for the criminal enforcement of statutory employment rights is undoubtedly legitimate. A separate point is that civil and criminal enforcement in this context should not be viewed as mutually exclusive. As we will see, shared enforcement is not that unusual in the case of employment rights.

One of the criticisms of an insistence on a civil litigation framework of enforcement of labour laws centres on its inability to secure more powerful or redistributive outcomes. For example, where certain rights are fundamental in nature or represent a reflection of the collective goals or shared values of a community, there is an argument that more symbolic¹¹ forms of enforcement and remedies are needed. In short, here, civil enforcement is not enough. From the perspective of securing compliance, the absence of any involvement for criminal adjudication will be of concern in many fields of the law. But even more so in the case of labour law, which can only be properly understood in light of its objectives and social/vocational mission,¹² namely to push back against the inequality of bargaining power intrinsic to the employment relationship.¹³

⁹ See ERA ss 13, 23 and 24. An unlawful deduction also constitutes a breach of contract, thus enabling an employee to raise a court action seeking damages.

¹⁰ The EqA s 129 enables a protected individual to present a complaint to an employment tribunal. A common law court action for damages is prescribed by the EqA s 128: see *Abdulla v Birmingham City Council* [2012] UKSC 47, [2012] ICR 1419.

¹¹ However, criminal enforcement may not necessarily be stronger or more powerful than civil litigation, and may, in fact, be weaker, e.g. owing to the higher standard of proof in the case of criminal trials.

¹² See Hugh Collins, ‘Labour Law as a Vocation’ (1989) 105 LQR 468.

¹³ Paul Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (3rd edn Stevens 1983) 18.

Of course, the classic counterpoint to the general proposition that labour law is predominantly enforced civilly¹⁴ finds its expression in section 33 of the HSWA. This statutory provision makes it an offence for an employer to fail to discharge various duties or to contravene any of the terms of the multitude of Health and Safety Regulations.¹⁵ The only adjunct to criminal proceedings is public agency enforcement by the Health and Safety Executive.¹⁶ As such, orthodoxy is turned on its head. This demands an explanation. Or at the very least an attempt at such a justification, which is a task to which section 3 of this chapter is dedicated.

It may be useful for analytical purposes to evoke a tripartite taxonomy of statutes conferring employment rights, reflective of the varying dimensions of complexity involved in the enforcement of labour laws. The first category is embodied by those statutes that confer employment rights where enforcement is exclusively private or carried out or assisted by a public agency, e.g. the Equality and Human Rights Commission. At the polar opposite is the third category, where we find exclusively criminal enforcement undertaken by the police and CPS or investigation delegated to specialist agencies such as the Gangmasters and Labour Abuse Authority with prosecutions subsequently conducted by the CPS. The criminal forms of intervention can range from the prescription of more traditional forms of offences carrying the sanctions of imprisonment or fines, to quasi-criminal public agency enforcement (e.g. the Certification Officer's powers in TULRCA, the powers of the HSE under the HSWA or those of the HMRC in terms of the NMWA), licensing requirements,¹⁷ breach of which triggers criminal sanctions, and preventive measures and orders to control managerial behaviour.¹⁸ Finally, the second category lying somewhere in between the first and third is the most complex, where the relevant statute lays down both civil and criminal liability, i.e. there are overlaps. This second category demonstrates how it is misconceived to present the enforcement of employment rights as necessarily entailing a binary choice between the criminal and civil.

¹⁴ For other exceptions to the privatised model of justice, see Ford, 'Employment Tribunal Fees and the Rule of Law' (n 3) 5-8.

¹⁵ The various penalties are set out in the HSWA sch 3A. HSWA s 47 expressly disavows civil liability for breach of statutory duty.

¹⁶ See Steve Tombs and David Whyte, 'Reshaping Health and Safety Enforcement: Institutionalising Impunity' in Linda Dickens (ed), *Making Employment Rights Effective* (Hart Publishing 2012) 67.

¹⁷ [Cross-refer to Anne Davies's chapter].

¹⁸ A similar issue arises where there is a cross-over between criminal and civil enforcement, e.g. where a civil breach is clothed with criminal liability in certain circumstances.

We can pick out a limited sample of the most central employment rights conferred by statute¹⁹ and whether they correspond to categories 1, 2 or 3. For example, statutory rights such as the right not to suffer direct discrimination or indirect discrimination,²⁰ the right to be supplied with a written statement of the main particulars of employment,²¹ the right not to be unfairly dismissed,²² and the failure to inform and consult on collective redundancies²³ are each enforced civilly through private means or with the assistance of an administrative agency. But there are many other examples. Meanwhile, criminal proceedings are the only way of enforcing rights such as the right of employees to health & safety at work,²⁴ the right of young workers not to be compelled to work in excess of 40 hours in a working week,²⁵ and the right to be provided with adequate rest breaks owing to the pattern of an employee's work.²⁶ Finally, we encounter the statutory entitlement where enforcement is shared between the civil and criminal law, e.g. in the case of the right to be paid the minimum wage or National Living Wage.²⁷

Two observations can be derived from the preceding exposition of rights falling within the tripartite categories. First, the criminal enforcement of statutory labour laws is scant in comparison with the instances of civil proceedings. This may not be surprising inasmuch as it conforms to the general pattern discussed above. But we need a more reflective and better understanding of the possible reasons for this finding. Here, a pack of explanations jostle for our attention. For instance, an explanation may lie in a lack of specialism on the part of the police and CPS. Another may alight on the absence of proper funding and resourcing in the case of the specialist public agencies tasked with enforcement. Alternatively, we may resort to normative theories of criminalization for assistance, which is a task we turn to in section 3 below. A second remark is that the aforementioned illustration where enforcement is divided between civil and criminal law is particularly intriguing. What the existence of shared enforcement in the case of the minimum wage suggests is that the basic distinction between civil and criminal liability may be somewhat anachronistic and bear a greater amount of weight than it is currently equipped to carry. In the next section, we delve deeper into these issues, and in much broader terms, we enquire whether the prevailing configuration of enforcement we

¹⁹ This analysis is not intended to be exhaustive of each and every statutory employment right in UK law.

