Criminalization

The Political Morality of the Criminal Law

Edited by
R A DUFF
LINDSAY FARMER
S E MARSHALL
MASSIMO RENZO
VICTOR TADROS

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Introduction

Towards a Theory of Criminalization?

R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, and Victor Tadros

This is the fourth volume of papers arising from an AHRC funded project on *Criminalization* conducted by the five editors. The three previous volumes contained papers from three pairs of workshops held during the project's first three years;[1] most of the chapters in this volume were originally delivered as plenary papers at the project's final conference in 2011;[2] three monographs by members of the project team will complete the mini-series that the project has produced.[3]

We described the project's overall aim in our Introduction to the first volume of papers. The Introduction to this fourth and final volume of papers gives us the opportunity to discuss what the project has and has not achieved, some of the ways in which debate about the issues of criminalization has developed during the last five years, and what we take to be the most promising lines of further enquiry.

I. Where We Started—and Why We Didn't Get Where We Intended

'Our first objective', we said, 'is 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':[4] this reflected, no doubt, the confidence that we felt after finishing our previous project on the criminal trial,

[1] *The Boundaries of the Criminal Law* (2010), *The Structures of the Criminal Law* (2011), *The Constitution of the Criminal Law* (2013), all published by Oxford University Press.

[2] The papers by James Chalmers and Fiona Leverick, by Lindsay Farmer, by Sandra Marshall, and by Loic Wacquant were not delivered at the conference; 54 papers were delivered and discussed at the conference.

[3] R. A. Duff, *The Realm of Criminal Law*; Lindsay Farmer, *The Institution of Criminal Law*; Victor Tadros, *Wrongs and Crimes*; see Section VII.

[4] From the 'Objectives' section of our original application to the Arts and Humanities Research Council (Grant No. AH/E007821/1).

when we thought that we had, as we had intended, developed at least the outlines of a normative theory of the criminal trial.[5] Fortunately, we also spoke more cautiously about 'working towards an overarching, theoretically informed, normative perspective' on 'the proper scope and structure of criminal law';[6] whilst we have not succeeded in our 'first', more ambitious, objective, we think that the project has achieved that second, more modest objective.

A variety of reasons help to explain our failure to achieve that first objective—a failure that is also itself instructive and, we believe, productive. We will comment in more detail on some of the reasons in the following sections, but they are worth summarizing here.

A simple reason for not producing even the outlines of a theory of criminalization is that it soon became clear that we would not be able to agree among ourselves on the structure or the content of such a theory. There is, as this Introduction should make clear, much on which we agreed or came to agree—in particular about what any such theory would need to include, about the questions that need to be asked and answered, and about the kinds of approach that are likely (or unlikely) to prove fruitful. But on matters of substantive content we found that our views were, and remained, too divergent to permit agreement even on a sketch of a theory of criminalization. That is hardly surprising—and in itself hardly of great interest: it is worth noting, however, that such disagreements have helped, rather than hindered, the more realistic (and still ambitious) project of developing a richer and more adequate overarching theoretical perspective on the problems of criminalization.

A second, and theoretically more significant, obstacle to developing 'a normative theory of criminalization' lies in the very complexity of the phenomena—of the decisions, practices, and institutions—to be theorized. Theorists are prone to talk (as our talk of 'the principles and values that should guide decisions about what to criminalize' implied) as if criminalization is a matter of decision by an authoritative legal body—presumably a legislature. From this perspective, to criminalize a particular type of conduct is to pass a statute defining that conduct as criminal, and attaching a sanction to it. A normative theory of criminalization would then be a theory of the principles, values, and aims that should guide legislatures in making such decisions.[7]

To understand criminalization in this way is, however, too narrow. For one thing, to talk in such terms is to ignore the role still played in some legal systems by a non-statutory common law—or perhaps to wish it away, on the grounds that a rational, principled system of criminal law must be a codified system. It is also to ignore the role played by the courts and judges who have to interpret a criminal code or statute in deciding cases: whether we see the Herculean task that

[5] R. A. Duff, L. Farmer, S. E. Marshall, and V. Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007).

[6] In the 'Case for Support' in our original application, p. 2.

[7] See e.g. A. P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs* (Oxford: Hart Publishing, 2011), 3, and 6 on 'the act of criminalization', which is clearly a legislative act.

faces judges in hard cases as that of seeking 'the right answer', or as that of trying to arrive at the best, or at least an acceptable, decision, they play a crucial role in determining which kinds of conduct are actually treated as criminal by the legal system; so surely a theory of criminalization should have something to say to them, about the principles, values, and aims in the light of which they should approach their task.[8] More importantly, though, to understand criminalization in this way is to overlook the role of enforcement of the law. As has been pointed out, from Oliver Wendell Holmes's account of the 'bad man' onwards,[9] the meaning of the law is less a matter of the law in the books than of the law in action. Criminal laws might be passed but not enforced; their enforcement and use will depend on interpretation by officials on the street; and so the content or meaning of the law, or at least its de facto effect on the lives of individuals, will ultimately depend on how it is interpreted by a range of enforcement officials—from police officers to prosecutors to those such as compliance officers or tax inspectors. From this perspective the question of who is criminalized, and how and for what, cannot be seen as a matter simply of legislative decision: it is a complex process, or set of processes, through which certain kinds of conduct come to be formally defined, to be understood (by officials and citizens), and to be treated (especially by various kinds of official) as criminal. A normative theory of criminalization will need to discuss the nature and structure, the proper operations and outcomes, of these processes.

A further complication, making the task of theory development yet more demanding, is that we cannot treat the criminal law as an isolated institution or practice. The criminal law is, after all, at least one amongst many kinds of law; its institutions and practices function within the overall institutional structure of the law. A theory of criminalization must therefore have something to say about the relationships, and the proper differences in function and in scope, between the criminal law and other modes of legal regulation. We will return to this point in Section III, but it is worth indicating here three ways in which this point raises complex issues for a theory of criminalization.

First, it is common to draw a contrast between 'real' criminal offences and 'regulatory' criminal offences.[10] There is more than one contrast here, and the different contrasts are sometimes conflated. One contrast is between offences that criminalize conduct that is wrong independently of its being regulated and offences that criminalize conduct that is wrong only in virtue of its being regulated (the contrast between crimes that are *mala in se* and crimes that are *mala prohibita*). Another is the contrast between offences that are deemed punishable and those to which mere penalties are attached (and there is more than one way to understand the

[8] We should also note that this perspective implies a somewhat dated view of the law-making process. First, it ignores the impact of membership of international and transnational bodies on law-making, given which the source of law might not always be a sovereign national parliament. Second, it overlooks the role of secondary or delegated legislation as a source of law. Both of these points are discussed further in Section II.

[9] Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review*, 10 (1897), 457, at 459.

[10] See Horder, and Chalmers and Leverick, in this volume, and Section II in this chapter, text at nn. 29–31.

distinction between punishments and penalties). A crucial question for any theory of criminalization is whether the latter range of offences really belong within the criminal law: or should they be formally separated off, into a distinct realm of non-criminal 'regulatory' or 'administrative' violations—as in the German system of *Ordnungswidrigkeiten*?[11]

Second, victimizing crimes are also very often torts: the perpetrator could, in principle if not often in practice, face not only criminal prosecution, but a civil case brought by the victim (or the victim's relatives or dependants). So how should we understand the respective aims of these two kinds of legal process—if we do have good reason to maintain them both? If tort law already provides victims with legal recourse against those who harmed them, why should we also criminalize the harmful conduct? If only some kinds of tort should also be criminal, which should be—and why?

Third, practices of 'preventive justice', which are increasingly common and significant as governments look for effective ways of preventing various kinds of harm or annoyance, also challenge theorists of criminal law, since they seem to blur the boundaries between criminal law and other modes of legal regulation and control.[12] This is especially true of measures that impose constraints on the conduct of individuals judged to be dangerous, or likely to offend, and criminalize any violation of those constraints: anti-social behaviour orders and control orders[13] are the two most familiar examples of this phenomenon; such measures restrict liberty through civil orders, the breach of which is sanctioned by the criminal law. We must ask both whether it is appropriate to use the criminal law in this way; and whether these kinds of restrictive orders are an appropriate way of addressing kinds of harmful or wrongful conduct—rather than simply leaving it to the criminal law to deal with such conduct once it is committed.

