The Realm of Criminal Law

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[1] AHRC Grant No. 128737.

[2] *The Boundaries of the Criminal Law* (2010), *The Structures of the Criminal Law* (2011), *The Constitution of the Criminal Law* (2013), *Criminalization: The Political Morality of the Criminal Law* (2014); and L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016), V Tadros, *Wrongs and Crimes* (2017).

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I have drawn (sometimes heavily, sometimes lightly) on several previously published papers and book chapters (full details are given in the Bibliography)—'Relational Reasons and the Criminal Law'; 'Towards a Modest Legal Moralism'; 'Criminal Responsibility and the Emotions'; 'Legal Moralism and Public Wrongs'; and 'Discretion and Accountability in a Democratic Criminal Law'.

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Introduction

A Theory of Criminalization?

In 2000, Andrew Ashworth asked whether English criminal law is a lost cause.[1] His question was provoked by the 'unprincipled and chaotic construction of the criminal law' in England in recent years; and his answer was that whilst the criminal law was indeed in practice, 'from the point of view of principle', a lost cause, it was still worth trying to 'identify a principled core of criminal law'.[2] Such a pessimistic view of our contemporary criminal law is shared by many in both Britain and the United States:[3] it is sometimes expressed by saying that we face a crisis of 'over-criminalization' (but I will say a bit more later about the scope of this 'we').

To say that we face a crisis of over-criminalization is to say that the scope of our criminal law is too wide: we criminalize too many types of conduct that should not be criminal.[4] One version of this criticism is that we are creating too many criminal offences, but it might not be best, or fully, expressed in those terms. For, first, it is surprisingly hard to determine just how many new offences are created each year, or how significantly the rate of crime-creation has increased in recent decades.[5] Second, at least some new offences seem to be created for very good reasons: for just two instances, the creation of the new, distinct offences of 'stalking',[6] and of 'revenge porn',[7] were intended to bring within the explicit, condemnatory scope of the criminal law kinds of conduct that surely deserve to be marked and treated as criminal. Third, over-criminalization can result not from the creation of too many offences, but from the over-broad definition of offences that are intended to deal with a properly criminalizable mischief: in trying to make sure that the statute leaves no gaps through which wrongdoers can escape, and that it can be more easily enforced, the legislature produces an over-broad specification of the kind of conduct that is to count as

[1] A J Ashworth, 'Is the Criminal Law a Lost Cause?'.

[2] 'Is the Criminal Law a Lost Cause?', 225, 253.

[3] For two American examples, see D Husak, *Overcriminalization: The Limits of the Criminal Law*, ch. 1; W Stuntz, *The Collapse of American Criminal Justice*. But for a rather more optimistic view, see D K Brown, 'Democracy and Decriminalization'.

[4] In talking of 'conduct' here I do not mean to beg any questions about the proper objects of criminalization—for instance by assuming that only 'acts' may properly be criminalized: 'conduct' should be treated here simply as a placeholder for whatever can be criminalized, whether or not it involves what we might normally count as a kind of 'conduct'.

[5] See especially J Chalmers and F Leverick, 'Tracking the Creation of Criminal Offences', and 'Quantifying Criminalization'; J Chalmers, '"Frenzied Law Making": Overcriminalization by Numbers'; J Chalmers, F Leverick, and A Shaw, 'Is Formal Criminalisation Really on the Rise? Evidence from the 1950s'. See also Husak, *Overcriminalization*, 8–11.

[6] Protection of Freedom Act 2012, ss 111–12, amending Protection from Harassment Act 1997.

[7] Criminal Justice and Courts Act 2015, s. 33; Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s. 2.

criminal;[8] or it makes liability strict, thus failing to require the kind of culpability that could warrant criminal conviction.[9]

Despite the difficulty of formulating the charge of over-criminalization precisely, it does seem hard to resist the argument that our laws define as criminal too many types of conduct that should not be criminalized. This matters for a variety of familiar reasons, apart from the very substantial costs involved in administering such an expansive criminal law: two reasons can be noted here. First, such over-criminalization exposes too many people to the prospect of prosecution, conviction, and punishment for conduct that does not merit such a response: a response that can be destructively oppressive, given the character of our penal institutions,[10] and that can bring in its train a host of other damaging effects—the 'collateral consequences' of criminal convictions and criminal records.[11] Second, since it would be impossible, given the sheer quantity of conduct that satisfies the formal definition of some criminal offence, to detect and prosecute even the majority of criminal offences, such an over-broad criminal law gives a wide (and inadequately accountable) discretion to police and prosecutors in deciding what (and whom) to investigate and prosecute, enormous power to prosecutors to 'bargain' (or coerce) guilty pleas to enable the criminal process to function at all,[12] and a potentially oppressive weapon to police to control or coerce by wielding the threat of prosecution.

There is, however, from a normative theorist's point of view, a deeper problem with our contemporary practices and policies of criminalization, which underlies their tendency to excess. It concerns not the sheer quantity of criminalization, but the quality of the decision processes that lead to the creation of new crimes: the problem is not (or not only) that we criminalize too many types of conduct that should not be criminal, or have created a criminal law so expansive that we cannot enforce it with tolerable justice and efficiency, but that our criminalization decisions have become (were they ever not?) unprincipled. This is the point of Ashworth's reference to the 'unprincipled and chaotic construction of the criminal law',[13] and William Stuntz's comment that 'American criminal law's historical development has borne no relation to any plausible normative theory, unless "more" counts as a normative theory'.[14] The challenge then will be not so much to try directly to reduce the scope of the criminal law, but to work to develop a more principled criminal law. One way to do this is to try to develop a normative theory of criminalization—a theory that will provide principles by which criminalization decisions should be structured and guided. It is quite likely that this would result in a criminal law that was in various ways more modest in its scope than the law we now have: whilst we might see principled reason to criminalize some types of conduct that are not now criminal, we would also probably see principled reason to decriminalize more types of conduct that are now criminal. (A more principled approach should also result in a criminal law, and a set of institutions of criminal justice,

[8] For a striking example, see Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (now repealed). For a related phenomenon, see D Husak, 'Drug Proscriptions as Proxy Crimes'.

[9] See Ashworth, 'Is the Criminal Law a Lost Cause?', 227–8; A J Ashworth and M Blake, 'The Presumption of Innocence in English Criminal Law'.

[10] See Husak, *Overcriminalization*, ch. 1. It is worth noting that this applies not just to the more serious kinds of crime that typically attract sentences of imprisonment, but also to the wide range of lower-level offences that make up the bulk of criminal courts' business: see A Natapoff, 'Misdemeanors'.

[11] See M Love et al, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*.

[12] See Husak, *Overcriminalization*, 22–4, and further references there.

[13] 'Is the Criminal Law a Lost Cause?', 225.

[14] W Stuntz, 'The Pathological Politics of Criminal Law', 508.

that bear less harshly and less destructively on those who are accused or convicted of crimes.) We should not assume in advance, however, that this would be so: for the aim is not to achieve a narrower criminal law as such, but to achieve a criminal law that is more firmly grounded in, and guided by, a set of appropriate principles. We might not hope, realistically, that legislators and others involved in the creation and administration of criminal law could be persuaded to consider and adopt such a theory; but we might hope that it could provide a helpful structure, and foundation, for the critical examination of our current law, and for arguments aimed at its reform.

It was in the hope of developing such a theory that we embarked on the *Criminalization* project from which this book has emerged: our declared (and naïve) 'first objective' was 'to develop a normative theory of criminalization: an account of the principles and values that should guide decisions about what to criminalize and about how to define offences'.[15] We did not develop such a theory, although we did—we believe—achieve the more modest objective of 'working towards an overarching, theoretically informed, normative perspective' on 'the proper scope and structure of criminal law'.[16] Nor will this book offer such a theory—if that would involve providing a coherent set of substantive principles from which we could then derive substantive criteria by which to determine which kinds of conduct should, or should not, be criminalized. It will offer a 'master principle' of criminalization, which specifies what could give us good reason in principle to criminalize a type of conduct; but that principle will be a thin, formal principle that leaves most of the substantive work still to be done. It will also offer a theory of criminalization, as part of a theory of criminal law: an account, that is, of the proper role of criminal law in a democratic polity, and on that basis an account of how such a polity should set about deciding what kinds of conduct to criminalize. For reasons that should become apparent during the course of the book, however, the theory will not include the kind of substantive principle of criminalization that we might have hoped to establish.

Before saying a little more about the structure and contents of the book, and the kind of theory that it offers, I should say something brief about method.

Philosophers who seek to develop normative theories of criminal law are often accused of failing to take historical contingencies seriously enough. They offer, critics object, theories of 'criminal law' as if they were theorizing, from a position of Olympian detachment, about a practice or institution of an abstract kind, lacking historical and geographical location. They fail to attend to the implications of the fact that what they are theorizing is an actual practice or institution, or more precisely a diverse range of practices and institutions, located within wider sets of legal and social practices and institutions, and formed by complex historical contingencies: if we are to understand criminal law (which will always inevitably be to understand the criminal laws of particular societies), the role it plays or the aims it can serve, we must understand its historical development and its current sociological actuality.[17] Philosophical theorists

[15] This was how we described our aims in our original application for Arts and Humanities Research Council funding; for further details on the project (conducted by Lindsay Farmer, Sandra Marshall, Massimo Renzo, and Victor Tadros), see the Acknowledgements for this book, and R A Duff et al, 'Introduction: Towards a Theory of Criminalization'.

[16] Through the four edited volumes and three monographs that have emerged from the project (for details see the Acknowledgements), as well as the meetings and workshops that we organized.

[17] For different versions of this kind of critique, see N Lacey, 'In Search of the Responsible Subject: History, Philosophy and the Social Sciences in Criminal Law Theory', 'Historicising Criminalisation: Conceptual and Empirical Issues', and *In Search of Criminal Responsibility: Ideas, Interests, and Institutions*; A W Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*; L Farmer, 'Criminal Wrongs in Historical Perspective', and *Making the Modern Criminal Law: Criminalization and Civil Order*.

also too often fail to attend, such critics argue, to the implications of the fact that normative theorizing itself cannot but be located within a particular historical context, and thus within some particular, contingent, tradition of thought. Such critics do not aim to preclude normative theorizing about criminal law, although there are questions to ask about what kind of normative theorizing they leave room for:[18] but they insist that theorists need to recognize both the political and intellectual context from within which they theorize, and the contingent and historically conditioned character of that which they theorize.

I will not try to engage here with this critique of some kinds of philosophical theorizing, or with the larger question of what kinds of normative theorizing are possible, or fruitful, in this context,[19] but should explain the kind of theory that I hope to develop. In this as in other normative contexts, we begin to theorize not from 'nowhere',[20] but from where we happen to be: from within a particular, contingent, intellectual and political context, together with an ill-defined but limited 'we' as our interlocutors—a 'we' with whom we share enough in the way of concepts and understandings to be able to engage in the theorizing conversation. We begin to theorize not with nothing (not with a *tabula rasa* on which we can then inscribe brand new institutions and practices), but with what we have: with a contingent, historically formed, set of practices and institutions—in the present case, with the practices and institutions that make up 'our' criminal law. The beginnings of our theorizing are thus local or parochial. But that is not to say that we cannot hope to transcend those local beginnings, to engage with a wider 'we', with interlocutors from different traditions and different starting points, with whom we find that we can converse and from whom we can learn; that we cannot aspire to take a broader view—if not 'from nowhere', then at least from a perspective broader than that from which we began. Nor is it to say that we must take for granted as an unchangeable given the particular institutions and practices with which we begin. First, we can hope to engage in a process of 'rational reconstruction' of those institutions and practices:[21] to excavate, or (re-)construct, the goals and values by which they purport to be structured; to construct on that basis a theoretical account of what 'our' criminal law claims to aspire to be, and in the light of that account to critically evaluate our existing practices, by way of an 'immanent critique'. Second, since our criminal law is part not only of a whole legal system, but of the political structure of a polity, we can extend our rationally reconstructive enterprise to theorize the criminal law in terms of its role in that larger context, and in the light of political values that we can discern in or reconstruct from that political structure—already a somewhat Herculean enterprise.[22] Third, we can reach beyond these localized practices and values, to engage with others with which we find that conversation is possible. We can recognize that other systems of criminal law differ from ours; that even central features of our own practice are contingent rather than necessary (something that awareness of the historical contingency of our practices should already have brought home to us): we can thus be led

[18] See C Kennedy, 'Immanence and Transcendence: History's Role in Normative Legal Theory'; also A W Norrie, 'Criminal Law and Ethics: Beyond Normative Assertion and its Critique'. For a good example of historically informed normative theorizing about the functions of criminal law, see V Chiao, *Criminal Law in the Age of the Administrative State*.