²⁰ EqA ss 13, 19 and 120.

²¹ ERA ss 1, 2, 3, and 11.

²² ERA ss 95 and 111.

²³ TULRCA ss 188, 188A and 189.

²⁴ HSWA ss 2-7 and 33(1)(a).

²⁵ WTR regs 5A(1) and 29(1).

²⁶ WTR regs 8 and 29(1).

²⁷ NMWA s 31(1) and ERA s 23.

find in UK labour law statutes is defensible in terms of some overarching normative theory of criminalization.

III. The Notion of ‘Public Wrongs’ in Criminal Law Theory

A. Introduction

Having provided a sketch of various statutory employment rights that are exclusively enforced via the criminal law or civil law, and the circumstances where we encounter a complex mixture of both civil and criminal compliance measures and techniques, a natural successive point is to assess whether some existing criminal law theory can make sense of, and/or provide a normative account of, and justification for the forms of enforcement prescribed in the case of a limited range of the statutory employment rights discussed in section 2. It should be stressed that this search for a theory is motivated by the desire to explore whether criminalization would be justified in normative terms in relation to the selected range of employment rights. It is an exercise that is analytically distinct from enquiring whether a theory of criminalization can supply an explanatory account for the political choices made by law-makers in Parliament about criminalization from time to time. This is a distinction of material importance, since there is every possibility that there might be a misalignment between what a normative theory would suggest ought or ought not to be criminalized and what we actually find has been criminalized in practice.

If we embark on our enquiry by evoking normative principles and concepts that can be derived from the academic literature that identify when it might be legitimate to criminalize a practice, it is evident that a number of options present themselves as potential candidates. However, for reasons of economy of space, we will restrict the discussion to one: the ‘public wrongs’ theory of criminalization will be taken as the focus of our enquiry. Historically, the public wrongs framework claimed that criminal laws ought to regulate a form of human behaviour where it constituted a wrong done to the public. This does not seem entirely persuasive as a univocal theory of criminal law for two self-explanatory reasons. Even a mere cursory glance at the law reveals that certain wrongs are controlled by the criminal law even though they (i) cause no direct harm to the public or (ii) have no inherent properties which are

public in character.²⁸ In recent years, a more refined incarnation of the ‘public wrongs’ theory has been put forward by Duff and Marshall.²⁹ It is this form of the ‘public wrongs’ theory that can be treated as a conceptually more formidable account for the criminalization of behaviour. It is taken as an evaluative tool to test whether it might have the capacity in normative terms to provide support to those areas of labour law (i) that are the subject of civil enforcement, (ii) that have been earmarked exclusively for criminal enforcement, and (iii) where a breach of employment rights entails both civil and criminal enforcement on a shared basis.

The notion of ‘public wrongs’ advanced by Duff and Marshall has undergone a series of evolutions since it was first versed in 1998.³⁰ The most recent articulation focuses on the positive and negative embodiments of that theory, as well as their respective implications.³¹ The positive form of the public wrongs theory is intended to help us understand what we have a reason to criminalize, rather than what we ought to criminalize: a legitimate justification is simply a necessary, albeit not a sufficient, condition for the criminalization of conduct. The fact that conduct X concerns us as living together as members and citizens of a political community – referred to as the ‘civil order’ in shorthand – and X is a wrongful kind of conduct within that civil order, means that we have sufficient justification to criminalize it. Turning to the negative version, this is deployed by Duff and Marshall in an additive and more profound way. It is used to cast light on what we have no reason to criminalize, *but also what ought not to be criminalized* by the law. It claims that we have no legitimate justification to criminalize a conduct A, and we ought not to criminalize it, if it is not (i) a public matter in the sense that it does not concern the ‘civil order’ or (ii) a wrongful kind of conduct within that civil order: in this way, for an activity not to be criminalized, it may be (a) public, but not wrongful, or (b) wrongful, but not public. As such, the value of the negative version of the public wrongs theory

²⁸ Although this may lead us to conclude that illustrations of criminalization where there is (a) no harm to the public or (b) nothing public about their nature, are simply illegitimate under the public wrongs theory, rather than sufficient to question its legitimacy.

²⁹ Antony Duff and Sandra E Marshall, ‘Crimes, Public Wrongs, and Civil Order’ (2018) 12 *Criminal Law and Philosophy* 1.

³⁰ Sandra E Marshall and Antony Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *CJLJ* 7, Antony Duff, ‘Towards A Theory of Criminal Law’ (2010) 84 *Proceedings of the Aristotelian Society, Supplementary Volume* 1, Antony Duff and Sandra E Marshall, ‘Public and Private Wrongs’ in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (EUP 2010) 70, Antony Duff, ‘Responsibility, Citizenship, and Criminal Law’ in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (OUP 2011) 125, Antony Duff, ‘Legal Moralism and Public Wrongs’ in Kimberly K Ferzan and Stephen J Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S Moore* (OUP 2016) 95 and Antony Duff, *The Realm of Criminal Law* (OUP 2018) 146-184. See also Ambrose Y K Lee, ‘Public Wrongs and the Criminal Law’ (2015) 9 *Criminal Law and Philosophy* 155, 158.