The larger question that these points raise is whether there is something distinctive about the character or function of criminal law. Is the criminal law just another mode of regulation? If it is not, as is implied by the suggestion that we can distinguish 'proper' criminal law from regulatory offences, then what are the distinctive features or characteristics of the criminal law? This also then raises the question of when it is appropriate to resort to the criminal law. Should it be used as a matter of first, or of last, resort; or are there other considerations that might come into play?

The task of building a theory of criminalization is already, one might think, challenging enough given the complex range of institutional practices and processes that it must capture and the need to explicate the criminal law's proper place

[11] *Gesetzüber 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', *Revue Internationale de Droit Pénal*, 59 (1988), 67.

[12] See especially A. J. Ashworth and L. Zedner, 'Preventive Orders: A Problem of Under-Criminalization?', in *The Boundaries of the Criminal Law*, and Section V in this chapter.

[13] See further (and on the new provisions that are replacing anti-social behaviour orders and control orders) at nn. 137–41.

among the range of other kinds of legal institution that make up the legal system as a whole. But three further challenges should be noted here.

First, although philosophical theorists of criminal law have often discussed the problems of punishment, of criminal liability, and of criminalization as if they are essentially problems in moral philosophy, they are also problems in political philosophy. The criminal law is not an institutional embodiment of the moral law, addressing and binding us as moral agents; it is a political institution, part of the state, and must address us as citizens—members of the polity whose law it is. A theory of criminalization must therefore include or depend on a political theory of state and society: it must be a theory of the role that criminal law should play within a particular kind of polity. Ambitiously universalist theorists might hope to offer theories of criminal law that will apply to every kind of polity—theories of what criminal law should be and mean in any and every kind of society, whatever its political structure. Given the criminal law's essentially political structure and foundations, however, it is arguable that any such universal theory of the criminal law would have to be grounded in a universal political theory of society and the state: failing such a political theory, we can only ask what kind of criminal law, serving what kinds of aim and structured by what principles, would be appropriate for this or that more particular kind of polity.

Second, and relatedly, the criminal law has a history; more precisely, every contemporary system of criminal law has a long and complex history—and different systems have different histories. What kind of attention should would-be normative theorists pay to those histories? Should they recognize that what they are theorizing is and cannot but be a particular system, with a history from which it cannot be detached? Or can they hope, to at least some degree, to transcend that history? To the extent that normative theorizing must attend to, or depends on a grasp of, the contingent, historical actualities of existing systems of criminal law, it must also therefore draw not only on the resources of legal theory and of normative philosophy (moral and political), but also on the disciplines that deal with those actualities: on history, on criminology, on sociology, on political science. The extent and character of such attention to historical contingencies is of course a matter of continuing debate (and one of the matters on which the editors have rather different views): is it, modestly, a matter of seeing how such historical contingencies make a difference to the practical application and implications of a set of ahistorical, non-contingent, normative principles; or is it, more radically, a matter of grounding the normative principles themselves in particular historical settings? On either kind of view, however, a substantive normative theory of criminalization must attend to the particular histories of the systems of criminal law that are to be theorized.

Third, further questions need to be addressed about the shape and structure, as well as the starting points, of a theory of criminalization. Such a theory must, we have noted, include, or be able to draw on, a larger political theory of the state; we have also noted that any aspiration to an ahistorical universality is at least controversial. But whether the theory is to be universal or not, we must also ask how neat and systematic we should expect it to be. It is tempting, in this as in other

contexts, to search for a grand unifying theory: an account of the proper aims of the criminal law (which must be part of any normative theory of its scope), of its proper scope and limits, and of how decisions about criminalization should be made, which appeals if not to a single master principle from which all else can be derived, then at least to a coherent set of principles which either do not conflict or include meta-principles by which any conflict can be resolved and from which we can derive specific and substantive conclusions about what should or should not be criminal. Prominent examples of this type of approach are the republican theory of criminalization defended by John Braithwaite and Philip Pettit,[14] the legal moralist theory defended by Michael Moore,[15] and the view recently proposed by Larry Alexander and Kimberley Ferzan, according to which the only purpose of the criminal law is to prevent the imposition of unjustifiable risks on legally protected interests.[16] Perhaps, however, the grail of grand theory is illusory: all that theorists should hope for or aspire to is a much messier, more piecemeal account that can do justice, as grand theories could not, to moral and/or social complexity.

In the following sections we will explore some of these challenges to the construction of a theory of criminalization in more detail, and use them as a framework in which to discuss some of the main developments in public and scholarly debate since 2007 (when we applied for our grant). We hope in this way, if not to sketch or even gesture towards a theory of criminalization, at least to indicate the directions in which future work can fruitfully proceed, the issues that need to be addressed, and some of the ways in which they can be addressed. This will contribute to our aim of helping to develop an 'overarching, theoretically informed, normative perspective' on criminalization: that perspective will need to be rather different from the more limited perspectives suggested by current debates, which too often take the basic divisions to be those between consequentialist and non-consequentialist theories, or between versions of legal moralism and harm-based theories.

II. The Complexity of the Phenomena

We have already noted the distorting tendency among theorists to see criminalization as a matter essentially of legislation. One effect of this is that the perceived problem of 'over-criminalization' is then understood as essentially a problem of legislative overactivity: that politicians are too prone to pass a new criminal law when faced with a perceived social mischief or problem; that criminal provisions are too routinely tacked onto pieces of legislation without proper scrutiny of the appropriateness of such uses of the criminal law or of their consistency with existing norms

[14] J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990). See also Pettit's chapter in this volume.

[15] M. S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997). See also Moore's chapter in this volume.

[16] L. Alexander and K. Ferzan (with contributions by S. J. Morse), *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009).

and principles. This understanding of over-criminalization explains the salience of claims such as the one which has acquired a certain currency in Britain: that the New Labour government created over 3,000 new offences between 1997 and 2006.[17] There is indeed clear evidence of 'penal populism' in many Western countries: politicians are too ready to seek electoral popularity by demanding more punitive sentences, building more prisons, appeasing victims' movements, passing new laws in response to moral panics, and so on.[18] It is not clear, however, that such penal populism is closely related to over-criminalization in the narrow sense of excessive legislation.

One difficulty with such claims about the increasing number of criminal laws or offences is that they are rarely accurate—and one reason for this is that quantifying criminal laws or offences is far from easy. As Chalmers and Leverick show, identifying and individuating crimes is fraught with difficulties.[19] The question of whether a particular piece of legislation has created several offences or only one might be a matter of drafting style or might be down to the judgment of the researcher—and in either case, while this might lead to a high or a low headline figure for the number of 'new' crimes, it might be better evidence of the level and forms of parliamentary activity than of the actual criminalization of conduct. A second problem, identified both by Chalmers and Leverick and by Hunter,[20] is that it is hard to know what counts as legislation. While many offences are created by primary legislation, a great number are created as adjuncts to other statutes regulating a wide range of activities, by statutory instruments, by local authorities' by-laws, and by regulatory bodies. This might lead to confusion for citizens—and perhaps point to the need for a requirement for legislators clearly to identify criminal legislation and to explain the reasons for it;[21] but this again points to concerns with the drafting and enactment of legislation rather than with criminalization as such. Even if we can satisfactorily resolve these kinds of issues of quantification—and Chalmers and Leverick have come closest to developing a satisfactory measure—there is no clear standard against which we can measure what would count as too many criminal laws or criminal offences, to which it might be replied that we do not need to know the appropriate amount of criminalization to know when there is too much.[22]

Another way of framing the claim about over-criminalization is to argue that we have too much of the wrong sort of criminal law. Theorists may distinguish the

[17] N. Morris, 'Blair's Frenzied Law Making: A New Offence for Every Day Spent in Office', *The Independent*, 16 August 2006, <http://www.independent.co.uk/news/uk/politics/blairs-frenzied-law-making--a-new-offence-for-every-day-spent-in-office-412072.html>; discussed by Chalmers and Leverick (in this volume) pp. 58–9.

[18] See J. V. Roberts, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford: Oxford University Press, 2003). See also J. Simon, *Governing through Crime* (Oxford: Oxford University Press, 2007).