[19] See R A Duff, 'Theorizing Criminal Law'.

[20] See famously T Nagel, *The View from Nowhere*; also B Williams, *Descartes: The Project of Pure Enquiry*.

[21] See D N MacCormick, 'Reconstruction after Deconstruction: A Response to CLS'; below, Chapter 1 at n. 7.

[22] See R M Dworkin, *Law's Empire*, esp chs 7–10.

to imagine ways of changing, and improving, our own practices. We can and must also engage with political theory: in what kind of polity, structured by what values, can or should we aspire to live; what kind of criminal law, serving what kinds of goal, would be appropriate to such a polity?

Thus whilst we must start from where we are, we can and must transcend that very local starting point to engage in wider conversation with wider sets of interlocutors, and to theorize our existing institutions and practices in the light of wider theoretical understandings—in the end, as we will see in more detail later, in the light of political theory. One question I cannot pursue here concerns the ideal end points of such theorizing. Can we hope that, from such local starting points, we can work towards a universal theory of criminal law: a theory not of the precise institutional forms that criminal law must take in any polity, since those must depend on local contingencies, but at least of the basic structure and aims of criminal law, of the values and principles by which criminal law should be structured, at all times and all places? Can we hope to work towards a universal political theory, of the kind on which a universal account of criminal law must depend: a theory of how any polity should be structured, of the values that any polity should pursue? Or should we only aspire, more modestly but still ambitiously, to work towards an account of the role that criminal law should play, and the values, goals and principles that should structure it, in a more particular kind of polity, and towards a political theory that would make normative sense (at least to us) of such a polity—towards, that is, an account of a kind of polity, and a kind of criminal law, in and with which we (as the kind of human beings we are) could plausibly aspire to live?[23]

(This way of putting the matter might seem to beg the question: to 'beg the institution',[24] by assuming that a plausible political theory will justify criminal law—that the kind of polity in which we could plausibly aspire to live will include a system of criminal law. This would be to illegitimately rule out in advance any argument that what we should really seek to do is not to maintain or reform our criminal law, but to replace it by other more constructive, less destructively oppressive, ways of governing ourselves and dealing with each other: but such arguments must be addressed, not ignored.[25] In what follows I will try to justify, rather than simply assume, criminal law as an important element in a polity's structures of governance, by showing how it is distinctively suited to serve certain important ends.)

I will not comment here on the viability of aspirations to a universalist theory of criminal law (though I have grave doubts about them): my aims are more modest, and thus in a sense more parochial. I will offer a conception of criminal law as a distinctive kind of institution: a conception that is grounded, via a kind of rational reconstruction, in what I take to be central aspects of 'our' Anglo-American systems of criminal law; that I believe is also recognizable in other legal systems, notably those of other contemporary western democracies; but that I do not claim to be an account of what criminal law must be at all times or places. I will also offer an account of the kind of polity in which criminal law, as thus conceived, can play an important and

[23] And, perhaps (though this is not something I will tackle here), an account of certain minimal normative constraints or demands that any human polity ought to respect—for instance those that formal declarations of human rights aim to capture.

[24] See M M Mackenzie, *Plato on Punishment*, 41 (talking about justificatory theories of punishment).

[25] 'Abolitionism' is more familiar in relation to criminal punishment than to criminal law as such: but radical abolitionist theorists can be read as advocating, in the end, the abolition of the whole apparatus of criminal law in favour of practices of conflict resolution and repair. See e.g. N Christie, 'Conflicts as Property'; L Hulsman, 'Critical Criminology and the Concept of Crime'.

valuable role: that account draws on republican political theory, but it is not offered as a would-be universalist account of the form that any polity ought to take—only as an account of a kind of polity to which we can plausibly aspire. Theorists with universalist ambitions might reject such an approach as unduly parochial, and as not enabling the kind of foundational theorizing about what criminal law ought to be, and the kind of fundamental critique of our existing laws, that an adequately grounded normative theory of criminal law requires. My response to that kind of criticism consists in the remainder of this book, which will show how far we can get, how deep we can dig, and how fruitfully critical a perspective we can attain, from such local beginnings—how far the initially parochial can become, if not universal, at least not *merely* parochial.

These rather gestural remarks about method should become less obscure as I explain the structure of the book and the way in which I will build a normative account of criminal law—the task to which I must now turn.

Chapter 1 develops a conception of criminal law as a distinctive kind of legal institution, since a normative theory of criminal law must begin with some account of that which is to be theorized. This account is not meant to provide an analysis of 'the concept of criminal law'—of, for instance, the necessary and sufficient conditions for anything to count as a system of criminal law; nor is it meant to be a normatively neutral analysis that leaves entirely open the question of why criminal law might be important or valuable. Rather, it aims to identify, by a rationally reconstructive approach, what I take to be the normatively most salient dimensions of systems of criminal law like our own—dimensions, that is, not so much of the criminal law as it operates in its imperfect empirical actuality, but of the criminal law as it is supposed to be in terms of its own forms and self-presentation. On this conception the central dimensions of criminal law are the substantive law, which consists in a set not of 'prohibitions', but of declarative definitions of those 'public' wrongs that are to be formally marked in this way; the criminal process and the criminal trial, through which those accused of committing such wrongs are called formally to answer to those accusations, and to answer for those wrongs if their guilt is proved; and criminal punishment—though I resist the common idea that criminal punishment is what gives the criminal law its primary or essential purpose. I also discuss the processes of criminalization; the distinction between formal and substantive criminalization (between the law 'in the books' and the law 'in action'); and the discretion that the inevitable gaps between the law in the books and the law in action leave to officials, and to lay citizens, in determining what kinds of conduct are actually to be treated as criminal.

Chapter 2 provides a preliminary discussion of 'legal moralism'. In arguing that criminal law is concerned with wrongs, I commit myself to some version of legal moralism—to the claim that the wrongfulness of a type of conduct is essentially relevant to the legitimacy of its criminalization. This chapter draws some initial distinctions between different types of legal moralism, especially between 'negative' and 'positive' legal moralisms; it defends negative legal moralism (according to which we may not criminalize conduct that is not wrongful prior to its criminalization) against some recent criticisms; and it shows why some form of positive legal moralism, according to which the wrongfulness of a type of conduct gives us positive reason to criminalize it, is attractive. It goes on, however, to criticize the most familiar form of positive legal moralism, according to which we have good reason to criminalize *every* kind of morally wrongful conduct,[26] as being implausibly over-ambitious in relation to both the scope

[26] Michael Moore is the most prominent proponent of this species of legal moralism: see M S Moore, *Placing Blame: A Theory of Criminal Law*, 'A Tale of Two Theories'.

and the jurisdictional reach of the criminal law; and to argue that we should prefer a more modest version of positive legal moralism according to which criminal law is properly concerned only with 'public' wrongs. The idea of a public wrong will need to be explained with some care (an explanation that will be fleshed out in the following chapters). It receives an initial explanation in this chapter through a discussion of the way in which a profession might set about drawing up a code of professional ethics—a code that defines various types of 'professional misconduct': I will argue that we can draw a useful analogy between codes of professional ethics, as concerned with kinds of wrongdoing that fall within a particular kind of practice (the practice of medicine, for instance), and criminal law, as concerned with kinds of wrongdoing that fall within or bear on the distinctive practice of civic life—of living together as members of a polity.

Chapter 3 then begins the task of explaining that distinctive kind of practice of civic life, by looking first at the identity of those who participate in it—at what it is to be a member of such a practice. It argues that just as medical practitioners are the primary addressees (and owners) of a code of medical ethics, citizens are the primary addressees (and owners) of the criminal law. This argument requires a discussion of the normative basis on which the ambit and jurisdiction of domestic systems of criminal law can be properly determined, in particular of the rationale of the Territoriality Principle, which formally grounds ambit and jurisdiction in territory rather than citizenship (and of the various exceptions and qualifications to that principle). It also requires an account of citizenship, as membership of a distinctive kind of political, civic practice, and of the terms in which the criminal law should address the citizens whose law it is supposed to be. This inevitably leads into a discussion of the status of those who are not (at least not formally) citizens of the polity by whose laws they are nonetheless bound, and protected, whilst they are within its territory; of how the criminal law ought to address (and how their fellow citizens ought to address) those who dissent from the law's content, or deny its authority; and of the by now notorious distinction that Günther Jakobs has drawn between 'criminal law for citizens' (*Bürgerstrafrecht*) and 'criminal law for enemies' (*Feindstrafrecht*).[27]

Chapter 4 offers an initial account of the kind of practice in which citizens are engaged, as citizens: the 'public realm' that constitutes their life together as citizens—a realm that, in non-totalitarian polities, occupies only a limited part of their lives. This is the realm in which criminal law operates, as a species of public law. The concept of 'civil order' is central to an understanding of this public realm: 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: it can be partly defined by a written constitution, a formal statement of the fundamental goals towards which the polity's collective activities are to be oriented, and of the values by which those activities are to be governed; but it is also implicit in the polity's institutions of government, and in its citizens' shared understandings of their civic life. Such a conception of civil order, as the ordering of the polity's public realm, depends on a normative distinction between the 'public' and the 'private': we need therefore to attend to the different distinctions between 'public' and 'private' that can be drawn, and to the ways in which such distinctions are often controversial. We also need to attend to the preconditions of civil order: what kinds of agreement, what kinds of shared understanding, among the citizens are necessary if civil order is to be possible; what can

[27] See e.g. G Jakobs, '*Bürgerstrafrecht und Feindstrafrecht*'; D Ohana, 'Günther Jakobs's *Feindstrafrecht*: A Dispassionate Account'.

those who share such understandings say to those who do not? But given a viable conception of a polity's civil order, and thus of its public realm, we can make better sense of the idea of a 'public wrong', as a kind of wrong that falls within that public realm, and that violates that civil order: such wrongs are the business of the polity's criminal law.

Chapter 5 puts some more substantial flesh on the relatively formal account of civil order provided in Chapter 4, by sketching the central aspects of the civil order of a particular kind of polity—a liberal republic of free and equal citizens: it draws on the republican tradition of political thought to portray the kind of polity in which, I suggest, we can plausibly aspire to live (the kind of polity that we can plausibly aspire to create). We can then see in more detail the role that criminal law, as a distinctive legal practice of the kind described in Chapter 1, can play in such a polity, as both helping to sustain, and partly constituting, its civil order. For once we understand the idea of a public wrong, as a wrong that violates or threatens an aspect of civil order, we can see how criminal law is an appropriate way of marking and responding to such wrongs. Its central role is to provide formal declarations of some of the central norms of that civil order, as norms that define what kinds of conduct citizens are entitled to expect from each other (and from the polity); and to provide the process through which those who are accused of violating these norms can be called to formal, public account. (The fact that criminal law is concerned with only some, not all, of the norms of civil order reminds us that criminal law is not the only kind of law that deals with public wrongs, and that not all public wrongs should be defined as legal wrongs—a point that will reappear in Chapter 7.) To say that the criminal law's central role is to declare such norms and provide for those who violate them to be called to public account is to deny that criminal punishment is the primary purpose of criminal law: but given the salience of punishment in our existing systems of criminal law (and its often harshly oppressive character), I must clearly say something about the role that punishment could play in the criminal law of a liberal republic.