³¹ Duff and Marshall, ‘Crimes, Public Wrongs, and Civil Order’ (n 29) 18 and Duff, *The Realm of Criminal Law* (n 30) 235-237.

to labour law lies in its negative normative edge, i.e. how it purports to convey what workplace practices or exercises of the managerial prerogative *we ought not to criminalize* and helps us understand better those areas of labour law where a conscious decision has been made to eschew the operation of the criminal law.

First, a few clarificatory remarks to make about ‘public wrongs’ theory. The notion of a public wrong does not tell us anything about the effect of the relevant conduct on the public, i.e. whether the public are somehow wronged. It also fails to clarify whether the wrong is in some sense ‘collective’ in nature.³² Likewise, it says nothing about ‘the intrinsic character [of that conduct] as a wrong’, i.e. whether it is public or private.³³ For example, an inherently private act may constitute conduct that is (i) a ‘public matter’ which is (ii) wrongful. Instead, we are concerned with ‘public wrongdoing’ not ‘moral wrongdoing’,³⁴ in terms of the specific framework adumbrated by Duff and Marshall. What this means is that ‘public wrongs’ theory does not correspond to the public/private dichotomy in traditional legal thought,³⁵ or the debate conducted by labour lawyers as to whether we can distinguish public and private activities according to a spatial conceptualisation.³⁶ In this way, the fact that certain key workplace behaviours regulated by statutory labour laws such as dismissal, suspension, etc. might take place exclusively in the private sphere between two parties to a horizontal employment relationship does not automatically translate into any claim about the proper or improper criminalization of such activities.³⁷ Instead, the key issue here is whether the conduct is (i) a public matter, *or* (ii) that within the context of that civil order, the conduct is a ‘wrong’.

B: Applying the Negative and Positive Versions of Public Wrongs Theory

Duff tells us two things about the (i) ‘public’ as opposed to the (ii) ‘wrongfulness’ variable: first, that for a practice to be a ‘public matter’, it must be something *that directly bears on the distinctive goals and values of the civil order* concerning us as living together as members and citizens of a political community.³⁸ Secondly, workplace conduct will not be a public matter if

³² Marshall and Duff, ‘Criminalization and Sharing Wrongs’ (n 30).

³³ *Ibid* 2 and Duff, *The Realm of Criminal Law* (n 30) 146.

³⁴ James Edwards and A. Simester, ‘What’s Public About Crime?’ (2017) 37 OJLS 105, 107.

³⁵ See *R v Disciplinary Committee of the Jockey Club (ex parte Aga Khan)* [1993] 1 WLR 909 (CA).

³⁶ For example, see *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634, *Pay v Lancashire Probation Service* [2003] EAT/1224/02/LA, [2004] ICR 187 and *Pay v UK* [2009] IRLR 139 (ECtHR).

³⁷ Otherwise domestic violence would also slip out of the net. See also the discussion in Edwards and Simester, ‘What’s Public About Crime?’ (n 34) 108-110.

³⁸ Duff and Marshall, ‘Crimes, Public Wrongs, and Civil Order’ (n 29) 18.

it is not the ‘business of members of the community [simply] in virtue of their membership [and our mutual citizenship]’.³⁹ As for the wrongfulness criterion (ii), we are informed that this will be met if the conduct either violates or is inconsistent with the shared values of the polity in that civil order.⁴⁰ This translates into a requirement for a political community with a ‘sufficiently rich shared understanding between at least most of its members about the goals and values that define that community and its civil order.’⁴¹

But how do we ascertain whether this negative formulation of Duff and Marshall’s public wrongs theory harbours the capacity to provide a normative justification (i) running counter to criminalization in the case of statutory labour law wrongs that are exclusively enforced via the civil law, (ii) for those workplace practices or omissions that have been left largely to the criminal law for enforcement and (iii) for areas of shared enforcement? This exercise will involve ascertaining (a) which labour rights do or do not qualify as public wrongs and/or (b) whether existing legislative patterns of criminalization track those normative distinctions.⁴² In analysing the salience of the public wrongs theory, we adopt dismissal, discriminatory conduct and the right to a written statement as three illustrative samples of statutory employment rights that attract civil enforcement, whereas health and safety is taken as *the* classic embodiment of statutory labour laws that have been earmarked for criminal prosecution. We also invoke an employer’s infringement of the right to receive the national minimum wage as an illustration of shared civil and criminal enforcement.⁴³

If we apply the (i) ‘publicness’ and (ii) ‘wrongfulness’ criteria to the selected five statutory rights in reverse order, turning first to the wrongfulness criterion (ii), the question is whether each of these five illustrations *do not* represent an affront to, or rupture from, such shared values of the community. In the case of discriminatory treatment, the answer is ‘no’, as it clearly does. This is undoubtedly the appropriate response if we call to mind the various powerful social justifications for this statutory body of labour law, e.g. respect for individual

³⁹ Duff, ‘Towards a Theory of Criminal Law?’ (n 30) 5.

⁴⁰ Marshall and Duff, ‘Criminalization and Sharing Wrongs’ (n 30) 18-22, Duff and Marshall, ‘Public and Private Wrongs’ (n 30), 70-72, Duff, ‘Responsibility, Citizenship, and Criminal Law’ (n 30) 125, 139-140, Antony Duff, *Answering for Crime* (Hart Publishing 2007) 141-143, Lee, ‘Public Wrongs and the Criminal Law’ (n 30) 158.

⁴¹ Duff and Marshall, ‘Crimes, Public Wrongs, and Civil Order’ (n 29) 18.

⁴² Of course, there may be a mismatch between (a) and (b), but this doesn’t discredit public wrongs as a normative theory. Instead, it simply means that what has and has not been criminalized by Parliament falls short of the standards set by this theory.