[19] Chalmers and Leverick, in this volume, pp. 62–3.

[20] Both in this volume. See also Law Commission, *Criminal Law in Regulatory Contexts* (Law Com. CP No. 195; London: HMSO, 2010).

[21] See e.g. Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), ch. 1 suggesting that there is a need for reasons to be given.

[22] See also D. N. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2007), ch. 1.

'core' of criminal law from criminal laws lying outside the core.[23] It is natural then to see these 'outside the core' crimes as 'peripheral'—as not being part of the 'real', legitimate, criminal law. It is hard to know what to make of such contrasts between the core and the periphery without being given a clearer idea of how the core is to be identified. If it is taken, for instance, to consist in that set of familiar '*mala in se*' which is salient in so much theoretical writing about criminal law, the bulk of existing criminal law falls outside the 'core': but a normative theory of criminal law cannot simply exclude so much of existing criminal law by definitional fiat.

Two relevant suggestions are, first, that crimes 'outside the core' are those that do not (obviously) involve the kind of pre-legal moral wrongfulness that might be said to characterize 'core' crimes—which implies that criminal law, properly speaking, is concerned only with pre-legal wrongs; and second, that crimes 'outside the core' are those that do not respect some supposedly general principles of criminal law—for instance that they are offences of strict liability,[24] or impose reverse burdens of proof. These suggested criteria for identifying the core of criminal law might then be treated as normative criteria of legitimate criminalization: statutes should criminalize conduct only if it is (pre-legally) wrongful, and should conform to such general principles as '*actus non facit reum nisi mens sit rea*' and the presumption of innocence.

This kind of approach, which has received some support recently both from courts and from academics,[25] might not by itself provide much of a brake on the overenthusiastic legislation of criminal offences, but might at least help to ensure that criminal statutes meet minimal standards of justice. However, these principles can become problematic when we consider the vast array of 'regulatory' offences that constitute a large proportion of 'crimes outside the core'.[26]

One problem is that there is no close relationship between the *mala in se*/*mala prohibita* distinction and the serious/non-serious distinction. Some offences might be regulatory in the sense that the wrongness of the conduct prohibited depends on the existence of a regulation governing it, but this need not imply that the conduct is not very seriously wrongful; the fact that the conduct's wrongfulness is contingent upon its being regulated has no implications for its seriousness.[27] Even theft and criminal damage might be argued to be regulatory in this sense, in virtue of the fact that the wrongness of the conduct, at least in some instances,

[23] See e.g. W. Stuntz, 'The Pathological Politics of Criminal Law', *Michigan Law Review*, 100 (2001), 506; for a more critical discussion of the distinction between 'core' and 'periphery', see D. N. Husak, 'Crimes Outside the Core', *Tulsa Law Review*, 39 (2004), 755.

[24] This connects with the first suggestion insofar as it is supposed that the criminal law is concerned with *culpable* wrongdoing, and that strict liability offences permit conviction without proof of fault.

[25] See e.g. *Clingham (formerly C (a minor)) v Royal Borough of Kensington & Chelsea, R v Manchester Crown Court ex parte McCann* [2002] UKHL 39; [2003] 1 AC 787; for academic support, see e.g. A. J. Ashworth, 'Is the Criminal Law a Lost Cause?', *Law Quarterly Review*, 116 (2000), 225, and A. J. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn.; Oxford: Oxford University Press, 2013), chs 2–3; and Husak, *Overcriminalization* (n. 22), ch. 2, on 'internal constraints'.

[26] But not all of them: see Husak, *Overcriminalization* (n. 22), 36–45, on 'overlapping' and 'ancillary' offences, and offences of 'risk creation'; see also the Introduction to *The Boundaries of the Criminal Law* (n. 1), 3–5.

[27] See e.g. Bottoms' discussion of the criminalization of drink driving in this volume.

depends on property law. This fact hardly makes theft and criminal damage either non-serious or 'outside the core' of criminal law. So if there is a proper distinction to be drawn between 'real' and 'regulatory' criminal law, it is to be found elsewhere, perhaps in the form of the regulation, the penalties that attach to it, and the conditions of liability that are specified.

Furthermore, worries about overcriminalization are not restricted to regulatory offences. For example, lying is wrong independently of its being criminalized. Very broad dishonesty offences, such as the offence of fraud in English criminal law,[28] are nevertheless problematic. The fact that lying is typically wrong in itself, and not in virtue of state regulation, does not make its criminalization unproblematic. Lying might typically not involve wrongfulness that is serious enough, or of the right kind, to warrant its criminalization.

Despite such difficulties, it might still be claimed that some offences, in particular some kinds of regulatory offence, are not 'really' criminal offences: they are 'quasi-criminal', since conviction for them does not involve the kind of stigma that conviction for a 'real' criminal offence brings; and for that very reason we need not be so concerned about the requirements of *mens rea* and burdens of proof that are appropriate for 'real' criminal offences.[29] Theorists who want to preserve the principled purity of the criminal law are likely to argue in response that such offences have no place in the criminal law: we might be able to justify them as part of a separate, non-criminal, system of 'administrative' or 'regulatory' law, which prohibits and penalizes conduct but does not criminalize it;[30] but any criminal law must conform to the wrongfulness requirement and to the general principles of criminal liability. This, they might argue, is where the problem of over-criminalization is most acute: the problem is not that we have too much criminal law in the 'core', but that we have too much criminal law outside the core—too many *mala prohibita*, too much regulatory criminal law; the criminal law's reach is overextended, into areas where its use seems inappropriate.[31]

One problem with this line of argument is that, as Horder forcefully argues in his chapter in this volume, the line between 'regulatory' and 'proper' criminal offences

[28] Fraud Act 2006, s. 1; for discussion, see D. Ormerod, 'Criminalising Lying', *Criminal Law Review* (2007), 193.

[29] See e.g. the judicial dicta cited in A. P. Simester, 'Is Strict Liability Always Wrong?', in A. P. Simester (ed.), *Appraising Strict Liability* (Oxford: Oxford University Press, 2005), 21, at 23–4; but Simester adds some appropriately cautionary remarks about the relationships between the ideas of 'quasi-criminal' laws, of 'regulatory' offences, and of '*mala prohibita*'.

[30] See J. Feinberg, 'The Expressive Function of Punishment', in *Doing and Deserving* (Princeton: Princeton University Press, 1970), 95, at 96–8, on the difference between 'punishments' (which have a 'reprobative' meaning) and 'penalties' (which do not). But see Weigend, 'The Legal and Practical Problems' (n. 11); Duff et al., *The Trial on Trial (3)* (n. 5), 189–98; V. Tadros, 'Criminalization and Regulation', in *The Boundaries of the Criminal Law* (n. 1), 163.

[31] This claim taps into a broader argument about an over-regulation by the modern state which is at least implicit in many recent analyses of criminalization. See e.g. J. Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1985), ii. 357–73 on the colonization of the lifeworld; G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', in G. Teubner (ed.), *Juridifcation of Social Spheres* (Berlin: de Gruyter, 1987). See also S. Veitch et al., *Jurisprudence: Themes and Concepts* (2nd edn.; London: Routledge, 2012), 255–64.

has become blurred, so that it is hard to draw any sharp distinction between them. A more substantive objection is found both in Horder's chapter and in Chalmers and Leverick's: that whilst it is easy to object that there are too many regulatory offences, a closer and deeper examination suggests that many might be justifiable. We must at least be open to the possibility that different values or goals are properly relevant in different contexts of criminalization; that principles concerning moral culpability, and concerns with efficiency, might weigh differently in different contexts; and thus that not every legitimate criminal offence need involve the requirements of fault that characterize offences in the 'core'. Dimock, in her chapter in this volume, offers a contractarian rationale for a range of so-called *mala prohibita*, focused especially on market offences and offences against the state:[32] this is the kind of discussion in which theorists of criminalization need to engage more thoroughly than they often do, to tackle difficult questions about the precise form, the substantive content, and the normative grounding of 'regulatory' offences. Such discussion will also, as Dimock's chapter makes clear, involve important questions in political theory about the nature and aims of the state, about the scope of liberty, and about the legitimate grounds and forms of state coercion. We touch on these in Section III.