Chapter 6 returns, at last, to the issue of criminalization, in particular to the question of whether a normative theory of criminalization should offer some kind of 'master principle' (or set of master principles) by which criminalization deliberations could be guided. Different kinds of would-be master principle are distinguished (positive from negative, responsive from preventive, pro tanto from categorical, thick from thin); some familiar principles (notably the 'harm principle', or more precisely the harm principles) are critically discussed. The upshot of this discussion is that a master principle needs to be positive rather than purely negative, and pro tanto rather than categorical; and that even a primarily responsive master principle will have a preventive dimension. Furthermore, the only plausible kind of master principle will be very thin: it will not provide substantive criteria for criminalization, but will instead provide formal criteria that leave most of the substantive normative work in deciding what kinds of conduct are to be criminalized still to be done. This is true of the master principle that emerges from the preceding chapters of this book: we have good reason to criminalize a type of conduct if and only if it constitutes a public wrong;[28] and it constitutes a public wrong if and only if it violates the polity's civil order. This master principle is extremely thin, since it leaves the normative questions of how the polity's civil order is to be constituted, and of what kinds of conduct should be taken to violate that order, still to be decided (decided through the kind

[28] The most a master principle can plausibly offer is an account of what gives us good reason to criminalize, not of what we should criminalize all things considered.

of public deliberation by which a democratic republic should form its criminal law); but we should not expect to be able to identify a master principle that is both thick and plausible; and the thin principle suggested here can still be fruitful in identifying the kinds of argument that must be offered for or against the criminalization of a type of conduct, and the kinds of consideration that are relevant (or irrelevant) to criminalization decisions.

Chapter 7 then seeks to make good on that claim for a 'public wrongs' master principle, but only after a further essential qualification. Criminalization is just one among a range of possible responses to public wrongs, distinguished from other responses by its concentration on the wrongfulness of the criminalized conduct and the need to call perpetrators to public, censorial (and penal) account: in asking whether we have good reason to criminalize a type of conduct, we must therefore ask whether we have good reason to criminalize it *rather than* to respond in some other way; and a master principle of criminalization must help us to see how we can make that kind of 'rather than' decision. To illustrate the work that a 'public wrongs' principle can do, I then briefly discuss examples of three kinds of criminal offence. First, I discuss examples of '*mala in se*', which consist in conduct that is held to be wrongful prior to its legal regulation. These are in one way the most straightforward kinds of offence to understand and to justify, but are in two respects less straightforward than is often supposed: for the criminalization process is a process not simply of trying to capture a pre-existing moral wrong, but rather of constructing a civic conception of the relevant wrong as a public wrong; and, partly for this reason, the standard distinction between '*mala in se*' and '*mala prohibita*' (the latter being understood to consist in conduct that might be wrongful only because it is legally prohibited), whilst still important, is less clear-cut than many think it is (or should be). Second, I discuss different types of '*malum prohibitum*', involving different ways in which violations of pre-criminal regulations can constitute criminalizable wrongs: the distinction between regulation and criminalization is important here, and we must notice the different ways in which regulatory violations can be wrongful—and can be wrongful even when the conduct itself does not cause the kind of mischief at which the law is aimed. Third, I discuss some examples of 'pre-emptive' offences, which criminalize conduct that does not itself involve the kind of mischief at which the law is ultimately aimed, but that is in some way preparatory to, or increases the (perhaps still remote) risk of, that mischief: one of the ways in which the criminal law has been expanding, especially in relation to terrorism, has been in the creation of wider kinds of pre-emptive offence; it is therefore important to see how far such offences can be justified—and how their creation can be subjected to principled constraint.

As should be evident from these chapter outlines, this book does not (despite its length) offer anything like a complete theory of criminal law or of criminalization: it offers an outline, or skeleton, of such a theory, but leaves much more work to be done to put substantive flesh on those bones; my hope is that it at least makes clear what kind of further work is required, and how we should embark on it. Four more particular gaps in the book's scope should also be noted here: these topics are omitted not because they are not important, but because their inclusion would have made the book (even more) unmanageably long.

First, the book focuses almost entirely on domestic criminal law; it says very little about transnational and international criminal law, despite their significance not only in their own right, but in their ever-increasing impact on domestic criminal law. I think (or hope) that we can still discuss the domestic law of a nation state as a set of institutions that are relatively autonomous in relation to the realms of transnational

and international law, although a full account of domestic law must in the end attend to its relationship to those wider realms of law.[29]

Second, in discussing the role of criminal law in the life and governance of a polity, I say nothing about policing, although this is clearly an important dimension of criminal law: one of the functions of a system of criminal law is to authorize and regulate the activities of the police in investigating and preventing crime.[30] There is certainly a need for more sustained normative theorizing about the proper role and operations of the police; but that task cannot be pursued here.[31]

Third, in discussing both perpetrators and victims of crime, I focus entirely on individual human beings; I say nothing about corporations either as criminal agents or as victims. Again, this is not because a complete theory of criminal law would not need to include an account of the ways in which criminal law can deal with corporations,[32] but because I do not have the space to tackle that large set of issues in this book.

Fourth, I say very little about the internal structure of the substantive criminal law: about just how offences should be defined, in particular what kinds of *mens rea* or fault element should be required; about how different factors that bear on liability should be allocated as between offences and defences; or about how fine grained or coarse grained our offence definitions should be. Such matters as these clearly bear on the general question of criminalization. In particular, the scope of offences, just what range of conduct they criminalize, depends significantly on how precisely or vaguely they are defined, and what kind of fault (if any) they require;[33] insofar as criminal law has a communicative dimension (as I will argue it does) the form of its offence definitions will also matter for reasons of fair labelling.[34] However, this is one more range of issues that, for reasons of space, I will not try to tackle directly in this book.

Having explained what I aim to do in this book, and noted some of the things that I will not try to, I must now turn to the actual doing of what I aim to do.

[29] But see below, Chapter 3, sections 1 and 2, for some sketchy remarks on the relationship between domestic and international criminal law.

[30] Though the responsibilities and activities of the police stretch well beyond the prevention and investigation of crime; see e.g. E J Miller, 'A Fair Cop and a Fair Trial'.

[31] See J Kleinig, *The Ethics of Policing*; A Sanders et al, *Criminal Justice*; A J Ashworth and M Redmayne, *The Criminal Process*, chs 1–6; I Loader, 'In Search of Civic Policing: Recasting the "Peelian" Principles'; C Nathan, 'Principles of Policing and Principles of Punishment'.

[32] See C Wells, *Corporations and Criminal Liability*; M D Dubber and S Stern (eds), 'Symposium: Corporate Personhood and Criminal Liability'.

[33] See at nn 8 and 9 above.

[34] See J Chalmers and F Leverick, 'Fair Labelling in Criminal Law'.

1

Criminal Law

1. Analytical Theory and Rational Reconstruction

A normative theory of criminalization—an account of the principles by which deliberations about what to criminalize should be guided—must depend on an account of what criminal law is for. What purposes should it serve; what is its proper role in the life of a political community? An account of what criminal law is for must depend on an account of what criminal law is: what are its distinguishing features as a particular kind of law? This suggests that, before we embark on the normative or 'censorial' exercise of theorizing about what criminal law ought to be, we must first engage in the analytical or 'expository' exercise of determining what criminal law is.[1] However, both the character of that analytical exercise, and the distinction between the analytical and the normative, are problematic.

The analytical exercise is an exercise in conceptual analysis. It thus cannot consist simply in an empirical or sociological description of the existing institutions and practices of criminal law; it must rather seek to pick out the characteristics of those institutions and practices in virtue of which they count as institutions and practices of criminal law. Given that those institutions and practices are local, that they vary from country to country, and that they have developed through complicated and variegated histories, one question that must arise is whether we should aspire to a universal analysis of 'criminal law' as such—one that can tell us what counts as criminal law at all times and all places; or should we aspire only to a more local, more parochial account, which tells us only about *our* criminal law (whatever the scope of that 'our' might turn out to be)?[2] In line with my modest ambitions, as sketched above,[3] I will be content to provide only a relatively local analysis, of what we can recognize as criminal law, leaving aside both the question of just how expansive that 'we' might turn out to be, and the question of whether it would be possible to develop the analysis into one that could claim universality.

Another question concerns the relationship between the descriptive, the analytical, and the normative. If we begin with a set of empirically accurate descriptions of our existing institutions and practices (those that are normally described as institutions and practices of criminal law), we might come to think that they resist any coherent analysis; and that insofar as they are susceptible to analytical understanding, they resist any favourable normative theorizing. For what we find is not so much a coherently functioning criminal justice *system*, but rather a complicated and messy collection of parts which reflect the diverse and often conflicting historical forces that produced them;

[1] On analytical as against normative criminal law theory, see D Husak, *Philosophy of Criminal Law*, 20–26; for 'expository' as against 'censorial' jurisprudence, see J Bentham, *An Introduction to the Principles of Morals and Legislation*, ch. 19.

[2] Compare J Raz, 'Can There Be a Theory of Law?' on whether theories of 'the nature of law' can be 'universal', or only 'parochial'; Bentham (n. 1 above) on 'local' as against 'universal' jurisprudence (given the diversity of laws, in both content and form, expository jurisprudence can claim universal application only if it confines its attention to 'terminology' or 'the import of words').

[3] See above, Introduction at nn 19–25.

and insofar as we can provide coherent accounts of how they operate, they will often be accounts of various kinds of coercion, oppression, or exclusion for which justificatory normative theorizing seems impossible. We can, for instance, describe the ways in which large numbers of disadvantaged and vulnerable people are processed through a system that cannot claim to treat them justly or with consideration, and from which they cannot but be alienated;[4] we can suggest sociological accounts of the interests or goals that such practices actually serve.[5] But we should not then expect to be able to develop a normative justification for criminal law as thus conceived, or to identify the purposes that it should serve; the most we can say is that if that is what criminal law is, we should strive to abolish it.

An analytical account of criminal law that is to provide a basis for normative theorizing, and leave open the possibility of offering a normative account of the goals that criminal law should serve, must therefore be selective, and normatively informed. It must be selective, since it must pick out features of our existing institutions that are relevant to their identity as institutions of *criminal law*; and it must be normatively informed, because any such selection will reflect the theorist's understanding of which features matter as potential materials for normative theory.

One approach to this selective analytical enterprise is to strip criminal law down to its bare essentials. For instance, Chiao argues that criminal law is 'a generically coercive rule-enforcing institution' (distinguished from other such institutions by the harshness of the sanctions that it imposes), whose justifying function is to 'contribute[] to making social cooperation under the rule of law possible'.[6] This minimalist account portrays criminal law as one among other kinds of technique for ensuring compliance with rules, whose justification depends on its instrumental efficacy in serving a valuable end ('social cooperation under the rule of law'), and its consistency with whatever other normative constraints we should set on the means to be used in our pursuit of that end. The point to note here, however, is that it is not (and is not intended to be) a neutral account of what criminal law is: it selects one aspect of criminal law as central, and that selection reflects a normative conception of the kind of purpose that could justify such an institution.

My approach will be different, and analytically more ambitious. I will pay more attention to features of the practices, and the language, of criminal law, to provide a 'rational reconstruction' of criminal law as a distinctive kind of institution dealing in distinctive kinds of normative claim, and apt to play a distinctive role in the legal order of a political community. This will be a matter of rational reconstruction, rather than of simple description, since it will involve both a selection of the features on which to focus, and an interpretation of those features in the light of the ends or values that they can—I will suggest—be taken to reflect.[7] It will be an exercise in conceptual analysis

[4] For a few recent examples describing American criminal justice (where the problems are more vividly extreme than in Britain) in such terms, see M Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*; W Stuntz, *The Collapse of American Criminal Justice*; A Lerman and V Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control*; I Kohler-Hausmann, 'Managerial Justice and Mass Misdemeanors'.