⁴³ We have limited the enquiry in these terms for reasons of economy of space.

dignity⁴⁴ or fundamental choices,⁴⁵ the prevention of serious, persistent and ubiquitous forms of relative disadvantage,⁴⁶ the recognition of a person's immutable characteristics⁴⁷ or historic stigmatisation of certain practices or characteristics.⁴⁸ As for health and safety infringements giving rise to the harm and injury of workers, we must ask whether they do not represent a breach of the common values underpinning a social and political community. Like discriminatory conduct, the answer again must be negative, bearing in mind that the objective of health and safety laws is the protection of the physical and psychological integrity of workers, which is clearly a fundamental issue.⁴⁹ In the case of the failure of an employer to issue a statutory written statement, this can be viewed as generating a rift with the community's common values insofar as an employee has a basic entitlement to understand the basis of his/her relationship with the hirer of his/her labour, i.e. exactly where he/she stands. As for the right to be paid the minimum wage, if a society places weight on the dignity of workers and the capacity of wage controls to generate redistributive results,⁵⁰ there is a strong case to be made for the proposition that a polity's values will be breached where the earning capacity of some of the workforce is squeezed by the employer so that they struggle to meet their basic needs. In such a context, the deprivation of a wage floor would strike at the society's shared values and be wrongful. Finally, turning to unreasonable no cause dismissals, the position is less clear-cut, as all depends on one's personal opinions and moral convictions on the relative strength of countervailing social, economic and political arguments. Here, we can evoke competing claims concerning the beneficial value of laws restricting dismissals insofar as they limit the scope for failures in the operation of the labour market, as against the contention that strong controls over dismissals entail higher unemployment, lower labour force participation⁵¹ and less efficient, dynamic and flexible labour markets. As such, the assessment of whether

⁴⁴ Benjamin Eidelson, 'Treating People as Individuals' in Deborah Hellmann and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 203, Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 (2) *IJCL* 267.

⁴⁵ Robert Wintemute, *Sexual Orientation and Human Rights Framework* (Clarendon Press 1997) and John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *OJLS* 167, 169-174.

⁴⁶ Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 137-139.

⁴⁷ Catherine Dupre, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart Publishing 2015), Samuel A Marcossou, 'Constructive Immutability' (2001) 3(2) *University of Pennsylvania Journal of Constitutional Law* 673, Jessica A Clarke, 'Against Immutability' (2015) 125 *Yale LJ* 1 and Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 130-134.

⁴⁸ Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart 2017) ch 4, Robin A Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' (2004) 79 *NYUL Rev* 803 and Iyiola Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40 *ILJ* 336, 350-5.

⁴⁹ Thus, the claim that they are merely *mala prohibita* or regulatory criminal law is rejected: see Duff, *The Realm of Criminal Law* (n 30) 245-247.

⁵⁰ Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 *MLR* 581, 586-594 and Brisham Rogers, 'Justice at Work: Minimum Wage Laws and Social Equality' (2015) 92 *Tex L Rev* 1543.

⁵¹ Juan C Botero et al, 'The Regulation of Labor' (2004) 119 *The Quarterly Journal of Economics* 1339, 1379.

dismissals fall down at the wrongfulness criterion (ii) is more finely balanced, but if one subscribes to, and assumes the existence of a social community wedded to a ‘job security’⁵² or ‘job property’⁵³ outlook, the argument can be made that such dismissals would jar quite severely against the common values of that society. In the final analysis, this would mean that the wrongfulness criterion (ii) would be satisfied. Of course, the prevalence of competing contestations here might suggest that public wrongs theory’s implicit faith in being able to identify a civil order with uniform, shared or common values is entirely misplaced in the industrial relations context, which is a site of sharp political conflict characterised by pluralism and disagreement. In this way, the immersion of Duff’s theory within the crucible of labour law may give rise to serious doubts about the plausibility of concepts such as the ‘civil order’ and ‘common values’, as well as the operational capacity of ‘public wrongs’ theory more generally. However, Duff would counter this by invoking the pluralist and liberal nature of his conception of the ‘civil order’. Such a formulation recognises that citizens may reasonably disagree about what is ‘good’, but nonetheless reach consensus on certain basic, minimum values of a substantive and procedural hue relating to the operation and composition of their political community.⁵⁴

It follows from the preceding analysis that each of the selected five examples of managerial behaviour or failures are indeed ‘wrongful’. We now turn to the requirement that such workplace practices must not be a ‘public matter’ (i). It is not entirely persuasive to argue that no cause dismissals, discriminatory workplace behaviour, the failure to adhere to a wage floor and health and safety norms in employment have no bearing on the distinctive goals and values of the civil order. On the contrary, each of them are surely sites of workplace activity qualifying as the business of members of that social community. In particular, in the case of discriminatory practices, it can be claimed that by setting out one’s stall, an employer has voluntarily transposed its field of activities into the public sphere and as such, the values of the political community in which its employees reside are engaged.⁵⁵ Seen from this perspective, the case that such examples of workplace conduct ought not to be criminalized also founders on the rock of the ‘publicness’ criterion (i).

⁵² Keith D Ewing, ‘Job Security and the Contract of Employment’ (1989) 18 ILJ 217 and Hugh Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 ILJ 17, 29.

⁵³ Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate 2007) 6–7; Claire Mummé, ‘Property in Labor and the Limits of Contracting’ in Ugo Mattei and John D Haskell (eds), *Research Handbook on Political Economy and Law* (Edward Elgar 2015) 413–15.

⁵⁴ Duff, *The Realm of Criminal Law* (n 30) 167–182.

⁵⁵ Khaitan, *A Theory of Discrimination Law* (n 46) 201–209.