A further problem with the focus on legislation, which will turn our attention to other key players in the processes of criminalization, is that when a legislature passes a statute defining certain types of conduct as criminal, it might not intend that every instance of conduct fitting that definition should actually be treated as criminal—that *all* such conduct should, ideally, be detected, prosecuted, and punished.[33] This quite common phenomenon is sometimes made helpfully explicit. When what became the Sexual Offences Act 2003 was passing through the House of Commons, concern was expressed that ss. 9 and 14 would criminalize any kind of sexual activity (however consensual) between two young people aged 15. Paul Goggins, a Home Office Minister, assured the House:

> That is not the intention of the Bill; nor will it be its effect in practice. . . . There have . . . been no prosecutions simply for kissing; nor will there be in future. [I]f we find no other way to deal with this question, . . . we shall be able to trust the Crown Prosecution Service to ensure that that intention is followed.[34]

Legislatures often pass statutes that they know to be, if read literally, too broad, relying upon police or prosecutorial discretion to ensure that only kinds of conduct involving the mischief at which the statute is 'really' aimed are prosecuted: they delegate the task of criminalization, the task of deciding which kinds of conduct are actually to be treated as criminal, to others. A normative theory of criminalization

[32] See also S. P. Green, 'Why it's a Crime to Tear the Tag off a Mattress: Over-Criminalization and the Moral Content of Regulatory Offenses', *Emory Law Journal*, 46 (1997), 1533; R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007), 89–94, 166–74.

[33] We can leave aside here some familiar questions about what it means to say that a legislature intends this or that in passing a statute, or how such intentions can be discerned.

[34] Hansard vol. 409, 15 July 2003, col. 248.

will need to have something to say about such legislative tactics. Could they and should they be avoided, for instance through more careful legislative drafting and a principle of compulsory prosecution; or must such quasi-legislative discretion inevitably be delegated to police and prosecutors? If it is inevitable, criminalization is already shown to be a much more complex process than statutory legislation: we must then ask both about the conditions under which, and the considerations in the light of which, a legislature can properly pass what it believes to be (on its face) an overly broad statute, and about the considerations that should then guide other officials, especially police and prosecutors, in the exercise of the quasi-legislative power that is thus delegated to them.[35]

More generally, and even apart from such delegation of quasi-legislative power, police and prosecutors (as well as courts) play important roles in determining what kinds of conduct are in practice defined and treated as criminal. The police must decide where to focus their investigative resources—which kinds of case to investigate as (actual or potential) crimes. Whether this is a matter of developing policies or can be done on a more ad hoc, case-by-case basis, they must decide which cases to investigate further and to pass on to prosecutors, and which to ignore, or to deal with by formal or informal diversionary processes. Sometimes policing policies might amount to the de facto decriminalization of types of conduct that the law formally defines as criminal: if a police force institutes a policy of not prosecuting or reporting those found in possession of small amounts of a prohibited drug, it might be argued that such possession has, within that force's area, been decriminalized.[36] Prosecutors must also decide which cases to prosecute: in England and Wales, this requires them to decide not only whether there is sufficient evidence to ground a realistic prospect of conviction, but also whether prosecution would be 'in the public interest'.[37] Here too, prosecutorial policies might bring about the de facto decriminalization of conduct that is formally defined as criminal.

For example, in 2010 the English Director of Public Prosecutions issued a formal *Policy* specifying the factors that would guide decisions about the prosecution of those who assist others' suicides, in particular by helping them to travel to the

[35] Compare Stuntz, 'The Pathological Politics of Criminal Law' (n. 23), on the uneasy equilibrium between over-criminalization and under-enforcement in contemporary criminal law.

[36] See e.g. <http://www.direct.gov.uk/en/YoungPeople/CrimeAndJustice/TypesOfCrime/DG_10027693>, and <http://www.urban75.org/paddick/facts.html>, on such policies in the UK; also the Obama administration's instruction on federal prosecution of possession of medical marijuana: see <http://www.huffingtonpost.com/2009/10/19/new-medical-marijuana-pol_n_325426.html>. But we should bear in mind that decriminalization is not the same as legalization: if, for instance, those small amounts of the prohibited drug are liable to be confiscated, such possession has been de facto decriminalized, but not legalized.

[37] See Code for Crown Prosecutors (<http://www.cps.gov.uk/publications/docs/code2010english.pdf>), s. 4; A. J. Ashworth and M. Redmayne, *The Criminal Process* (4th edn.; Oxford: Oxford University Press, 2010), 199–206; also S. Moody and J. Tombs, *Prosecution in the Public Interest* (Edinburgh: Scottish Academic Press, 1982). For further discussion see J. Rogers, 'The Role of the Public Prosecutor in Applying and Developing the Substantive Criminal Law', in *The Constitution of the Criminal Law* (n. 1), 53. They must also, of course, decide just what charges to pursue—a decision of particular significance in systems that allow widespread plea bargaining and 'charge stacking': see Husak, *Overcriminalization* (n. 22), 22–3.

Dignitas clinic in Switzerland:[38] the document specifies sixteen 'public interest factors tending in favour of prosecution' (para. 43), and six 'tending against prosecution' (para. 45). It declares that 'only Parliament can change the law on encouraging or assisting suicide', and that '[t]his policy does not in any way "decriminalise" . . . assisting suicide', or give an 'assurance that a person will be immune from prosecution if he or she . . . assists' another's suicide (paras 5–6). However, the court's reasons for requiring the DPP to issue these guidelines had to do with the need to enable those whose contemplated conduct would fall within the statutory definition of assisting suicide to predict whether they would face prosecution, and plan their actions accordingly.[39] It is therefore hard not to read the document as, in effect, assuring anyone to whose case most or all of the factors 'tending against prosecution' (and none of those 'tending in favour of prosecution') apply that they will not face prosecution; indeed, it is at least arguable that if such a person was nonetheless prosecuted, the court should dismiss the case as an abuse of process. It is therefore tempting to say that, although such conduct is still formally criminal as a matter of statute, and although there is no evidence of a legislative intent or desire that it should not be treated as criminal, it has now been in effect decriminalized by the DPP. A theory of criminalization must have something to say about the roles of such officials in the practice of criminalization: what kind of power should they have to determine the effective scope of the law, and what kinds of consideration should guide their exercise of that power?[40]

The case of assisted suicide is perhaps more complicated than this, in ways that also bear on the project of developing a theory of criminalization, since we need to ask why the factors that the DPP specifies as tending against prosecution should do so. If the answer is that when these factors obtain, the assister's conduct is not (sufficiently) wrongful to merit conviction as criminal, or does not perpetrate the kind of mischief against which the statute can be taken to be aimed,[41] the policy amounts to a de facto decriminalization: it makes clear to citizens that such conduct, although it fits the law's formal definition of a crime, is not a kind of conduct from which they ought to desist as a criminal wrong. We might instead, however,

[38] Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, issued by the CPS in 2010 (<http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html>): the DPP was required to issue these guidelines by the court in *R (ex parte Purdy) v DPP* [2009] 3 WLR 403, [2009] UKHL 45.

[39] See e.g. *Purdy* (n. 38), paras 40–3 (Lord Hope), 84–6 (Lord Brown), and 96 (Lord Neuberger). The court was concerned with the requirements of 'accessibility and foreseeability' implicit in art. 8(2) of the European Convention on Human Rights: could a person know 'what acts and omissions will make him criminally liable', and foresee 'the consequences which a given action may entail' (para. 40; Lord Hope)?

[40] See also C. Steiker, 'Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration', in *The Boundaries of the Criminal Law* (n. 1), 27, arguing that at various stages in the criminal process officials should have, and use, a greater discretionary power to exercise mercy, to mitigate the systemic tendency to over-punish.