[5] For just two famous examples, see M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court*; and J Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*.

[6] V Chiao, 'What is the Criminal Law For?', at 139 (see also 144, 159). For more detail see his *Criminal Law in the Age of the Administrative State*: a crucial constraint is that the use of criminal law to enforce the rules of our public institutions must be consistent with the principles that make those institutions valuable.

[7] See D N MacCormick, 'Reconstruction after Deconstruction: A Response to CLS'.

insofar as I will be claiming that anything that we are to count as a system of criminal law must display at least some of the features that I will highlight (although, for reasons that will emerge in what follows, it might not display them all, and the ways in which they are displayed or instantiated can differ quite radically between different systems); but my purpose here is not so much to establish a set of conceptually necessary features of criminal law, as to describe a distinctive kind of institution—one that we can recognize as a system of criminal law—whose proper role in a political community we can then usefully discuss.[8]

In the remainder of this chapter I will therefore offer a partial rational reconstruction of what I will argue are the three main dimensions of a system of criminal law—of the kind of criminal law with which we are familiar. I will not be assuming that a political community *must* have such an institution, or that it must be justifiable; for that would be to beg the institution.[9] But I aim to describe a kind of institution of which we can then plausibly ask whether, why, and how it should figure in the governing structure of a political community.

One final caution is needed, however. I will be arguing that we can spell out an appropriate role for criminal law in a contemporary, liberal political community; and I will be operating with a conception of criminal law, to be developed in this chapter, grounded in a process of rational reconstruction that begins with the kinds of criminal law with which we are familiar—with 'our' criminal law. This will not, however, amount to a justification of our criminal law as it actually exists and actually operates: it will not, that is, aim to provide a comforting justification of the status quo. A process of rational reconstruction is a process of idealization: it reconstructs what the practice or institution in question must, in terms of the values intrinsic to it, aspire to be. It is entirely likely, then, that the result of the reconstruction will differ in more or less radical ways from the practice or institution as it actually exists, in the way that ideals typically differ from actuality: it provides, not a description of that actuality, but a standard against which the actual must be judged—and will no doubt be found to be more or less seriously wanting. The kind of justification of criminal law that I will offer is therefore a justification of criminal law as it ought to be, not of criminal law as it actually is—but in terms of values that can be discerned within, or excavated from, criminal law as it actually is. If that justification, and the ideal of criminal law that it portrays, is plausible, the question then will be whether, and how, we can work to bring the actual closer to the ideal—to turn our criminal law into what it ought to aspire to be.

2. Crime, Process, and Punishment

Systems of criminal law typically have three dimensions. First, the substantive criminal law defines a range of criminal offences: it specifies the kinds of conduct that will count as criminal, the conditions given which a person counts as committing a crime, and the defences by which one who commits a crime can avoid conviction. Central

[8] This approach also enables us to describe various features, including some salient features, of our existing practices of criminal law not just as conceptually inessential aspects of those practices as practices of criminal law, but as pathologies—as ways in which those practices are defective or misdirected, distorted, or perverted, in terms of the values and purposes that are internal to the kind of practice they purport, or are supposed, to be. Hence the aptness of the title of W Stuntz, 'The Pathological Politics of Criminal Law'; see also R A Duff, 'Perversions and Subversions of Criminal Law'.

[9] See above, Introduction at n. 24.

to the substantive criminal law are the offence definitions themselves, and it is worth noting the different terms in which these may be expressed in different systems. The American Model Penal Code, for instance, declares that 'a person is guilty of', or 'commits' a specified (type of) offence, 'if . . .'. English statutes typically say that a person is, or 'shall be', 'guilty of an offence', or of a specified offence, if. . . . In the German Criminal Code, by contrast, offence definitions declare that 'Whoever [acts in the way specified] shall be liable to' a specified type of punishment; similarly, the French Penal Code's offence specifications are set in terms of what types of conduct render a person liable to what types of punishment.

These modes of offence definition are worth noting because they do not sit happily with the common idea that the substantive criminal law consists essentially in 'prohibitions'—that the criminal law 'prohibits' certain types of conduct, on pain of conviction and punishment if one does what is prohibited. If one imagines the kind of sovereign described by classical legal positivism, whose law consists in 'commands' issued to a subject population, one might indeed talk of such a sovereign's criminal law as a set of prohibitions. The same is true if we see the substantive criminal law as consisting in 'rules', insofar as those rules are taken to be addressed to citizens rather than to courts:[10] for rules are (like prohibitions) to be obeyed or disobeyed, and when what they require is that those to whom they apply refrain from certain types of conduct, we might describe them as prohibiting such conduct. Thus Robinson's *Draft Code of Conduct*, which is addressed to citizens, is set in terms of what 'you may not' do.[11] Now I have argued elsewhere that we should not see the substantive criminal law in this way,[12] and will draw on this argument later; for the moment, we need note only that it is not clear in what terms we should describe the substantive criminal law's offence definitions—as prohibitions, as declarations of what constitutes a crime, or as creating liability relations. I return to this issue in section 3, where I will also discuss the kinds of regulation, related to but not properly part of the criminal law, that are more accurately described as prohibiting (or prescribing) certain kinds of conduct.

The second dimension of criminal law is procedural: it provides for the procedures through which actual or suspected or alleged commissions of what the substantive law defines as crimes are to be formally dealt with. Some of these procedures concern the prevention, detection, and investigation of (alleged) crimes: they govern the powers and activities of the police, and of any other officials who have roles to play in investigating crime. These dimensions of criminal law or criminal justice are enormously important, and deserve more careful theoretical attention than they have often received from criminal law theorists,[13] but they will not receive that attention here. My focus will rather be on the processes that follow from the completed investigation of alleged crime, when an alleged perpetrator has been identified. The most salient and familiar of these processes (in the literature of criminal law, if not in the actual world) is the criminal trial, in which a person is formally charged with a crime, and the court before which he is accused must return a verdict as to whether or not he is (provably) guilty of that crime: if the accused person does not formally admit his guilt, the trial will involve an examination of the evidence; if (as is increasingly common in some jurisdictions) the accused person formally admits his guilt, the verdict then follows more

[10] See e.g. M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law'; P Alldridge, 'Rules for Courts and Rules for Citizens'.

[11] P H Robinson, *Structure and Function in Criminal Law*, Appendix A.

[12] See R A Duff, 'Relational Reasons and the Criminal Law', 181–3; and at nn 46–8, 50–2 below.

[13] See above, Introduction at nn 30–1.

or less directly from that formal admission. What is less clear is how we should theorize this process (and how we should theorize the kinds of plea bargaining that have in some systems more or less completely replaced the trial, as a substantive process of determining guilt). This is the topic of sections 4 and 5.

The third dimension of criminal law is penal: those who are found to have committed crimes thereby become liable to penal sanctions.[14] One question is how much we should build into our initial, analytical, specification of this dimension of criminal law: should we look for some way of distinguishing criminal punishment, properly speaking, from the kinds of 'penalty' that might be imposed by a wide range of legal or extra-legal bodies?[15] Or should we take it that criminal punishment is a type of penalty, distinguished from others only by the body that imposes it; or, perhaps, by its often greater harshness, for instance in that it can consist in imprisonment or even death?

Another question is whether punishment is a necessary or essential feature of criminal law. We can imagine a system that defines a range of 'crimes', and provides a trial process through which those accused of committing such crimes are found 'Guilty' or 'Not Guilty', but that does not make any provision for the punishment of those who are convicted: perhaps it provides for avowedly therapeutic measures to be imposed if judged to be necessary, or for some 'restorative justice' process that is avowedly non-punitive. If we accept (which might be arguable) that such measures are not 'punishments' properly speaking, must we also accept that such a system would not be a system of *criminal* law, properly speaking?[16] Some theorists do suggest that punishment is at least a definitionally essential dimension, and perhaps even the primary internal purpose, of criminal law. Thus Husak argues that '[a] law simply is not criminal unless persons who break it become subject to state punishment',[17] whilst Moore argues that the function of criminal law is to secure the deserved punishment of wrongdoers,[18] and Chiao notes that '[p]erhaps it goes without saying that the criminal law and its associated institutions … are institutions that we have set up to punish people'.[19] In similar vein, some suggest that it is punishment that makes criminal law distinctively problematic.[20] Now it would not be fruitful to spend time on the definitional question of whether a system of law without punishment could strictly count as a system of *criminal* law; and it is certainly true that when a system of criminal law imposes punishments, especially when those punishments are as harsh and destructive as those that our criminal courts often impose, they must loom large in any normative theorizing about criminal law. I will discuss this dimension of criminal law in section 6, but will argue that we should not let criminal punishment dominate our discussion of what criminal law is, or ought to be: its other two dimensions have meanings, and can serve significant purposes, that do not depend on punishment.[21]

[14] I leave aside for the time being the fact that penal sanctions can be imposed without a trial (although typically they require a formal admission of guilt): for English law see A J Ashworth and M Redmayne, *The Criminal Process*, ch. 6; see also P Duff, 'The Prosecutor Fine'; and below, Chapter 7 at n. 30.

[15] See e.g. J Feinberg, 'The Expressive Function of Punishment', 96–8, on the difference between 'punishments' and 'penalties' (the former, but not the latter, have 'reprobative' meaning).

[16] We might note that, in German, criminal law (*Strafrecht*) does seem to entail punishment (*Strafe*).

[17] D N Husak, *Overcriminalization: The Limits of the Criminal Law*, 78.

[18] M S Moore, *Placing Blame: A Theory of Criminal Law*, ch. 1.

[19] Chiao, 'What is the Criminal Law For?', 137: Chiao does not himself favour a focus on 'punishment', given its moralistic connotations, but in arguing (see at n. 6 above) that criminal law should be understood as a 'coercive rule-enforcing institution', he makes its sanctions essential to its purpose.

[20] See e.g. Husak, *Overcriminalization*.

[21] We must also bear in mind that conviction for a criminal offence can render one liable to a range of further, 'collateral consequences'—often onerous burdens, including deportation, subjection to

Finally, something must be said about criminalization—about what it is to criminalize a type of conduct: as we will see in section 7, this is not as simple a matter as it might seem. To criminalize a type of conduct is to bring it within the reach of the criminal law; but just what kinds of process, with what kinds of result, does that involve?

An analytical account of what criminal law is should therefore have something to say about what crime is; about the criminal process; about punishment; and about criminalization. We will see just how much we can usefully say, in analytical terms, in the following sections.

3. Crime

Glanville Williams famously argued that the only accurate way to define 'crime' is in terms of its legal implications: '[a] crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings'.[22] It is no doubt true that we cannot provide a substantive definition of crime, in terms of the kinds of conduct that do or could count as criminal. It is also true, I will argue, that we should understand the idea of crime partly in such procedural terms: to criminalize some type of conduct is, in crucial part, to make its perpetrators liable to a criminal process, and that is indeed an essential part of the reason for criminalizing it. However, we can say a little more than Williams allows—albeit in formal rather than substantive terms.

We can make progress by considering the distinction that some legal systems draw (whether formally or informally) between criminal law and other modes of non-criminal regulation: in the latter kind of case, breaches of the regulations attract penalties, but the breach is not defined as a crime, and the penalty is not defined as a punishment. Thus in Germany the 1968 Regulatory Offences Act transferred various categories of offence (including many road traffic offences) from the criminal law (*Strafrecht*) to a regulatory regime (*Ordnungswidrigkeitenrecht*): what had been crimes (*Straftaten*) became regulatory infractions (*Ordnungswidrigkeiten*), and financial sanctions that had been fines (*Geldstrafen*) now became administrative penalties (*Geldbussen*).[23] Even when no such distinction is formally drawn, courts and theorists often distinguish 'real' crimes from 'quasi-crimes' or (mere) 'regulatory offences'.[24] The English Law Commission has also recommended that more use should be made, in

continued supervision or detention, or exclusion from various normal civic entitlements, but that do not formally count as part of the punishment (but see the US Supreme Court's discussion of deportation in *Padilla v Kentucky* 559 US 356 (2010)): see M Love et al, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*; Z Hoskins, *Beyond Punishment? A Normative Account of Collateral Restrictions on Offenders*, and 'Criminalization and the Collateral Consequences of Conviction'.