These rights can be contrasted with the statutory right to receive a written statement, which would appear to have a less obvious public character. Here, the relevance of an employer's non-compliance to the shared understandings of the community and defining that polity is not as clear-cut. However, on balance, there is a strong case for the proposition that the role of the statutory right to a statement in enabling employees to appreciate where they stand vis-à-vis their employer incorporates a material and vital core of publicness. It is surely a matter of shared public concern that societal groups who may be subject to the rational or irrational exercise of coercive social power – such as employees by their employers – have full transparency and disclosure of fundamental contractual terms. And if such an analysis is correct, we cannot claim that there is a normative obligation not to criminalise such failures of disclosure.

Having established that the negative strand of public wrongs theory provides no support for the proposition that each of our five statutory employment rights should not be criminalized, its positive incarnation - whereby we have a reason to criminalise them - is also by definition satisfied. In terms of the positive strand, the (i) 'publicness' and (ii) 'wrongfulness' tests must be met, and the preceding analysis has shown how they indeed are in the case of the five selected examples. However, it is worth recalling that although we have positive grounds to criminalise each of these five practices, this does not lead automatically to the proposition that we *ought to criminalise* them. Instead, that would be a false move. The crucial point here is that the positive incarnation of Duff & Marshall's public wrongs theory stops short of exacting a full 'normative bite'. How one transitions from (a) having a positive legitimate basis for the criminalization of these forms of workplace conduct to (b) being under an all-things-considered absolute obligation to do so (hereinafter referred to as the "positive to the absolute") is an issue to which we now turn. The various countervailing considerations to criminalization must first be assessed, including any possible regulatory alternatives.

C. Public Wrongs Theory: Getting from the Positive to the Absolute

A pressing issue for resolution is whether we are persuaded to take the relevant leap from the (a) positive to the (b) absolute case for criminalization. If not, then the current legal position described in section 2 above that dismissals, the right to receive a written statement and discriminatory practices are not matters for the criminal law would be theoretically justified in terms of public wrongs theory, i.e. the policy decision to leave these matters to individuals to

litigate in the courts and tribunals. But, if we elicit the opposite response, then the conclusion can be drawn that Parliament's decision not to marshal the criminal law in these three instances is philosophically misconceived in terms of the public wrongs theory.⁵⁶ Meanwhile, in the case of health and safety infractions, our analysis would be turned on its head, e.g. if we pose the question whether we ought to make the transition from the positive to the absolute, and our answer is negative, then the subjection of health and safety breaches to the criminal law in the current legal regime can be cast as wrong-headed as a matter of public wrongs theory.

On the subject of such a transition, Duff says the following: first, we don't need to take that step if we have 'reasons, principled or pragmatic... against doing so... [or if we] conclude that on balance we have better reason not to criminalise...'⁵⁷ Secondly, we may decide that 'criminalisation is only one among other possible ways of responding to public wrongs... [e.g. we may provide] no formal response to [them], and instead leav[e] any response to be an informal social matter, or rather [make] it a matter of tort law rather than of criminal law.'⁵⁸ In light of this, do the variety of factors and justifications cited by Duff truly assist, and/or persuade, us to take the relevant jump in the case of the five illustrative employment rights? The response calls into question, in general, the nature of the relevant and appropriate factors and reasons that must be taken into account in evaluating whether to take that step. The difficulty is that the guidance from Duff regarding the relevant issues to take into account at the normative leap stage is so general as to be rather scant, e.g. Duff's most recent work identifies only six factors⁵⁹ that we should consider. To a large extent we are left guessing, showing how the positive version of the public wrongs theory is somewhat impoverished as soon as it reaches the second stage of questioning whether there is an absolute obligation to criminalize: it is here that the public wrongs theory seems to break down.⁶⁰ The fundamental point here is that, in comparison with this second stage concerning whether to take the step from the positive to the absolute case for criminalization, the first stage gateway in the public

⁵⁶ An alternative conclusion is that public wrongs theory is intrinsically defective. But this is a suspect move, since it is not intellectually persuasive to extrapolate from what we see (or don't see) 'on the ground' in the case of (what political choices have or have not been made regarding) criminalization to broader propositions about the lack of value or flaws in public wrongs theory or normative theorising about criminal law more generally.

⁵⁷ Duff and Marshall, 'Crimes, Public Wrongs, and Civil Order' (n 29) 4.

⁵⁸ Ibid.

⁵⁹ Duff, *The Realm of Criminal Law* (n 30) 297. Each of the six issues are addressed in the discussion in the remainder of this section.

⁶⁰ Duff decides not to provide a detailed account of how we ought to make this transition: *ibid* 298.

wrongs theory is extraordinarily wide – it is difficult to see how any statutory labour right would fail to meet the (i) ‘public’ and (ii) ‘wrongful’ criteria.⁶¹

In effect, we must resort to our own capacities for lateral reasoning and call to mind a number of factors that we anticipate would assume a degree of relevance. They can be each grouped into justifications in favour of adopting the relevant leap from the positive to the absolute case for criminalization and secondly, those against doing so. Two sets of distinctions should be made at this juncture. First, there are general factors/reasons and secondly, rights-particular factors/variables. The latter are by definition context-dependent on the particular right. As for the general variables, these are of relevance and application to each of the five chosen examples. We begin with a consideration of what might constitute the abstract reasons for criminalization.