[41] Compare Model Penal Code § 2.1, on 'De Minimis Infractions': one ground for dismissing a prosecution is that 'the defendant's conduct . . . did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense'; see D. Husak, 'The De Minimis "Defence" to Criminal Liability', in R. A. Duff and S. P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2010), 328.

read the policy as implying that when these factors are present the assister's criminal culpability is mitigated to such an extent that, even though the law provides no formal excuse, it should be treated as excused - as not meriting conviction and punishment. If we also agree that while justificatory defences are addressed *ex ante* to citizens as guides for their conduct, excuses and excusatory mitigations are relevant only *ex post*, and do not provide *ex ante* guidance on which citizens may rely,[42] we might read the policy as declaring that, whilst assisting suicide is still a criminal wrong even when the factors tending against prosecution are present, it is one for which citizens can expect not to be held criminally liable when those factors obtain.[43]

We do not intend to try to settle this question here:[44] but it highlights a further complexity in the phenomena of criminalization, to do with the familiar distinction between two faces of the criminal law. On the one hand, it speaks to the citizens *ex ante*, specifying the kinds of conduct that are to count as public wrongs, and from which they ought to refrain. From that perspective, to criminalize some type of conduct is to define it as such a not-to-be-committed wrong, whilst to issue guidelines of the kind that the DPP has issued for assisted suicide is to suggest that some conduct which is formally criminal does not constitute such a not-to-be-committed wrong—which is in effect to decriminalize it. On the other hand, the criminal law also speaks *ex post* to those whose responsibility it is to administer the law, in particular but not only to courts, about the procedures through which, and the conditions under which, those who commit such wrongs ought to be prosecuted and punished. It might be argued that from that perspective, a 'public interest' policy of not prosecuting certain types of conduct that fall within the law's formal definition of an offence need not be understood as decriminalization, since it could instead be read as a policy of exempting from prosecution (for reasons either of compassion or of public policy) conduct that is still to be seen as criminally wrongful. If we reject (as we should) any policy of 'acoustic separation',[45]

[42] As is implied by the familiar distinction between 'rules for citizens' (among which justifications belong) and 'rules for courts' (which include excuse doctrines): see e.g. P. Alldridge, 'Rules for Courts and Rules for Citizens', *Oxford Journal of Legal Studies*, 10 (1990), 487; P. H. Robinson, *Structure and Function in Criminal Law* (Oxford: Oxford University Press, 1997); J. Gardner, 'The Gist of Excuses', *Buffalo Criminal Law Review*, 1 (1998), 575.

[43] It is not entirely clear which of these readings the Law Lords favoured in *Purdy* (n. 38). Lord Hope insisted (para. 26) 'that it is no part of our function to change the law in order to decriminalise assisted suicide', but some of his colleagues' comments suggest the former view: see e.g. Baroness Hale (para. 59: 'People need and are entitled to be warned in advance so that, if they are of a law-abiding persuasion, they can behave accordingly'); also Lord Brown (para. 83: 'I seriously question whether one should always deprecate conduct criminalised by section 2(1)').

[44] It might be clarified, or further complicated, by thinking about the implications of such guidelines for other officials, such as the police. If the guidelines amount to an effective decriminalization of conduct to which the 'factors tending against prosecution' apply, it would presumably be inappropriate for a police officer to try to prevent such conduct—to prevent the would-be assister from providing the assistance; but if they serve only to indicate the conditions under which what is still a crime will (for reasons of mercy or public policy) not be prosecuted, the police could still properly intervene to prevent the commission of the crime.

[45] See M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law', *Harvard Law Review*, 97 (1984), 625; for criticism, see R. Singer, 'On Classism and Dissonance

and insist that 'rules for courts' (and other legal officials) must also be accessible to citizens, such a policy should still be published, so that citizens can predict what kinds of conduct might result in prosecution; but what they are enabled to predict is when they can hope to escape prosecution for committing a crime.

What this review suggests is that, while legislation is clearly an important dimension of criminalization, a theoretical approach to criminalization must have a broader focus. In this context, Lacey offers a useful typology of different forms or dimensions of criminalization.[46] She distinguishes between criminalization as an outcome and criminalization as a practice—each understood as having both formal and substantive aspects.[47] Criminalization as outcome is a matter of what is or should be criminalized, either formally in legislation or through judicial decisions, or substantively in the actual implementation of those formal norms. Criminalization as social practice is a matter of who does the criminalizing (formal or substantive), through what procedures, and according to what principles. As Lacey points out, while both outcome and practice have normative dimensions, normative theorizing has tended to focus on criminalization as outcome, with the practice of criminalization being treated too often as an empirical question for criminology or socio-legal studies. This also highlights the need for an appropriate theoretical language in which to discuss the relations between these areas.

This is a challenge which is taken up in a distinctive way by Wacquant, both in his contribution to this volume and his work more generally.[48] Drawing on the work of Pierre Bourdieu, Wacquant suggests that developments in crime and punishment must be understood in terms of an ambitious social theory, which can incorporate an analysis of class, race, urban transformation, and the rise of the neoliberal state. On this account, the key concept is penality, and the focus is on how the criminal law and punishment are used by the state to manage the urban poor though a nexus of class and race. He argues that the criminal law is used as a distinct strategy in response to the social insecurity spawned by the precarization of wage labour and to the ethnic anxiety generated by the destabilization of established hierarchies of honour'.[49] His account thus challenges the treatment of criminalization and punishment as distinct but related phenomena, the latter a direct response to the former. Instead he argues that penalization should be seen as a response to political and economic development, rather than to crime or insecurity, and consequently that criminalization must be understood in terms of state transformation and strategy for the control or management of sections of society rather than

in the Criminal Law: A Reply to Professor Dan-Cohen', *Journal of Criminal Law and Criminology*, 77 (1986), 69. However one reads the decision in *Purdy*, it clearly rejected such acoustic separation.

[46] N. Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues', *Modern Law Review*, 72 (2009), 936; see also her 'What Constitutes Criminal Law', in *The Constitution of the Criminal Law* (n. 1), 12.

[47] Lacey, 'Historicising Criminalisation' (n. 46), 942–3.

[48] 'Marginality, Ethnicity, and Penality', in this volume. See also *Punishing the Poor* (Durham, NC, and London: Duke University Press, 2009); *Deadly Symbiosis: Race and the Rise of the Penal State* (Cambridge: Polity, forthcoming 2015).

[49] In this volume p. 278.

as a primarily normative question. This is an important challenge to moral and political philosophical approaches to criminalization, which tend to neglect this institutional or social dimension altogether.

One further dimension to the issue of complexity should be noted here. The simple focus on legislation assumes that national parliaments are responsible for criminal legislation. It is clear, however, both that national parliaments are frequently legislating to fulfil international obligations, and that international and transnational bodies are now a significant, independent source of new criminal norms. This means that questions about the relationship between the justification of political legitimacy and the justification of criminalization now play a crucial role not only at the domestic level (a topic to be discussed in Section III), but also in relation to issues of international and transnational criminal law. Indeed, it might be argued that the need for an account of the relationship between legitimacy and criminalization is particularly pressing at the international and at the transnational level, for two reasons. First, the relationship between legitimacy and criminalization has received even less attention at this level than it has at the domestic level. While, for example, there is sophisticated debate about how we should conceptualize,[50] or justify,[51] domestic political legitimacy, legal and political theorists have only recently begun to explore the idea of international legitimacy (particularly that of international institutions).[52] Second, it is at the international level that the relationship between issues of political legitimacy and of criminalization becomes most clear. Providing an account of international and transnational criminal law requires that we provide an account of the distinction between crimes that are the exclusive business of the domestic political community, and crimes that are (also) the business of other states or of international institutions:[53] when can domestic

[50] See e.g. A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1988).

[51] e.g. C. H. Wellman and A. J. Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University Press, 2005); G. Klosko, *Political Obligations* (Oxford: Oxford University Press, 2005); M. Renzo, 'State Legitimacy and Self-Defence', *Law and Philosophy*, 30 (2011), 575, and 'Associative Responsibilities and Political Obligation', *Philosophical Quarterly*, 62 (2012), 106.

[52] See e.g. A. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010), part 2; T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 119; P. N. Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in Besson and Tasioulas (eds.), *The Philosophy of International Law*, 139; D. M. Weinstock, 'Prospects for Transnational Citizenship and Democracy', *Ethics & International Affairs*, 15 (2001), 53.