[22] G Williams, 'The Definition of Crime', 123. See G H Gordon, *The Criminal Law of Scotland* (3rd edn), vol. 1, 7: the 'criminal law is probably, therefore, sufficiently defined as that branch of the law which deals with those acts, attempts and omissions of which the state may take cognisance by prosecution in the criminal courts'.

[23] *Gesetz über Ordnungswidrigkeiten* (1968; consolidated in 1975). For a useful introductory (and critical) discussion, see T Weigend, 'The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law'; see also C Steiker, 'Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide'; M D Dubber and T Hörnle, *Criminal Law: A Comparative Approach*, 96–7.

[24] See the judicial dicta cited in A P Simester, 'Is Strict Liability Always Wrong?', 23–4.

'regulatory' contexts, of 'civil penalties' and other kinds of non-criminal measure, rather than resorting too quickly to the creation of new criminal offences.[25]

What is the difference between a crime and a regulatory infraction; between criminalizing a type of conduct and subjecting it to a regime of non-criminal regulation? The immediate material effect of each kind of provision might be rather similar: an official determines that a person has engaged in conduct to which the law attaches a certain sanction, such as a monetary payment, and imposes that sanction. It is true that further consequences may follow when the conduct has been defined as *criminal*: crimes might attract harsher sanctions (notably imprisonment) than can be imposed on regulatory infractions; a person who is convicted of a crime acquires a criminal record, and may face a range of further 'collateral consequences'.[26] Perhaps then the difference between crimes and regulatory infractions should be understood simply in terms of the severity of the legal consequences that can follow: we should count as crimes those kinds of conduct that can render us liable to particularly harsh penalties,[27] or to the further consequences connected to a criminal record.

This kind of account fits with the approach of the European Court of Human Rights in its interpretation of Article 6 of the European Convention on Human Rights, which guarantees a set of procedural rights and protections (grounded in the idea of 'a fair trial') to '[e]veryone charged with a criminal offence': could those 'charged' with an *Ordnungswidrigkeit* (or with violating a similar type of regulation in other jurisdictions) be denied such rights, on the grounds that they are not charged with a *criminal* offence? The Court held that, although the transfer of a type of conduct from *Strafrecht* to *Ordnungswidrigkeitenrecht* involved formal 'decriminalization', this was not enough to make Article 6 inapplicable: that would depend on such substantive factors as the nature of the offence or violation and the severity of the penalty that could be imposed.[28] On one reading, this is to define 'criminal offence' in terms of the severity of the sanctions (or other legal consequences) that can attach to a violation: the protections guaranteed by Article 6 must be available to those who face severe legal sanctions, but need not be provided to those who face only such relatively modest sanctions as a *Geldbuss*.[29]

This does not, however, provide a plausible account of what distinguishes criminal offences from other kinds of regulatory violation, or criminal law from other kinds of regulation. Those who argue (as many do argue) that we should eliminate all or most of the collateral consequences of criminal convictions or criminal records,[30] or that we should radically reduce the severity of the sentences that may be imposed on those convicted of criminal offences (including removing imprisonment as a possible

[25] Law Commission, *Criminal Liability in Regulatory Contexts*: 'regulatory contexts' are those contexts 'in which a Government department or agency has (by law) been given the task of developing and enforcing standards of conduct in a specialised area of activity' (para. 1.9).

[26] See n. 21 above. As the example of prosecutor fines (see n. 14 above) shows, criminal sanctions do not always involve either a formal conviction or a criminal record; but that might show only that what is formally classed as a crime should sometimes be understood as a 'quasi-crime'—as in substance a regulatory infraction.

[27] Compare Chiao's suggestion (see at n. 6 above) that what distinguishes criminal law from other modes of legal regulation is the harshness of the sanctions it can impose.

[28] See *Engel v Netherlands* (1979–80) 1 EHRR 647; *Öztürk v Germany* (1984) 6 EHRR 409; *Garryfallou AEBE v Greece* [1997] ECHR 18996/91; *Lauko v Slovakia* (2001) 33 EHRR 40.

[29] Compare A J Ashworth and L Zedner, 'Preventive Orders: A Problem of Undercriminalization?': one reason for bringing certain kinds of 'preventive' order within the criminal law is to provide better protection for those who are to be subjected to them.

[30] See e.g. Hoskins, *Beyond Punishment?*; J B Jacobs, *The Eternal Criminal Record*.

punishment for many offences),[31] are not arguing that we should take many existing criminal offences out of the criminal law, and transfer them to a regime of non-criminal regulation: they are arguing for a criminal law that is less harsh, less damaging, in its impact on those who commit crimes. We can agree with the plausible claim that the harsher the impact of a legal measure on those who become liable to it, the greater the procedural protections that the law should afford them; but this is tangential to the distinction between criminal law and other kinds of regulatory regime.

The Law Commission suggests a better approach to distinguishing criminal law from other modes of non-criminal regulation: 'What sets criminal laws apart from civil penalties (and from other non-criminal steps that a regulator may take to deter or encourage conduct), is that either the intention or one of the important effects of criminal conviction is to create significant stigma.'[32] The idea that criminal convictions typically involve 'stigma', in intention or in fact, is a common one, and points towards a central distinctive feature of criminal law; but it does not capture that feature accurately.

Stigma is, as the Commission implies, an *effect* of criminal conviction, and it marks those who are stigmatized (for it is people, not actions, that are stigmatized) in a way that is likely to make a significant, deleterious, difference to their social standing and relationships: to be stigmatized is to be marked as other—as someone to be treated with suspicion or hostility. It is true that this is in fact often the effect of a criminal conviction—and many think it an entirely appropriate effect of conviction for many kinds of offence; but we would do better to leave open the question of what effect a criminal conviction should have on offenders' standing or relations with their fellow citizens. Someone who argues that we should try to reduce, if not to eliminate, the stigmatic consequences of criminal conviction need not be arguing that we should turn such convictions into findings that the person violated a non-criminal regulation: she could instead be arguing about what impact a criminal conviction should have, or be intended to have. To identify this distinctive feature of criminal law and criminal convictions more precisely, we should think not about stigma, but about the meaning of a criminal conviction, which is what underpins its (typically) stigmatic effect: about the censure or condemnation that a conviction involves.

A finding that a person committed a regulatory violation and is thus liable to a penalty might or might not imply, or lead others to believe, that her conduct merits censure, or that she merits blame for engaging in it; but a criminal conviction is essentially censorious.[33] That is why the Law Commission recommended that: 'The criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.' Criminalization would be justified only if imprisonment (for a first offence) or an unlimited fine might be warranted given the 'seriousness of wrongdoing in issue, and its consequences'.[34] This is to say that criminal law should be concerned with culpable

[31] E.g. A J Ashworth, *What if Imprisonment were Abolished for Property Offences?*; P Ramsay, 'A Democratic Theory of Imprisonment'.

[32] Law Commission, *Criminal Liability in Regulatory Contexts*, para. 3.8.

[33] Thus in German law an *Ordnungswidrigkeit* is an unlawful action ('*rechtswidrige Handlung*'), but it need not involve the kind of guilt or fault ('*Schuld*') that a crime must involve; and its commission might, but need not always, be censurable ('*vorwerfbare*'). See *Gesetz über Ordnungswidrigkeiten* s. 1; Weigend, 'The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law', 71–2.

[34] Law Commission, *Criminal Liability in Regulatory Contexts*, paras 1.28–29.

wrongdoing: not merely with the violation of legal regulations, but with moral wrongdoing that merits condemnation or censure.[35]

The Law Commission's proposal might be read as suggesting, in line with its reference to 'significant stigma' as a mark of a criminal conviction, that the difference between crimes and mere regulatory violations lies in the degree of seriousness of the wrong committed: both involve 'reprehensible conduct' that merits some degree of 'stigma'; but we should reserve the criminal law for those more *seriously* reprehensible types of conduct that deserve *significant* stigma. We would do better, however, to draw a more categorical distinction than that: stigma, or censure as we should rather say, is essential to a criminal conviction in the sense that the very meaning of a conviction would be undermined if a court added that the convicted defendant had done nothing wrong and was wholly non-culpable, whereas this would not be true of a finding that someone had committed a regulatory violation. That is why people may talk of 'quasi-crimes':[36] these are offences that are formally part of the criminal law, but that cannot plausibly be seen or described as censure-worthy wrongs. That is why the language of criminal statutes and codes is often close to ordinary extra-legal moral language: although the criminal law's definitions of such crimes as murder, rape, theft and so on will diverge to various degrees from (in part because they need to be more precise than) our extra-legal moral concepts, the law's conceptions are recognizable as versions of those extra-legal concepts. That is why theorists often include some notion of censure in their analytical accounts of criminal punishment:[37] a key difference between punishment and other kinds of burdensome imposition that might have very similar material forms and impacts, including civil penalties, is that punishment is intended to communicate or to express censure. That is why we should object so strongly to convictions of those who are innocent of crime; or to statutes that impose strict criminal liability, understood as liability without fault;[38] or to statutes criminalizing conduct that cannot plausibly be portrayed as wrong: the reason is not (only) that people are then subjected to the prospect of material burdens that they had no fair opportunity to avoid,[39] but that they are unjustly portrayed and censured as wrongdoers, or that their conduct is unjustly portrayed and condemned as wrong.

This is not the place for a discussion of whether we should maintain a distinct, non-criminal, system of regulatory infractions, or indeed of whether, if we are to have such a system, it should penalize only wrongful, or only culpably wrongful, conduct, and what the meaning and effects of such penalties should be; I will return to such questions later.[40] The point to note here is simply that censurable wrongfulness is integral to criminal law in a way that it is not integral to a system of non-criminal regulation. If such a system penalized conduct that was not, and was not even alleged to be or portrayed as being, wrongful, it might be objectionable (if we think that such systems should respect a 'wrongfulness constraint'):[41] but its identification as a system of non-criminal regulation leaves open the question of whether it should respect such a

[35] For a different argument to a similar conclusion, see Husak, *Overcriminalization*, 72–7; see also A P Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalization*, 10–14, 20–30.

[36] See at n. 24 above.

[37] See at n. 15 above; A von Hirsch, *Censure and Sanctions*, ch. 2.

[38] See e.g. D N Husak, 'Strict Liability, Justice, and Proportionality'.

[39] Compare H L A Hart, 'Legal Responsibility and Excuses'.

[40] See generally J Horder, 'Bureaucratic "Criminal" Law: Too Much of a Bad Thing?'; also Law Commission, *Criminal Liability in Regulatory Contexts*; and see below, Chapter 7, section 2(d).

[41] On the 'wrongfulness constraint' on criminal law, see Husak, *Overcriminalization*, 73–6; and below, Chapter 2, sections 3 and 4.

constraint. By contrast, a system of criminal law that criminalizes conduct that is not wrongful is, necessarily, to that degree defective or mistaken precisely as a system of criminal law; one that criminalizes conduct that is not even alleged to be or portrayed as being wrongful is, necessarily, a perversion of criminal law.[42] That is why it is always a sound objection to a proposed or existing criminal offence that the conduct it criminalizes is not wrongful: such an objection cannot be dismissed as irrelevant, but must be answered by showing how the conduct really is wrongful.