On the positive side, first, it may be that there is something so egregious about infringements of the five statutory employment rights that we ought to adopt punitive⁶² rather than corrective measures. In that respect, we may conjecture that this is where the harm principle makes its presence felt within the context of the public wrongs theory:⁶³ the more severe the harm done to the employee by these practices or omissions, the more convincing the claim that we ought to take the relevant leap. Secondly, we may wish to subrogate the state to enforcement to ensure consistency in policy and to depart from the individual litigation-driven model for the enforcement of these five statutory employment laws. Thirdly, and a point closely related to the second, is that we may believe that state involvement via the criminal law has a degree of merit in propagating a greater level of deterrence of dismissals, etc. The symbolic communicative role of the criminal law in signposting the wrongfulness of a particular activity is important,⁶⁴ particularly in light of its supplementary deterrent function.⁶⁵ As is the relevance of the criminal law in securing a (a) formal and authoritative judicial declaration of the culpability of the employer,⁶⁶ as well as in a public and collective (b) calling to account of the employer.⁶⁷ Of course, if we do reach the relevant threshold that we demand the criminalization of such five managerial practices, we may also decide that there are powerful reasons to elicit stronger forms of criminal enforcement in the case of deliberate or intentional practices on the

⁶¹ All of the normative work is being done at this second stage.

⁶² Duff, *The Realm of Criminal Law* (n 30) 297.

⁶³ Duff himself recognises this at various points: *ibid* 296, 298 and 308.

⁶⁴ *Ibid* 293.

⁶⁵ *Ibid* 297.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

part of employers, such as direct discrimination and harassment (as opposed to indirect discrimination). In contrast, given the nature of the harm, in the case of managerial behaviour resulting in physical injury to employees, we may form the opinion that it is irrelevant whether the conduct was unintentional and that criminalization is the only appropriate response. Alternatively, we may decide on a regime where enforcement is shared between the criminal and civil law. Such a shared regulatory response may be appropriate in the case of objectionable forms of behaviour where we feel that we ought to reserve a role for individuals themselves to be involved in enforcement, (e.g. to leave scope for individual negotiation and settlement) or that the civil law can operate as an auxiliary aid to criminal enforcement, e.g. as recognised in the case of the minimum wage in the current legal regime.

On the negative side of the equation, we can evoke certain factors or values (integral to the civil order of the polity) which suggest that we ought to resist any recourse to the criminal law. For example, the costs of criminal enforcement may be too high and criminalization may be disproportionate in light of the magnitude and extent of the wrong. It may also be impractical to criminalize. A further consideration is that an anxiety may take root that the value of liberty would be undermined if we criminalize,⁶⁸ i.e. that we are illegitimately depriving individuals of their liberty to take remedial action by compelling them to relinquish their private control of enforcement and hand it over to the state. Such an expropriation would be tantamount to the denial of the hugely significant and symbolic sovereignty/autonomy and prerogative of the individual to retain the decision whether to vindicate his/her rights where he/she has been subjected to a wrong, i.e. whether it is the individual or the State who should 'own' any legal action and ultimately exercise control over the instituting of legal proceedings.⁶⁹ The devolution of control over enforcement to the state also carries the risk that the relevant prosecution officials decide not to take action for one reason or another. But even where they do act, there is also the danger that they engage in plea bargaining, which would be possible in the shadow of the criminal law. In essence, the State prosecution authorities would have the capacity to do deals. This may engender a negative perception towards any role for State enforcement. Another concern we may harbour is that the powers of the state are so far-reaching that it would be heavy-handed to involve it in the enforcement of these five statutory employment rights, i.e. that it is disproportionate to bring the criminal law into play in light of the harm done by the conduct which they regulate. Of course, there is also the higher standard

⁶⁸ Ibid 297.

⁶⁹ See Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016) 269-272 and Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33(1) IJLLIR 7, 21.

of proof associated with the criminal law, which may lead us down the path of securing fewer positive outcomes. One other possible issue to take into contention is that there is an insufficient basis to criminalize dismissal, discrimination, managerial omissions to issue a written statutory statement or pay the minimum wage, or health and safety breaches because a less restrictive alternative is available in the guise of *mala prohibita* offences or even civil penalties,⁷⁰ i.e. regulatory law/administrative enforcement mechanisms as a less compelling form of punishment. Finally, we also have to factor in the reality that the criminalisation of each of these workplace practices or failures will have a chilling effect on managerial decision-making more generally.

If we place each of these positive and negative factors into the balance, we can form a provisional holistic and general view as to whether the scales balance out in favour of, or against, a role for criminal enforcement. However, this would only be a preliminary conclusion, as we must also identify a swathe of context-particular issues that we consider significant in the sense described above. If we begin with dismissals, our response to the question whether the unfair dismissal right should be enforced by the criminal law would be largely dependent on our level of acceptance of dismissals in society and our attitude to a dismissal-free workplace. If the attitude to such exercises of the managerial prerogative is one of intolerance, this would support the establishment of a role for the criminal law. We⁷¹ may also harbour a desire to criminalise dismissals to avoid the opportunities for employers to engage in efficient repudiatory breaches of the contract of employment, i.e. to ‘profit from their own wrong’. Moving to the negative aspects, a ban on dismissals supported by criminal sanctions would represent a startling and radical intrusion into the managerial prerogative and the employer’s liberty and property rights.⁷² Another closely related factor to take into account from a managerial property rights angle is whether it is relevant that the employer retains the capacity to substitute labour for capital. The point being made here is whether some margin should be afforded to the employer as a badge of recognition that the employer has given the employee a job where it could otherwise have deployed capital instead. There is also the consideration that the employer needs to stay competitive to ensure employment security. Another salient question is whether it is in any way relevant that the employer’s power of dismissal can be viewed as reciprocal to the employee’s power of resignation, in the sense that it is correlative

⁷⁰ Duff lists and critiques each of these less drastic alternatives in *The Realm of Criminal Law* (n 30) 280-292.