[53] For some different kinds of approach to this task, see e.g. L. May, *Crimes against Humanity* (Cambridge: Cambridge University Press, 2005); A. Altman and C. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), esp. ch. 4; C. Wellman, 'Piercing Sovereignty', in Duff and Green (eds.), *Philosophical Foundations of Criminal Law* (n. 41), 461; L. May and Z. Hoskins (eds.), *International Criminal Law and Philosophy* (Cambridge: Cambridge University Press, 2010); D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Besson and Tasioulas (eds.), *The Philosophy of International Law*, 569; R. A. Duff, 'Authority and Responsibility in International Criminal Law', in Besson and Tasioulas (eds.), *The Philosophy of International Law*, 590; M. Renzo, 'Responsibility and Answerability in the Criminal Law', in *The Constitution of the Criminal Law* (n. 1), 209.

political institutions justifiably claim exclusive jurisdiction over criminal wrongdoing, and when may other states or international bodies justifiably insist on their right to intervene?[54]

Two points are worth noticing here. First, given that our understanding of transnational and international criminal law and our understanding of domestic criminal law are so closely interrelated, it is only to be expected that any answer to the question of how transnational and international crimes should be conceptualized will affect to some extent the way in which we understand domestic crimes, possibly leading us to rethink the way in which the structure and the boundaries of domestic criminal law are understood.[55] Indeed, one of the most interesting problems raised by the creation of international crimes is that, to the extent that these crimes are increasingly being incorporated into domestic legislations, they end up having a 'double-layered' structure: they constitute at the same time municipal criminal offences (insofar as they are part of domestic criminal codes) and international offences (insofar as they are enshrined in international treaties and *jus cogens* rules).[56] How to conceptualize this double-layered structure is a major challenge for scholars working on international and transnational criminal law.

Secondly, there are obvious limits on how much progress can be made in addressing these issues through general philosophical discussion. Thinking about specific problems, such as the way in which criminal law should deal with war crimes and terrorism, has proved to be a particularly fruitful way to think about how to conceptualize some of the fundamental categories of international and transnational criminal law.[57]

We will return to complexity in section IV, and in particular to the complexities introduced by the need to locate criminal law (institutionally and normatively) in the wide array of modes of legal regulation that characterize contemporary states. First, however, we should say more about some of the questions raised by the issue of legitimacy—an issue that bears as much on domestic criminal law as it does on international and transnational law: by what right do the various official actors involved in the making and enforcing of criminal law act as they do?

[54] On the significance of issues of jurisdiction for criminalization, see also 'Symposium on Criminal Jurisdiction: Comparison, History, Theory', *University of Toronto Law Journal*, 63 (2) (2013).

[55] See e.g. A. A. Haque, 'International Crime: in Context and in Contrast', in *The Structures of the Criminal Law* (n. 1), 106; Renzo, 'Responsibility and Answerability in the Criminal Law' (n. 53).

[56] See A. Cassese, 'Remarks on G. Scelle's Theory of Role-Splitting in International Law', *European Journal of International Law* 1 (1990), 210, 'The Rationale for International Criminal Justice', in A. Cassese et al. (eds.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 123.

[57] See e.g. J. McMahan, 'War Crimes and Wrongdoing in War', in *The Constitution of the Criminal Law* (n. 1), 151, on the relationship between *in bello* morality and *in bello* law; C. A. J. Coady, 'Terrorism and the Criminal Law', in *The Constitution of the Criminal Law*, 185, on the definition of terrorism and its implications.

III. Starting Points for a Theory of Criminalization: Moral or Political?

Any normative account of the proper scope and operations of the criminal law must clearly depend on an account of the legitimacy of the state. The criminal law is part of the apparatus of the state—a part that involves very obvious exercises of the state's coercive power. If we are to justify a system of criminal law, we must therefore be able to justify (or to appeal to a justification of) that coercive power. Legislators, judges, police officers, prosecutors, prison officials, and all the other actors who play official roles in the making and enforcement of the criminal law, in legislation, in law enforcement, in the criminal process, in the administration of punishment, all exercise that power. But by what right do they do so?

A normative theorist of criminal law might agree that her theorizing depends in this way on some account of the state's legitimacy, but argue that she need not herself provide such an account, or commit herself to any particular such account. For, she might argue, theories of criminal law need not be shaped or structured by any particular account of state legitimacy; they need only presuppose that some such account is available. This reflects a more general assumption that can be discerned (if only by implication) in much theorizing about criminal law—that criminal law theory is largely independent of political theory. Although in recent years there has been a growing, more explicit engagement with issues in political theory,[58] and although theorists often appeal to some usually vague and under-explained idea of a 'liberal' criminal law, they have too often treated criminal law theory more as a species of applied moral philosophy, without paying sufficient attention either to the implications for criminal law of different political theories or to the institutional framework and structure of the criminal law itself.[59] We will focus here on one central question about the way in which political theory, and conceptions of the state and political society, should figure in a theory of criminalization. Briefly stated, the question is: should a theory of criminalization start with an account of wrongs, understood independently of the criminal law and its institutional structure, and justify criminal law as an appropriate response to (some of) these wrongs? Or should we recognize that the wrongs with which the criminal law deals are always already embedded in a political-legal institutional framework, and that a theory of criminalization must therefore be grounded in a normative account of those institutions? This is one of the questions on which the editors have disagreed;[60] but the disagreement has been productive.

[58] This is reflected especially in the essays by Dimock and Pettit in this volume.

[59] Thus, for just one instance, Fletcher began his seminal book by saying that '[c]riminal law is a species of political and moral philosophy' (G. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), xix); but as the book develops, the moral philosophy dominates. But contrast Fletcher, 'Political Theory and Criminal Law', *Criminal Justice Ethics*, 25 (2006), 18.

[60] Compare, for instance, R. A. Duff and S. E. Marshall, 'Public and Private Wrongs', in J. Chalmers et al. (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), 70; V. Tadros, 'Wrongness and Criminalization', in A. Marmor (ed.), *Routledge Companion to Philosophy of Law* (London: Routledge, 2010), 157; and Farmer's chapter in this volume.

Any non-institutional approach must begin by identifying some set of pre-institutional concerns that need to be addressed, and then show how criminal law, as an institution of the state, is an (or the) appropriate way to address those concerns, or mischiefs. Those mischiefs might initially be identified in non-moral terms: on some versions of the Harm Principle, for instance, we should begin by identifying a range of harms, understood perhaps as setbacks to interests;[61] we then have reason to criminalize a type of conduct if doing so is likely to be an efficient way of reducing the incidence of such harms.[62] Or they might be identified in moral terms: we might begin not with some pre-moral notion of harm, or of offence, but with the idea of wrongful harm or offence, harms or offences that wrong those who suffer them;[63] or we might begin with some more precise moral value, for instance that of sovereignty, or dignity, and take as the relevant mischief conduct that violates such values;[64] or we might begin simply with the notion of (culpable) wrongdoing, and take the whole broad realm of moral wrongdoing as our starting point.[65] For simplicity's sake, to clarify the general point at issue here, we will focus on the legal moralist's claim that the relevant category of (pre-legal, pre-institutional) mischiefs is constituted by moral wrongdoing.

The claim that concerns us here is not the widely accepted 'negative' moralist principle that *only* wrongdoing should be criminalized (which does not take the wrongfulness of a kind of conduct to give us by itself, any positive reason to criminalize it), but rather the 'positive' moralist principle that the wrongfulness of a kind of conduct gives us reason to criminalize it.[66] That reason might, depending on the theorist, be preventive—that we have good reason to prevent wrongdoing, and criminal law can help to prevent it; or retributive—that culpable wrongdoing deserves punishment, which the criminal law can provide; or that wrongdoers should be called to account, which the criminal process can achieve. Wrongfulness is at most, of course, a good reason for criminalization, not a conclusive reason. No one supposes that, in the end and all things considered, we should criminalize

[61] As Feinberg famously defined harm: J. Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), ch. 1. For an alternative recent account, see Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), ch. 3. Feinberg's account of harm as a basis for criminalization, however, also builds in wrongfulness: what gives us reason to criminalize a type of conduct is that doing so will efficiently prevent *wrongful* harms.

[62] This is how the Harm Principle is explicated in its canonical formulations: see e.g. J. S. Mill, *On Liberty* (London: Parker, 1859), ch. 1, para. 9; Feinberg, *Harm to Others* (n. 61), 26. In actually applying the Harm Principle, however, theorists often instead take the key question to be whether the conduct to be criminalized itself causes or might cause harm: but see J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series (Oxford: Oxford University Press, 2000), 193.