We can distinguish a weak from a strong version of this point. The strong version holds that absence of wrongfulness is necessarily a *conclusive* objection to a proposed or existing criminal offence: one who would justify the creation or retention of the offence can coherently do so only by arguing that the conduct criminalized *is* wrongful. The weak version holds that the absence of wrongfulness is necessarily a *relevant* objection to a proposed or existing criminal offence; but it allows that the creation of the offence might nonetheless be justifiable, for the sake of some other important consideration. I will have more to say about this distinction when I come to discuss legal moralism (in Chapter 2), but we will see shortly that which of these versions is more plausible depends in part on how we understand the idea of criminalization. If the enactment of a statute that formally defines a certain type of conduct as criminal constitutes the criminalization of that type of conduct, only the weak version of the claim is plausible: for reasons to be discussed later, we cannot plausibly insist that statutory offence definitions *must* capture only wrongful conduct. But if we understand criminalization in a broader sense, to include the ways in which officials interpret and apply criminal statutes, the stronger version becomes more plausible.[43]

I am not suggesting that our existing practices of criminal justice fit this picture: it is hard to maintain that our existing laws define and treat as criminal only kinds of conduct that are, or are honestly claimed to be, censurably wrong. That is not, however, an objection to the claims made here about the connection between criminal law and wrongdoing; it is rather a mark of the way in which our existing practices are defective precisely as practices of criminal law. I have not yet argued that, or why, we should maintain a system of criminal law; that argument will come later. But *if* we are to maintain such a system, it should criminalize only censurably wrongful conduct.

The claim that part of what is distinctive about criminal law is that it portrays the conduct that it criminalizes as wrongful might seem, on the one hand, so familiar as to be hardly worth arguing at such length; or, on the other hand, manifestly false. The latter charge would be backed by suggesting that the claim seems plausible only if we focus (as so many theorists still focus) on the most familiar and uncontroversial kinds of so-called *mala in se*: crimes consisting in conduct that is (uncontroversially) wrongful independently of its criminalization. Once we attend instead to that wide range of offences (by far the majority of offences defined by the criminal law and dealt with by its courts) that are classed as *mala prohibita*, since they consist in conduct that might well not be wrongful prior to its legal regulation, it becomes far less plausible, since so many such offences look more like technical rule violations than real moral wrongs. I will have more to say later about *mala prohibita*, and about the distinction between *mala in se* and *mala prohibita*:[44] for the moment, I will briefly note three points for further discussion.

[42] See n. 8 above; and V Tadros, 'Rethinking the Presumption of Innocence'.

[43] See below, section 7 and Chapter 2, section 4.

[44] A distinction that I assume here, and will defend later against objections like Bentham's: see J Bentham, *A Comment on the Commentaries*, iii, 63, on this 'acute distinction … which being so shrewd, and sounding so pretty, and being in Latin, has no sort of occasion to have any meaning to it'.

First, the defining feature of *mala prohibita* is that the criminalized conduct is not, or might not be, pre-legally wrongful—wrongful, that is, prior to its legal prohibition: such conduct is not, we might say, prohibited because it is wrongful; it is wrongful because it is prohibited. This is not to say, however, that it is wrongful because it is criminalized: rather, it is prohibited by a pre- or non-criminal regulation; what is then criminalized is the violation of that regulation, on the grounds that such violations are wrongful. We will need to discuss later the grounds on which such violations may be argued to be wrongful, since we cannot just assume that they are; but this shows how a criminal law focused on wrongfulness can have room for *mala prohibita*.[45]

Second, this structure of criminalization is displayed in many statutes, which first lay down sets of regulations, and then define criminal offences that consist in breaking those regulations. For example, the Health and Safety at Work etc. Act 1974 defines certain general duties relating to health and safety for employers, employees, and manufacturers (ss. 2–7), and provides (s. 15) for the creation of 'regulations' to serve any of the Act's 'general purposes'; s. 33 then declares that '[i]t is an offence for a person … to fail to discharge a duty to which he is subject by virtue of sections 2 to 7 [or] to contravene any health and safety regulations'. The Vehicle Excise and Registration Act 1994 enacts, in Parts I and II, requirements concerning the registration and licensing of motor vehicles; Part III then defines a range of offences that consist in failing to obey those requirements. This helps to explain my claim that the criminal law does not prohibit the conduct it defines as criminal.[46] The regulations whose violation is criminalized do indeed prohibit:[47] but it would be very odd to say that the criminal law—those sections of the Acts that enact criminal offences—'prohibits' the violation of those regulations, since those regulations already 'prohibit' the conduct that is then criminalized; it would be at best otiose, and at worst nonsensical, for the law to prohibit a failure to obey its prohibitions. Instead, we can see the criminalizing sections of these Acts as declaring that failures to obey such regulations constitute criminal wrongs, which render the person criminally liable.[48]

Third, it might well turn out that many of our existing criminal laws, in particular many of those that create *mala prohibita*, criminalize conduct that is not even claimed to be wrongful: not only is it not claimed to be pre-legally wrongful—that is a defining feature of *mala prohibita*; it is not even claimed to be wrongful in virtue of its character as the violation of a regulation. That is only to say, however, that those existing criminal laws are radically defective as criminal laws: either we should not sanction such conduct at all; or, if it is to be sanctioned, this should be done through a system of non-criminal regulation.

As to the charge of over-familiarity, I would be very happy if the claim that the criminal law is essentially concerned with wrongdoing was uncontroversial. However, first, the precise nature of that concern with wrongdoing is not yet clear, and will need to be explained; second, the claim (once clarified) is not uncontroversial, and will need to be further defended. That explanation and defence will be provided in Chapter 2; all I have tried to do so far is to show it to be plausible that a concern with wrongdoing is

[45] See further below, Chapter 2 at nn 53–5, and Chapter 7, section 5.

[46] See at nn 10–12 above.

[47] For the sake of simplicity of expression, we can recast positive prescriptions or requirements as prohibitions: a requirement to ϕ (to take specified safety measures, or to license one's car, …) is a prohibition on not ϕing.

[48] Which is to say that the distinctive character of criminal law lies in part in the criminal process: the substantive criminal law defines the conditions under which we will be subject to the criminal process. See sections 3 and 4 below.

an essential feature of the substantive criminal law—that the offence definitions that comprise the criminal law's 'special part' consist in purportedly authoritative declarations of the range of wrongs whose perpetrators will be liable to criminal prosecution.

It matters, of course, that these definitions are (purportedly) authoritative. The criminal law does not just offer normative guidance: it claims the authority to define these wrongs, as wrongs that render us liable to prosecution. I will need to clarify the nature and grounds of that claimed authority later: this will involve discussing the kind of authority that the law must claim, and the reach of that authority;[49] and the ways in which citizens may relate to it (this will require us to examine the political grounding of criminal law in the governmental structures of a polity). All we need note here is that the criminal law's authority is not plausibly portrayed as the authority to prohibit the conduct that it defines as criminal. We have just seen that this is implausible in the case of *mala prohibita*, but it is also implausible in the case of *mala in se*.

To say that the criminal law prohibits the kinds of conduct that it defines as criminal is to say that it demands our obedience to these prohibitions (obedience is what prohibitions seek), which is also to say that it offers us new normative reasons for refraining from those kinds of conduct. That is what authoritative prohibitions purport to do: whatever reasons we may have had for *Φ*-ing, the prohibition gives us new, perhaps peremptory or exclusionary, reason not to *Φ*; we are to refrain from *Φ*-ing from respect for that authority. But that is not what the criminal law typically says to us in its definitions of such *mala in se* as murder, rape, criminal damage, and the like: it would be a strange message to a potential attacker to say that, whatever reasons he might have had to commit his attack in the absence of the criminal law, respect for the law should restrain him. The law rather presupposes that we already had ample, normally conclusive,[50] moral reasons to refrain from such wrongs—reasons to which it does not purport to add.[51] Its definitions of such wrongs as crimes constitute not prohibitions but declarations: declarations not that these are wrongs (it presupposes that), but that these wrongs are criminal wrongs—which is to say that they are wrongs of which the polity, through its laws, properly takes such formal, public notice, and whose perpetrators will therefore be liable to prosecution and punishment.[52]

It is true that the substantive criminal law can be seen as offering us new, prudential reasons for refraining from what it defines as crimes. The prospect of conviction and punishment might deter from crime those who are not, or not sufficiently, motivated by the pre-criminal reasons for refraining from such wrongdoing that the law presupposes; and if we think that deterrence has any proper role among the aims of a system of criminal law, we will take it that part of the point of the substantive criminal law is to provide citizens whose moral motivation is inadequate with supplementary prudential reasons for what would indeed count as obedience to its prohibitions: 'refrain from *Φ*-ing or else' is a sanction-backed prohibition on *Φ*-ing. This does not, however, undermine my argument that the primary purpose of the substantive criminal law is

[49] In other words, the 'ambit' and 'jurisdiction' of the criminal law: see further below, Chapter 3, section 1.

[50] Only normally conclusive, because through its specifications of general defences the criminal law recognizes that we can exceptionally have good reason to commit a *malum in se*.

[51] This is oversimplified: the law does sometimes offer new normative reasons, concerning the respect we should have for the law, to those who dissent from its definitions of criminal wrongs: see below, Chapter 3, sections 3 and 4.

[52] That is why the modes of offence definition noted at the start of section 2 are appropriate. They do not take the form of prohibitions: instead, they declare either that the specified type of conduct constitutes an offence (which is to say that it renders the agent liable to the criminal process), or that it renders the agent liable to a specified kind of punishment.

declaratory rather than prohibitory, and that it does not offer us new normative reasons for refraining from the conduct it defines as criminal. First, the prudential reasons offered by the law in its deterrent mode are not normative reasons: the criminal law does not tell us that we ought to refrain from what it defines as crimes in order to avoid punishment; rather, it offers such reasons as reasons that might in fact motivate those who are not sufficiently moved by the normative reasons on which it rests. Second, the legitimacy of deterrence depends on there already being sufficient, non-deterrent, normative reasons for us not to do what the law seeks to deter us from doing: if the criminal law is to have more normative authority than the gunman who coerces us to act as he wishes, what it seeks to deter us from must be something that we anyway, independently of its deterrent threats, have good normative reason not to do. A legitimately deterrent criminal law does not say to us simply 'refrain from *Φ*-ing, or else': it reminds us first that we ought not to *Φ*, and then adds a supplementary deterrent reason to motivate those unmoved by that (pre-criminal and non-deterrent) 'ought'.

These claims, about the way in which the substantive criminal law is concerned with (pre-criminal) wrongs, and about its declaratory rather than prohibitory character, will be explained and defended in the following chapters; but they are not yet sufficient to distinguish criminal law from other kinds of law that may also deal, and deal essentially, with wrongs. In particular, on some accounts of tort law, it is also essentially concerned with wrongs.

This is not true on all accounts: according to Lord Bingham, for instance, 'the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not'.[53] On this view, tort law is concerned with harm and who pays for it. It might aim to allocate the cost of harms that have been caused away from those who innocently suffered them to those who are properly held responsible for causing them, and such allocations might depend on a finding of some kind of fault or wrongdoing. But such findings are not the focus of tort law in the way that wrongdoing is the focus of criminal law: they concern the conditions given which a plaintiff can secure a verdict against, and damages from, a defendant, but are not the focus of that verdict or of the law that warrants it. On other accounts, however, the distinctive function of tort law is precisely to deal with certain kinds of wrong—for instance to provide 'civil recourse' for those who have been wronged in certain ways;[54] this view sits comfortably with the fact that someone who has been the victim of a crime can in principle bring a tort suit against the perpetrator.[55] We need not try to adjudicate between such conflicting accounts of the nature and aims of tort law here;[56] but we need to address the question of how criminal law differs from tort law, if both deal or can deal with wrongs.

It might be tempting to follow Blackstone here, and say that while tort law deals with private wrongs, criminal law deals with public wrongs: while civil wrongs violate 'the civil rights which belong to individuals, considered merely as individuals', crimes 'are breach and violation of the public rights and duties, due to the whole community,

[53] *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 [9].