⁷¹ Of course, the ‘we’ here depends on the polity’s civil order and the outcome of deliberations and debates between those citizens who have engaged in ‘reasonable disagreement’: *ibid* 167-182.

⁷² See the discussion in Mummé, ‘Property in Labor and the Limits of Contract’ (n 53) 400.

to the employee's fundamental freedom to quit? Might this reciprocity temper any claims that we have an absolute duty to criminalize a no cause and unreasonable dismissal regime?

Turning to discriminatory conduct, there is a potent argument that the intentional forms of 'prohibited conduct' in the EqA should be supported by punitive measures, as these forms of behaviour involve more direct and piercing forms of harm, bordering on corrosive malice. We may also criminalize them as an unequivocal manifestation of public solidarity with those possessing the legally protected characteristics adumbrated in section 4 of the Equality Act 2010. However, it is not entirely clear whether the state has a legitimate entitlement to be involved in the policing of discrimination. On the one hand, we can appreciate how claimants might wish to retain control over legal proceedings instead of relying on the state (through its officials) to take the decision whether to prosecute. Since such practices represent a personal attack on a claimant's individual dignity and identity, it may be that dispossessing them of the freedom to initiate and steer the litigation process is too much for us to contemplate. On the other hand, we may be reluctant to expect claimants to shoulder the costs of civil enforcement. There is also the public benefit associated with the deterrence of discrimination that can be secured through the intervention of the criminal law, as well as the authoritative judgment that the employer is 'guilty' of discrimination and ought to be 'punished'.

In the case of the rights to be paid the minimum wage and to receive a written statutory statement, it is an obvious point that the employer's breach causes no physical harm or threat to the employees concerned. However, of course, their financial position is adversely affected in the case of a minimum wage breach. But whether this is sufficient to claim with any authority that such a failure should be criminalized is debatable. It may be that there is a stronger case to be made for criminalization where the employer's failure to meet the wage floor is a conscious decision, but again, it is open to discussion whether it is warranted to (i) devolve decisions concerning enforcement to the state or (ii) enjoin prosecution authorities to make fine judgment calls about deliberate and inadvertent omissions. In fact, in this context and in the case of managerial failures to issue a written statement, state involvement does seem somewhat overblown and disproportionate. It is also problematic that there are clearly other less restrictive alternatives to criminal enforcement which would achieve the requisite objectives, e.g. civil enforcement, civil penalties, administrative agency or regulatory enforcement.

Finally, we come to health and safety breaches and whether the criminal law should play a part in enforcement. We may argue that the extent of the physical harm done to

employees is such that resorting to financial recompense through civil remedies would be bankrupt as a regulatory response.⁷³ However, herein lies a puzzle. If that is true in the case of contraventions of health and safety regulation, then why is it untrue in the case of tort law which regulates physical injury and property damage, where we do find that enforcement is left to the civil law? From another angle, if we decide that it is appropriate to eschew state enforcement, that may be misconceived where the actions of the employer that have led to the physical injury of its employees are reckless or deliberate.

There are a variety of possible conceptual frameworks for understanding the outcomes when we place the general and rights-specific factors above in the balance within the context of the five examples of statutory employment rights. The model adopted is to evoke three particular states that we can plot across a spectrum from a more heightened, to less intensive, set of justifications for us to invoke the criminal law: we can dub these the ‘thick’, the ‘medium’ and the ‘thin’ forms. If we pose each of these general and rights-specific questions, and reach the conclusion that the thick form is applicable in the case of each of the five selected employment rights, this will indicate that we have a strong case to criminalize these practices or omissions. At the opposite end of the pole, if the product of this exercise is the thin form, then we can say that we most certainly do not have any legitimate grounds to claim that we ought to criminalize them. And if our deliberations result in the medium form, a relevant series of justifications can be made for both criminal prosecution and civil proceedings, i.e. shared enforcement.⁷⁴ The choice between these three conceptual models is significant since it influences the way we understand the enforcement of these employment rights and the extent to which we can agree that the current legal position (as regards such enforcement) is aligned with, or falls below the standards set by public wrongs theory. It would also hint at the law being ripe for reform or further development.⁷⁵

We can benchmark the five statutory employment rights against each of the aforementioned rights-specific and universal factors, reasons and variables. The first conclusion that we can take from this exercise is that there are weighty general and context-

⁷³ However, the criminal enforcement of health and safety laws does not adhere to the standard pattern insofar as the police and DPP have no involvement in the process. Instead, the HSE can conduct investigations and enforce violations through enforcement notices (see the HSWA ss 22 and 23 and *HSE v Chevron North Sea Ltd.* [2018] UKSC 7, [2018] 1 WLR 964).

⁷⁴ The fact that public wrongs theory does not provide a comprehensive account of when it is appropriate to switch from having a reasonable ground, to having an absolute duty, to criminalize a practice, renders it of limited assistance in identifying the various employment rights where a shared enforcement is legitimate.

⁷⁵ However, where there is a misalignment, this should not call into question the normative credentials of public wrongs theory: see n 52 and 75.

dependent reasons for us not to criminalize employers who engage in decisions to dismiss for no cause or unreasonably. For example, it is stretching credulity to suggest that an employer should be punished in such a context, and it is suggested that the employee's liberty to engage in litigation should not be removed in favour of the state having exclusive control over criminal proceedings, since the latter seems disproportionate to the harm caused. As does any engagement of the higher criminal standard of proof. Likewise, there is a strong likelihood that the deterrence of no cause or unreasonable dismissals can be secured through less restrictive means, such as civil litigation. As such, in the context of dismissal, on the application of the public wrongs theory, the overall balance of factors, reasons and variables accords with the 'thin' state. This conforms to the contemporary legal position, which underscores how the deliberations of lawmakers in Parliament meet the expectations set by Duff's normative theoretical framework. To that extent, we can claim that Duff and Marshall's approach to the theorisation of what properly belongs to the criminal law possesses a degree of intellectual ballast in the case of no cause or unreasonable dismissals.