[63] See e.g. Feinberg, *Harm to Others* (n. 61); Feinberg, *Offense to Others* (New York: Oxford University Press, 1985); Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), chs 3, 6.

[64] e.g. A. Ripstein, 'Beyond the Harm Principle', *Philosophy & Public Affairs*, 34 (2006), 215 (sovereignty); M. Dan-Cohen, 'Defending Dignity', in M. Dan-Cohen, *Harmful Thoughts: Essays on Law, Self and Morality* (Princeton: Princeton University Press, 2002), 150 (dignity). See further Section VI.

[65] e.g. Moore, *Placing Blame* (n. 15), and in this volume.

[66] On 'negative' and 'positive' forms of legal moralism, see R. A. Duff, 'Towards a Modest Legal Moralism', *Criminal Law and Philosophy*, 8 (2014), 217.

every kind of culpable wrongdoing. Some of the reasons that militate against criminalization may reflect other moral or political principles that bear on and constrain the criminal law: for instance the principle of liberty.[67] Others are more pragmatic, to do with the feasibility, efficacy, and costs of criminalizing a type of conduct.[68] Such pragmatic reasons are highly context sensitive, and no philosophical account of the criminal law can be expected by itself to yield determinate conclusions about what ought to be criminalized in a particular social, political, and historical context—though such accounts should have something to say about the kinds of consideration, both practical and principled, that should be relevant, and how they should be evaluated. However, we can focus here not on the question of what kinds of conduct should in the end be criminalized, but on the more modest question of what gives us good reason to criminalize a type of conduct, and on the legal moralist's claim that such good reasons are (always or only) grounded in the wrongfulness of the conduct in question.

Some legal moralists argue that there is a *pro tanto* reason in favour of criminalizing any and every kind of culpable moral wrongdoing: no kind of wrongdoing is in principle and *ab initio* outside the purview of the criminal law, although quite often this reason in favour of criminalizing a given type of wrongdoing is outweighed by other reasons against doing so.[69] Others argue that only certain kinds of wrongdoing are even in principle apt candidates for criminalization: others are simply and from the start not the criminal law's business. If we ask why some kinds of wrong should be thus excluded as candidates for criminalization, we will get different kinds of answer from different theories.

Some of those answers will appeal to moral rather than to distinctively political values and considerations. Mill's advocacy of the Harm Principle, for instance, was grounded in the value of individual liberty, and our duty not to interfere with each other's freedom except to prevent harm to others. That principle of non-interference of course applied to the state—with particular force, given the extent of the state's coercive power. But it was not itself a political principle, since it applied as much to social pressures as it did to legal or political coercion: it should 'govern…the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion'.[70] Similarly, it might be argued that we have a right to do wrong: a right to commit (certain kinds of) wrong, and to

[67] See Moore, in this volume.

[68] Compare J. Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (Dordrecht: Kluwer, 1994), on the 'filters' through which any proposal to criminalize a type of conduct must pass.

[69] Moore (*Placing Blame* (n. 15) and in this volume) is again the clear contemporary defender of this view. Some would also take Devlin to be this kind of legal moralist: no kind of immorality is in principle not the business of the criminal law; see P. Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965). Devlin's concern, however, was not with immorality as such, but with what was believed or deeply felt to be immoral by the members of the particular society; and he was concerned with such perceived or felt immorality only insofar as a failure to criminalize it might lead to the harm of social collapse.

[70] Mill, *On Liberty* (n. 62), ch. 1, para. 9.

bear the consequences, without interference from others.[71] That right might be grounded in the value of autonomous agency, and a claim that respect for autonomous agency requires us to leave each other free to commit such kinds of wrong. That right, that duty of non-interference, has implications for the state: plausibly, if citizens have a right to do wrong, the state must not interfere with that right's exercise; which implies, *inter alia*, that it should not criminalize wrongs that we have a right to commit. But this right to do wrong is not itself a political right, and is not grounded in any particular conception of the state and its proper aims: it is a moral right, which constrains the conduct of all agents—including state agents.

By contrast, other accounts of why certain kinds of wrong are not, even in principle, the business of the criminal law appeal to a conception of the state and its proper aims and limits. The most familiar kind of account along these lines appeals to a roughly liberal conception of political community, and of the state's role as the institutional manifestation or mechanism of such a political community. If we understand a political community as consisting, in part, in a set of relationships among citizens structured by a set of values that constitutes their collective civic morality, the liberal argument is that that civic morality should not include all the values by which citizens, as moral agents, should guide their own lives: that some values, important though they might be for individual lives, should not be understood as civic values in which the polity has a collective interest; and that those matters of 'private' morality are therefore not the business of the criminal law, as an institution of the state. Many liberals would say something of this kind about adultery, for instance. Fidelity in interpersonal relationships is, they might agree, an important moral ideal, which they try to exemplify in their own lives: but it is not an ideal that should figure in the civic or political morality of a liberal polity, as a 'public' value by which all citizens must qua citizens be bound (an adulterer can be a good citizen); violations of that value are therefore in principle not the kinds of wrong that should concern the criminal law—they are in principle not apt candidates for criminalization.[72] If we ask why we should set such limits on the values that are to count, and be enforceable, as the 'public' values of the political community, a familiar liberal answer is Rawlsian. If we are to sustain a stable political community in which citizens with very different conceptions of the good can respect each other, whose basic institutions all citizens can be expected to endorse, and in which the crucial set of basic liberties are protected, that community's public, self-defining values must be limited in this way; they can include only those

[71] See J. Waldron, 'A Right to Do Wrong', *Ethics*, 92 (1981), 21; D. Enoch, 'A Right to Violate One's Duty', *Law and Philosophy*, 21 (2002), 367; O. J. Herstein, 'Defending the Right to Do Wrong', *Law and Philosophy*, 31 (2012), 343.

[72] Echoes of the Wolfenden Committee's comments on kinds of wrong that are 'in brief and crude terms, not the law's business' (*Report of the Committee on Homosexual Offences and Prostitution* (London: HMSO, 1957), para. 61) should be evident here. The terminology of 'public' and 'private' wrongs, which has a long history in criminal law theory (see, e.g., Blackstone's *Commentaries on the Laws of England* (available at <http://avalon.law.yale.edu/subject_menus/blackstone.asp>), Bk IV, ch. 1, p. 5) is of course problematic: see Moore, in this volume, pp. 198–200.

values that all citizens, whatever their conceptions of the good, can be reasonably expected to endorse.[73]

The two approaches sketched above differ on whether every kind of wrong is in principle a candidate for criminalization, but they agree in a crucial starting point: for both begin with a general category of moral wrongs, understood and identified independently of the criminal law and its institutional structures (indeed independently of the state), and then ask which of those wrongs we have good reason to criminalize.[74] Both therefore face the criticism that we should not begin our theorizing about the criminal law in this pre-legal, pre-institutional, even pre-political, way, with a general category of moral wrongs: that we must instead begin with the political and the institutional, if we are to understand the criminal law and its proper or legitimate scope.[75] This criticism can be developed in different ways, but its central claim is that criminalizable wrongs take their character as wrongs that merit criminalization not—or not primarily or solely—from any pre-legal and pre-institutional wrongness, but essentially from their institutional setting and meaning: to identify and understand them as wrongs that we (a 'we' that is now already the political 'we' of a political community) have good reason to criminalize, we must understand them as wrongs committed within such an institutional setting—a setting that partly determines their meaning and their implications.

One way to develop this line of thought is to argue that any understanding of specific wrongs determinate enough to guide decisions about criminalization, determinate enough to show that and why we have reason to criminalize them, must be the product of a political process of norm formation—a process that itself involves the institutions of the law.[76] One obvious example of this point is that of wrongs connected to property: different normative understandings of property and of our interest in it, understandings which themselves reflect different political structures, will generate different views about whether, why and how such wrongs should be criminalized.[77] But, it might be argued, the point applies well beyond

[73] See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993). See also M. Matravers, 'Political Neutrality and Punishment', *Criminal Law and Philosophy*, 7 (2013), 217.