[54] See especially B Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts'; J Goldberg and B Zipursky, 'Torts as Wrongs', and *Torts*. See also *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 (see n. 72 below).

[55] And in some jurisdictions victims can attach a civil case to the criminal prosecution: see e.g. the German Code of Criminal Procedure (*Strafprozessordnung*) §§ 403–6; and the Swedish provisions described in C Lernestedt, 'Victim and Society: Sharing Wrongs, but in which Roles?'.

[56] See generally J Oberdiek (ed.), *Philosophical Foundations of the Law of Torts*; M Dyson (ed.), *Unravelling Tort and Crime*.

considered as community, in its social aggregate capacity'.[57] Now I will argue later that we should understand crimes as public wrongs, but we will need to get clear about the particular sense in which they are 'public', and about the meaning of 'public' and 'private' in this context: both crimes and torts are 'public' wrongs in the sense that they are recognized as wrongs by the law, which is a public institution, and are dealt with through a public legal process.[58]

We can start to get clearer about the sense in which crimes are 'public' wrongs, and thus also about the difference between crimes and torts, by turning from the substantive criminal law to the second dimension of criminal law—the criminal process. What distinguishes crimes from torts is that they render the wrongdoer liable to a distinctive kind of legal process: this is the truth in Williams' suggestion, quoted at the start of this section, that '[a] crime then becomes an act that is capable of being followed by criminal proceedings'.[59]

4. The Criminal Process

When a type of conduct is defined as criminal, this gives the police new powers, preventive and investigatory: powers that they do not have in relation to non-criminal or extra-legal wrongs. They can take steps to prevent the commission of a crime, including the arrest of someone who is thought to be about to commit a crime; and they play a central role in the investigation of alleged crimes—a role that brings a range of powers to examine, to search, to question, and to detain: they do not have such powers in relation to alleged torts, or in relation to extra-legal wrongs. I will not discuss these powers here,[60] but will focus on the salient procedural differences between criminal and tort cases as they progress towards a hearing in court—although that progress can, as we will see, often be halted or diverted. By attending to these differences, we will be able to get clearer about the nature of crime, as distinct from other kinds of wrongdoing.

The procedural difference between torts and crimes is grounded in the fact that a tort case is brought (typically) by an individual plaintiff, whereas a criminal case is (typically) not. In a tort case an individual who claims to have suffered some relevant harm or wrong at another's hands sues that other person, seeking a remedy (different accounts of tort law give different accounts of the nature of that remedy—payment for the harm caused, or recourse for the wrong done). In a criminal case there might well be an individual victim or victims, a person who has been robbed or assaulted or defrauded or otherwise wronged in a way recognized by the criminal law; but it is not typically the victim who brings the case. In England, for instance, the case is investigated by the police, who pass it to a prosecutor if there is sufficient evidence of a crime and a perpetrator; the prosecutor then decides whether and on what charge to prosecute the alleged perpetrator; and when (if) the case comes to court it is listed not as '*Plaintiff v Defendant*', as a tort case is listed, but (in England, which still retains such visible marks of an undemocratic history) as '*Regina v Defendant*', or (in countries whose legal symbols are more democratic) as '*People v Defendant*', or '*State v Defendant*', or '*Commonwealth v Defendant*'.[61]

[57] Sir William Blackstone, *Commentaries on the Laws of England*, Bk IV, ch. 1, p. 5.
[58] See A Y K Lee, 'Public Wrongs and the Criminal Law'.
[59] Williams, 'The Definition of Crime', 123; see at n. 22 above.
[60] But see e.g. the range of powers defined in the Police and Criminal Evidence Act 1984.
[61] Here again localism (or parochialism) appears, since what I say applies accurately only to certain 'adversarial' systems of criminal law, and in different systems different officials play different roles in

The contrast drawn in the previous paragraph is in various ways oversimplified. Tort cases are not always brought by and against individual plaintiffs and defendants: the parties might, for instance, be corporations, or even governments. Criminal cases are not always brought by 'the state', since they can be brought by regulatory agencies.[62] More significantly, alleged victims of crime can in some jurisdictions bring private prosecutions, and occasionally do so—although in England the Director of Public Prosecutions (DPP) has the power to take over a private prosecution and then discontinue it.[63] In some countries, the alleged victim can act as prosecutor or co-prosecutor for some kinds of offence: German law makes provision for *Privatkläger* and *Nebenkläger*,[64] and French law makes provision for instituting or joining a criminal prosecution as a '*partie civile*'.[65] In other jurisdictions prosecutions for certain kinds of offence can be brought only at the request, or only with the consent, of the alleged victim;[66] in some the alleged victim, or other interested parties, can demand an independent review of a prosecutor's decision not to proceed, or take the matter to court for judicial review.[67]

These are some of the ways in which the initially clear distinction between civil and criminal processes can be blurred. Other kinds of blurring concern what follows from a verdict against the defendant. A civil court can, for instance, award 'punitive damages', which go to the victim, but are meant to punish the defendant for the malicious or wilful wrongness of the tort he committed—thus blurring the distinction between tort damages and criminal punishment.[68] On the other side, criminal courts can make compensation orders against convicted defendants, requiring them to pay compensation to their victims.[69] We will need to ask later whether we have good reason to blur (if not to collapse) the distinction between torts and crimes in such ways; for the moment, however, since our interest is in analytical rather than in normative questions, we can leave such complications aside, to focus on the salient differences between the paradigmatic ways in which crimes and torts are dealt with. We can note five such differences.

the investigation and prosecution of crimes. However, I hope that some version of the aims and values of the criminal process that I identify in this section will also be discernible in systems whose processes differ significantly.

[62] The English Law Commission noted that in England and Wales over sixty national regulators have the power to make criminal laws and to prosecute breaches of them, as do 486 local authorities and various trading standards authorities (*Criminal Liability in Regulatory Contexts*, para 1.21; examples are given in paras 1.22–24).

[63] See Prosecution of Offences Act 1985, s. 6; http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/#an01. Some non-governmental organizations, such as the Royal Society for the Prevention of Cruelty to Animals, can also bring 'private' prosecutions. In Scotland, by contrast, private prosecutions are harder to bring (and thus rarer): the would-be prosecutor must apply to the High Court of Justiciary for a 'bill of criminal letters', and the Lord Advocate can oppose the application: see *X v Sweeney* 1982 JC 70 for a rare successful application; and *Stewart v Payne, McQuade v Clarke* 2017 JC 155, for failed attempts to bring private prosecutions against drivers who had caused death.

[64] *Strafprozessordnung* §§ 374–402.

[65] See J R Spencer, 'Civil Liability for Crimes'.

[66] Compare the German category of *Antragsdelikte* (e.g. *Strafgesetzbuch* §§ 123, 185–94, 248b); Polish Criminal Code §§ 160.3, 161, 190 (thanks to Krzysztof Szczucki for information about Polish law). See also R Stevens, 'Private Rights and Public Wrongs', suggesting that when conduct is criminalized only because it constitutes an 'interpersonal wrong', it should be up to the victim whether a prosecution is brought.

[67] For the English provisions for independent review, see Crown Prosecution Service, *Victims' Right to Review Scheme*; for judicial review, see *R v Metropolitan Police Commissioner ex parte Blackburn (No.1)* [1969] 2 QB 118; *R (B) v DPP* [2009] 1 WLR 2072.

[68] See A Sebok, 'Normative Theories of Punitive Damages'.

[69] For English provisions, see Powers of Criminal Courts (Sentencing) Act 2000, ss 130–3.

First, a civil case is controlled by the plaintiff. She decides whether to sue, whether to pursue the case, or to settle it if a settlement is offered, whether to enforce any judgment in her favour. The burdens (both material and psychological) of bringing the case also fall on her. By contrast, a criminal case is controlled by criminal justice officials: the police decide whether to investigate the matter; a prosecutor decides whether and with what to charge the alleged wrongdoer, and negotiates any bargain that will avert a trial; the sentence is enforced by officials. Victims might have de facto influence on the process: the police might become aware of the crime only if the victim reports it; they or the prosecutor might not pursue it if the victim asks them not to. But the victim has no formal standing to demand that the perpetrator be, or not be, prosecuted.[70]

Second, both criminal and civil cases might aim to determine responsibility for some harm that occurred, in order to determine liability to a legal consequence; in both, the question whether the harm was caused by the defendant's conduct is central to that determination of responsibility. But the determination of criminal liability depends on culpability in ways that the determination of civil liability does not. A defendant's civil liability might be established by proving that his conduct fell below an objective standard of reasonable care, but more is needed for a criminal conviction—in English law, often, that he was at least reckless as to the risk of harm. A range of defences is also available in criminal cases that are unavailable in civil cases. I might avoid both criminal and civil liability by showing that the plaintiff consented to my action,[71] or that I was defending myself against her unlawful attack: but it would not avail me in the civil court, as it would in the criminal court, to show that I acted under duress, even if the court agreed that this rendered my action excusable, or that I acted on the unreasonably mistaken belief that I was defending myself against unlawful attack,[72] or that I was so mentally disordered that I was not criminally responsible for my actions.[73] Indeed, I might still be civilly liable even if the court found that my action was justified by necessity.[74] I could also mitigate my civil liability, but not my criminal liability, by showing that the plaintiff's negligence contributed to the damage.

Third, the liability imposed by a civil court that finds for the plaintiff is, typically, a liability to pay damages; in simple cases, the amount of damages is determined by the cost of repairing the harm for which the defendant is held responsible. If it costs £1,000 to rebuild my neighbour's garage after I destroyed it by my careless bonfire-lighting, and to restore, as far as is possible, the *status quo ante*, that is what the court will award, regardless of my means and of the extent of my culpability: it will matter

[70] This can be a particularly problematic issue in cases of domestic violence: see M M Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis*.

[71] But not always in the case of criminal law: see e.g. (and notoriously) *Brown* [1994] 1 AC 212. On defences in tort law generally, see J Goudkamp, *Tort Law Defences*.

[72] See *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, for an illustration of the complexities in the relationship between criminal and civil wrongs. An unarmed man was shot and killed during a bungled police raid; the policeman who shot him was acquitted at his criminal trial for murder, because there was no evidence to rebut his claim that he acted in self-defence—that he believed he was under attack, and used force that was reasonable given that belief; but the court held that the victim's family could still bring a tort suit for assault and battery, on the grounds that whilst in criminal law an unreasonable mistaken belief that I am being attacked suffices for a defence of self-defence, in tort law such a mistaken belief must at least be reasonable if it is to ground a defence (and the court was tempted by the view that the belief must actually be true). See further below, Chapter 7 at nn 37–8.

[73] Nor would 'unfitness to plead' bar a civil trial. See Goudkamp, *Tort Law Defences*, 101–3 (and 166–84, 186–90 for arguments that insanity should, whilst 'unfitness to plead' should not, bar tort liability); see further at nn 104–5 below.

[74] See *Vincent v Lake Erie Transportation Co.*, 109 Minn 456, 124 NW 221 (1910).

neither whether I am rich or poor, nor whether my conduct was only modestly negligent or more seriously reckless. Liability imposed by a criminal court, by contrast, is a liability to be punished, and in systems that take culpability and proportionality seriously the severity of that punishment is determined not by the cost of repairing whatever harm was caused, but by the seriousness of the offence—orthodoxly understood as a function of the culpability of the agent and the seriousness of the harm caused. If the punishment is a fine, it is appropriate to proportion its cash value to the offender's means, since the fine's penal severity depends not on its absolute amount, but on what proportion of the defendant's resources it takes.[75]

Fourth, in both cases a full trial might be avoided by pre-trial negotiation: a civil case might be settled before it comes to trial; a criminal case might be (indeed in Britain and the US usually is) decided by a guilty plea, which itself often results from pre-trial bargaining, or be disposed of by a police caution or a 'prosecutor fine',[76] or be informally diverted from the criminal process. However, settlements in civil cases often explicitly exclude any admission of liability, whereas a criminal plea bargain still requires the defendant formally to plead guilty in court, and cautions similarly require an admission of guilt.[77]

Fifth, we can insure ourselves against civil liability but not against criminal liability.[78] If I and the person I harm are insured, our insurers might seek to settle without going to trial; but whether the case is settled pre-trial or by a verdict for the plaintiff, the money will be paid by my insurers, not by me. The affair will not cost me nothing: apart from the burdens of filling out an insurance form and, perhaps, having to appear in court, I might find that my insurance premiums have increased, or find it harder to obtain insurance, or have to pay the first £N of the award; but I will not have to pay the £1,000 that the court awards her. But if I am convicted in the criminal court, I must undertake or undergo the punishment: I cannot expect my insurers to pay the fine (though the law cannot prevent someone else paying it).