Moving on to health and safety breaches, when we measure them against the yardsticks cited above, we find that they accord with the 'thick' state. This means that the current legal position and public wrongs theory conform with one another, i.e. predominantly criminal enforcement. Turning to the legal position prioritising the civil enforcement of managerial omissions to issue written statutory statements of terms and conditions, we also find that it is consistent with the application of public wrongs theory, i.e. there is little to suggest such failure ought to be criminalized. As for our findings in the case of rights affording employees protection from discriminatory treatment, the positive version of public wrongs theory suggests shared enforcement between the civil and criminal law when assessed against the yardsticks of deterrence, punishment, preservation of the 'victim's' individual liberty, the desirability of subrogating the state to enforcement, the aptness of the application of the criminal standard of proof and whether criminalization will have a chilling effect on workplace practices. However, this fails to adhere to the current legal reality, which demonstrates that it falls short of the benchmark set by the public wrongs theory. Likewise, in the case of failures to pay the national minimum wage, where the application of the aforementioned variables, factors, etc point towards civil enforcement in contrast to the shared enforcement enshrined in the existing law.

The conclusion can be drawn that – by a slim majority of 3-2 - the relationship between the legal position with regard to enforcement and the predictions of the public wrongs theory is, in general, a positive one. As such, the end result of this benchmarking exercise is to provide

moderate support for the proposition that the positive incarnation of the public wrongs theory possesses a degree of predictive power in the case of statutory labour laws.

IV. Conclusion

The objective of this chapter was twofold. First to chart some of the areas of statutorily imposed labour law where we encounter criminal enforcement, including where this is an absence of such enforcement, and also to probe where we find overlaps between them. This was primarily a descriptive exercise. Secondly, the account of ‘public wrongs’ in Duff’s work was harnessed as an evaluative instrument to determine whether criminalisation is normatively justified in relation to a limited range of five statutory employment rights. This enabled us to gauge the validity of the actual political choices made by law-makers concerning the areas earmarked for criminal enforcement in labour law (as well as those areas not chosen for criminal enforcement, or identified for shared enforcement) and to test whether they could be supported by normative theories of criminalization, such as Duff’s ‘public wrongs’ theory.

Chiming with the views of thinkers such as Christie,⁷⁶ Hulsman⁷⁷ and Bianchi,⁷⁸ like Michael Ford,⁷⁹ the writer’s intuition was one of scepticism. It was thought that the search for an all-encompassing normative theory of criminalization – such as Duff’s ‘public wrongs’ model – that would have relevance in the context of statutory labour laws was an exercise born of futility.⁸⁰ However, to the surprise of the author, the antipodean framing of ‘public versus private’ in the theorisation of what properly belongs to the criminal law is indeed of some utility in predicting the prevailing legislative position concerning statutory employment rights. Whilst the results stemming from the adoption of the negative incarnation of public wrongs theory were rather banal, in the case of the positive version, we were taken much further down the track in the search for an account of what should be criminalized in the case of statutory labour laws.

Nevertheless, in the final analysis, several notes of caution should be struck so that the workplace relevance of public wrongs theory is not overstated: first, that the Duff and Marshall account of public wrongs suffers from a marked lack of detail at the critical point at which it is essential to turn from a positive to absolute case for criminalization. The identity of the relevant factors/variables/justifications are impressionistic and the outcome of their application to the five employment rights is inherently subjective. This necessitates an element of guesswork as

⁷⁶ Nils Christie, ‘Conflicts as Property’ (1977) 17 *Brit J Criminol* 1.

⁷⁷ Louk H Hulsman, ‘Critical Criminology and the Concept of Crime’ (1986) 10 *Contemporary Crises* 63.

⁷⁸ Herman Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Indiana University Press 1994).

⁷⁹ [Cross-refer to Ch 9 by Michael Ford].

⁸⁰ However, an explanatory account of what is found to be criminalized in various areas of law (e.g. such as labour law) is not what criminal law theorists are purporting to achieve, as their objectives are primarily normative.

to the filling in of the relevant normative blanks,⁸¹ meaning that it is perhaps overly sanguine to make an unreserved positive case for its predictive capacity. This speaks to the reality that the findings drawn from this inherently indeterminate exercise are open to debate, as we may not all agree on how the relevant judgments have been made or the various processes have been applied. Secondly, having surveyed how five prominent statutory labour rights are enforced, and applied the public wrongs construct to them as a sorting principle, what broader claims can be extrapolated from the findings of the exercise adopted is unclear. Hence, further comprehensive research ought to be carried out to test this chapter's conclusion that this theory possesses a moderate degree of plausibility as an account of when criminalization is appropriate in the case of statutory labour rights. Finally, and more profoundly, there is the anxiety that by overly stressing the public nature of some statutory employment rights, the symbolism associated with the adoption of a lexicon of 'public wrongs' might underplay the collective and solidaristic origins and nature of labour laws. Here, the concern is with over-juridification and the general movement away from the social and economic power associated with the collective which has traditionally underpinned labour law. It would appear to overlook how labour law was forged in the historical crucible of class and social struggle and political discourse. The public wrongs theory is also vulnerable to the charge of being overly focused on the individual private employment relationship and whether the relevant regulated activity is public and wrongful, thus harbouring the potential to undercut the collective objectives that labour law is ultimately seeking to achieve.

⁸¹ This exercise demonstrates how normative criminal theories and other legal disciplines and modes of enquiry must engage in a dialogue to complete the picture.