These differentiating features help to put some (largely procedural) flesh on the idea that the criminal law is concerned with public wrongs: with wrongs rather than just with harms, and with wrongs that are in some sense public rather than private. Its concern with wrongs is shown in the role played by considerations of culpability, in assigning liability and in determining sanctions: for if wrongdoing is the object of attention, and we are to treat those who commit the wrongs as responsible agents, we must attend to their culpability. It is also a feature of wrongdoing that the seriousness of the wrong, or the culpability of its agent, is not mitigated (in the way that tortious liability is mitigated) by the fact that the victim's negligence was a contributory factor: it might be careless, even reckless to walk through an area of town in which muggings are frequent: but that does not mitigate the guilt of the mugger who attacks me, or render his attack less serious.[79] If wrongdoing is the focus we can also see why a pre-trial settlement without any admission of wrongdoing or liability should not be acceptable, since it precisely fails to address the core issue. Finally, it is a defining feature of punishment that it must be intended to burden the person being punished (hence the bar on

[75] Hence the attractions of a system of 'unit fines' or 'day fines': see e.g. S T Hillsman, 'Fines and Day Fines'.

[76] See n. 14 above.

[77] That is not true, however, of prosecutor fines. See Duff, 'The Prosecutor Fine', at 574.

[78] In which context it is significant that insurance policies will not usually provide cover for punitive damages.

[79] There is of course more to be said about this: see e.g. V Bergelson, *Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law*.

insurance against criminal sanctions);[80] if we ask what could justify the imposition of something that is not just foreseeably, but deliberately burdensome, a familiar answer is that the person must have rendered himself liable to this by his own wrongdoing.

As to the public character of criminal wrongs, this is shown (it partly consists) in the way in which the case is brought and controlled by public officials, in the name of the polity; and in the fact that what results from a verdict against the defendant is punishment rather than a payment or reparation to the victim. It is a controversial question in penal theory whether or in what ways the victims of crime should have a role in the determination of offenders' sentences,[81] or should be seen as in any way beneficiaries of their punishment, and it is a familiar criticism of our current institutions of criminal trials and punishments that they turn our attention away from the victims and their needs,[82] but this is not the place to engage with that controversy: for present purposes, we need only say that what marks out criminal law from other kinds of law, notably tort law, is that it is concerned with wrongs that are in this sense public—that the law's formal response to them is in the hands and under the control of officials rather than the victim.[83] This might suggest that what makes crimes 'public' wrongs is not that they are wrongs that are criminalized because they are 'public', but that they are wrongs that count as 'public' because they are criminalized—they are made 'public' by being criminalized. There is, as we will see, some partial truth in this.

The criminal process is thus a distinctively public process: but can we say any more than this about its distinctive character and aims, about how it differs from other kinds of legal process, without altogether abandoning the analytical for the normative?

The 'criminal process', broadly understood, extends from the initial police investigation of an alleged crime to the final conviction and sentencing (or of course the acquittal) of the person alleged to have committed it. In one sense, the focus of all the pre-trial stages of that process is on the criminal trial. In investigating crime, the police are trying not merely to establish whether a crime was committed and who committed it, but to establish whether there is, and to collect, evidence that can then be used to convict an offender in court. Similarly, a prosecuting official is concerned to establish whether there is sufficient evidence that a person committed a crime that could be used to secure a conviction in court. It might then be tempting to say that the trial is the natural or normal culmination of the criminal process—that if, for whatever reason, a trial does not take place (although there is sufficient evidence against a suspected offender), the criminal process is incomplete. It is true that police and prosecutors may divert people from the criminal process and the criminal trial in various ways: by not pursuing a case at all; by diverting alleged offenders to a non-criminal disposal—for instance, towards a 'restorative justice' process, or, for those with mental health problems, to psychiatric help; or by diverting them from a criminal trial by a pre-trial criminal disposal such as a caution or a prosecutor fine.[84] Some such diversions are ways of not treating the conduct in question as criminal: although it fits the formal definition

[80] On burdensomeness as a feature of punishment, see at nn 123–5 below.

[81] See the debates about the proper role, if any, of Victim Impact Statements in the sentencing process: see e.g. A J Ashworth, 'Victim Impact Statements and Sentencing'; E Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice'.

[82] See N Christie, 'Conflicts as Property'; also M D Dubber, *Victims in the War on Crime*.

[83] And we could say that Christie's objection to the way in which the criminal law 'steals' the 'conflicts' in which crime consists from those to whom they properly belong is precisely an objection to criminal law as public law.

[84] See n. 14 above; R Allen, 'Alternatives to Prosecution'; C Hoyle and R Young, 'Restorative Justice: Assessing the Prospects and Pitfalls'.

of an offence, and comes to the attention of the police or prosecutor because it is an offence, they do not treat it as a crime, but rather as perhaps a 'conflict' that can be better dealt with informally, or as evidence of the person's need for psychiatric help. Other kinds of diversion, such as formal cautions and prosecutor fines, still treat the conduct as criminal, but treat it as not being seriously criminal enough to warrant going to court. However, the assumed primacy of the criminal trial, as the 'natural' or presumed culmination of the criminal process, is shown in the way in which such provisions are standardly described as 'alternatives' to, or 'diversions' from, the criminal process of prosecution and trial.

We should not, however, take this to give the trial, or indeed prosecution, *normative* priority over such other ways of dealing with alleged crimes: we should not, that is, assume that when there is sufficient evidence that someone committed a crime, that person should be prosecuted and brought to trial *unless* there is some strong reason not to do so. That would be to presume a 'legality principle', according to which a prosecutor must prosecute if there is sufficient evidence of guilt—although that 'must' is in practice far from absolute, since even systems that officially subscribe to the principle recognize a range of grounds on which prosecutors may decide not to prosecute.[85] By contrast, an 'opportunity principle' leaves more open the question of whether a prosecution should proceed: it is for the prosecutor to decide whether or not to prosecute, without any presumption in favour of prosecution.[86]

Such a principle is especially (although not only) evident in regulatory contexts. Regulations dealing with taxation, health and safety at work, environmental protection, and many other kinds of activity are often backed by criminal laws that make it an offence to violate a regulation: but the officials responsible for applying and enforcing such regulatory regimes often use criminal prosecution only as a last resort, when other methods of securing compliance or of dealing with non-compliance have failed; they decide how to respond, that is, not just without a presumption that they should prosecute unless …, but with a presumption that they should *not* prosecute unless other methods have failed.[87] Thus, for example, someone who is found to have evaded her taxes could face criminal prosecution, but might instead be offered an arrangement under which she pays the tax owed, plus a further substantial penalty payment, and avoids criminal prosecution or liability. This is, indeed, the most common way of dealing with tax evasion: in 2010–11 there were fewer than 500 criminal convictions for tax evasion, whereas 2,000 people were put into a 'Managing Deliberate Defaulters' programme without prosecution,[88] and others were dealt with through 'cost effective Civil Investigation of Fraud (CIF) procedures'.[89] (Some of these ways of avoiding prosecution still depend on the possibility of prosecution: regulators can prosecute any who fail to cooperate with their non-criminal measures, and the prospect of prosecution

[85] See e.g. P Asp, 'The Prosecutor in Swedish Law', 153–8; A Perrodet, 'The Public Prosecutor'; S Boyne, 'German Prosecutors and the Rechtsstaat'.

[86] See e.g. H van de Bunt and J-L van Gelder, 'The Dutch Prosecution Service', 123–5; also the English Crown Prosecution Service, *Code for Crown Prosecutors*; and at nn 161–5 below.

[87] See, e.g. I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*; K Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*.

[88] See HM Revenue and Customs, *Closing in on Tax Evasion*, 8.

[89] See e.g. HM Revenue and Customs, *HMRC Code of Practice* 9, on the CIF process; also *HMRC Criminal Investigation Policy*, on the considerations that guide HMRC decisions about whether to use the CIF process or a criminal prosecution: prosecutions are 'reserved for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate'.

provides a strong incentive to cooperate.[90]) There is plenty of room for normative argument about the principles that *should* guide prosecutorial practice in different contexts: but our initial account of the criminal process should not beg such normative questions by building in a presumption that strong evidence of the commission of a crime should normally lead to prosecution and trial.

It is also worth noting here one further way in which the official collection of evidence (even of potentially conclusive evidence) of criminal conduct might not (directly) lead to prosecution or a criminal trial. One form that 'preventive justice' measures can take is the making of a distinctive kind of preventive order: given evidence that a person has been engaged or is engaged in a specified kind of criminal activity, an official can apply to a court for an order imposing restrictions on that person's conduct or movements—restrictions whose aim is to prevent his future engagement in such conduct. Such orders are civil, not criminal measures, formally speaking, and the process through which they are made is formally a civil, not a criminal process; but a breach of the order is then a criminal offence for which the person can be prosecuted. The Anti-social Behaviour Order (ASBO), now defunct,[91] is perhaps the best known example of this kind of measure; but our contemporary law contains many others.[92] This is a use of criminal law that we will need to discuss later: for the moment, we need note only that this is another way in which the official response to alleged or suspected offenders might not involve prosecution and trial (at least in the first instance).[93]

In various ways, then, the criminal process of investigation, evidence gathering, and charge preparation or consideration might not lead to a criminal trial, or to any formal finding of guilt or innocence; and even if it is correct to talk of them as involving diversions from or alternatives to prosecution and trial, we should not presume that prosecution and trial have normative priority as ways of responding to or dealing with alleged crimes. Nonetheless, the trial does mark a kind of culmination of the criminal process: an analytical account of criminal law must include it, and a normative theory of criminal law must include an account of the trial's proper role.

5. The Criminal Trial

I will focus here on criminal trials in 'adversarial' systems of criminal law: I hope that much the same structuring aims and values can be embodied in more 'inquisitorial'

[90] This feature of many regulatory regimes is formalized in the provisions for 'deferred prosecution agreements': see Serious Fraud Office, 'Deferred Prosecution Agreements'; D N Husak, 'Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality'; R A Shiner and H Ho, 'Deferred Prosecution Agreements and the Presumption of Innocence'.

[91] Crime and Disorder Act 1998, ss 1–4 (see Anti-Social Behaviour, Crime and Policing Act 2014, Part II, for the 'Criminal Behaviour Orders' that replaced ASBOs). The literature on ASBOs is voluminous, but see especially P Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*; A J Ashworth and L Zedner, *Preventive Justice*, ch. 4; A Cornford, 'Criminalising Anti-Social Behaviour'.

[92] See Ashworth and Zedner, *Preventive Justice*. Compare too the courts' power to bind someone over to keep the peace—a power that goes back to the Justices of the Peace Act 1361, but is now governed primarily by Justices of the Peace Act 1968, s. 1(7), and Magistrates' Courts Act 1980, s. 115: see the Crown Prosecution Service, *Binding Over Orders*; J Sprack, *A Practical Approach to Criminal Procedure*, 25.43–25.46.

[93] Although ASBOs and similar orders are often sought because there is insufficient admissible evidence to secure a conviction, they can be sought despite the (potential) availability of sufficient evidence.