[74] It is worth noting that this kind of approach makes '*mala in se*' central to criminal law—as they are central to so much criminal law theory; they are precisely wrongs that can be identified as wrongs independently of the (criminal) law. So-called '*mala prohibita*' will then form a secondary category, of offences whose wrongfulness might seem by comparison more doubtful or tenuous. Critics will argue that this is one of the distortions to which an over-moralized approach to criminal law theory is prone.

[75] See Duff, 'Towards a Modest Legal Moralism' (n. 66). For a useful exploration of this contrast between moral and political starting points in the philosophy of punishment, see F. Tanguay-Renauld, 'Victor's Justice: The Next Best Moral Theory of Punishment?', *Law and Philosophy*, 32 (2013), 129.

[76] See M. D. Dubber, 'Criminal Law between Public and Private Law', in *The Boundaries of the Criminal Law* (n. 1), 191; L. Farmer, 'Criminal Wrongs in Historical Perspective', in *The Boundaries of the Criminal Law* (n. 1), 214; and Bottoms and Farmer in this volume.

[77] See e.g. the debate between Ripstein and Bird over the example of the 'harmless nap', where the different starting points (in a Kantian idea of the sovereign individual or in a Millian idea of harm) generate different understandings of the nature of the wrong: see Ripstein, 'Beyond the Harm Principle' (n. 64); C. Bird, 'Harm Versus Sovereignty: A Reply to Ripstein', *Philosophy & Public Affairs*, 35 (2007), 179; A. Ripstein, 'Legal Moralism and the Harm Principle: A Rejoinder', *Philosophy & Public Affairs*, 35 (2007), 195.

such clearly institutionally structured wrongs. There is, for instance, wide scope for disagreement, not about whether sexual assault and domination are wrongs, but about what kinds of conduct count as sexual, as assault, as domination; about the character, and the scope, of such wrongs; about whether they should be understood as 'public' or as 'private' and if as 'public', how the law should define and deal with them. Such disagreements implicate our understandings of the nature and scope of political community: they can be worked through, in a way that can generate a determinate-enough conception of such wrongs to feed into deliberations about whether and how to criminalize them, only as part of a political process of norm formation.

This approach is developed in the two chapters in this volume which take MacCormick's account of law as an 'institutional normative order' as their starting point.[78] For both authors, one of the most distinctive features of MacCormick's account is the claim that criminal law contributes to 'securing the conditions of social peace and civility'.[79] The first chapter, by Anthony Bottoms, focuses on the particular role played by the institution of criminal law in the building and sustaining of social trust, as a key component of social peace or order. While recognizing that trust is a generalized social phenomenon, Bottoms argues that the role played by the criminal law in the articulation and enforcement of public wrongs is crucial to the understanding and maintenance of social peace. However, he makes an important qualification to MacCormick's argument by showing that the breach of social peace is insufficient to justify the creation of a criminal law, and that criminal law must draw on a conceptual vocabulary of harms and wrongs as a means of identifying and expressing social interests. This theme is developed in a slightly different way by Farmer, who argues that MacCormick's claim should be read in terms of the purposiveness of the institution of criminal law. Criminal law protects certain objects or goods not because of their pre-legal moral value, but because they contribute towards certain social ends or goods. An institutional account of criminalization accordingly requires that we focus not only on the goods to be protected, but also on the ends which the law thereby hopes to bring about. Thus both accounts focus on the way that wrongs and harms are articulated within an existing institutional structure.

Another way to develop the claim that we must begin with the political, not (merely) with the moral, is to argue that an account of the criminal law, as a particular kind of essentially coercive institution, must begin with an account of the proper functions and powers of the state; and that what makes any conduct criminalizable, what constitutes it as a criminalizable wrong, is the way in which it seeks or threatens to undermine the state's functions. Thorburn, for instance, has been developing this kind of argument in a number of papers. He offers a (Kantian) liberal account of the essential function of the state as being 'to secure for all of us the conditions of freedom as independence': to secure the conditions

[78] D. N. MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007). See also now N. Lacey, 'Institutionalising Responsibility: Implications for Jurisprudence', *Jurisprudence*, 4 (2013), 1.

[79] MacCormick, *Institutions of Law* (n. 78), 221.

under which we can live together as free and equal agents, not vulnerable to arbitrary interference from others.[80] The criminal law, as part of the apparatus of the state, is then properly concerned with actions that 'demonstrate a willingness . . . to displace the legal rules themselves', and that thus constitute 'an injury to . . . the very idea of living together under law'.[81] This kind of account draws a sharp distinction between the pre-legal, pre-institutional character of such moral wrongs as rape, murder, and other kinds of attack on the person, and their character as criminalizable wrongs in the context of a state. What makes them criminalizable is not their pre-institutional moral character as wrongs against or attacks on individual victims, but their character as denials or violations of 'the very idea of living together under law'.

Our question is not whether we should accept something like Thorburn's Kantian account of the state and of the criminal law, but whether this is the right kind of approach to take to questions of criminalization. We can put the question in terms of the traditional idea of crimes as public wrongs.[82] On one kind of approach, which we labelled 'pre-institutional' above, we begin with a general category of wrongs, and ask which of them (understood still as the kinds of wrong that we initially identified) should count as 'public', i.e. as the proper business of the state and of the criminal law: the features in virtue of which we see them as criminalizable (for instance that they cause or threaten harm to others, or that they violate another's moral rights or sovereignty) are features that they already have, and that ground the determination that they should be counted as public wrongs. On the other kind of approach, which is exemplified by Thorburn's argument, the wrongfulness of the wrongs that we have reason to criminalize is already a public wrongfulness: what constitutes the relevant kind of conduct as wrongful, in a way that could concern the criminal law, is precisely its impact on, its implications for, or its meaning in the context of, the public realm of the polity. A simple version of this approach is found in the idea that a public wrong is just a wrong that has some harmful impact on 'the public'—on the citizen body as a whole: as Blackstone put it, crimes

> are breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. . . . [They] strike at the very being of society, which cannot possibly subsist, where actions of [that] sort are suffered to escape with impunity. In all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.[83]

[80] Compare Braithwaite and Pettit, *Not Just Deserts* (n. 14), 61–9, and Pettit's chapter in this volume, on 'non-domination' as the key good for a republican political theory.

[81] See M. Thorburn, 'Constitutionalism and the Limits of the Criminal Law', in *The Structures of the Criminal Law* (n. 1), 85 (the quotes are from 98 and 100); also his 'Justifications, Powers and Authority', *Yale Law Journal*, 117 (2008), 1070; 'Criminal Law as Public Law', in *Philosophical Foundations of Criminal Law* (n. 41), 21. For a Kantian conception of the state, see also A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009). Compare too A. Brudner, *Punishment and Freedom* (New York: Oxford University Press, 2012).

[82] See n. 72.

[83] Blackstone, *Commentaries on the Laws of England* (n. 72), Bk IV, ch. 1, p. 5.

But there are other ways of characterizing the essentially public nature of the kinds of wrong that could concern the criminal law.

In their contributions to this volume, Philip Pettit and Susan Dimock offer alternatives to the Kantian approach by appealing to two other prominent conceptions of 'the political'. Dimock draws on the contractarian tradition in political philosophy, which understands political societies as cooperative schemes whose purpose is to realize the mutual advantage of their members.[84] Within this framework, criminalization is justified instrumentally as a way of ensuring mutually beneficial cooperation among rational persons living together. Thus, for Dimock, legitimate forms of criminalization are only those that could be reasonably agreed to by members of society. Pettit, on the other hand, appeals to the republican tradition to whose revival he has powerfully contributed.[85] In this tradition, the fundamental value on which the justification of political legitimacy rests is *non-domination* – individuals' capacity to freely exercise their choices without being vulnerable to a power of interference by others. This capacity, Pettit argues, can be guaranteed only within a system of public law in which everyone is protected against interference with their basic liberties. Criminalization is a crucial element of this system, because through the imposition of costs accompanied by public condemnation on those who interfere with basic liberties, it provides individuals with the distinctively public security required by the republican conception of freedom.

Obviously, the plausibility of these theories of criminalization largely depends on the plausibility of the wider political theories within which they are embedded. We will not find Dimock's or Pettit's views convincing unless we think that political societies should indeed be conceived in contractarian or in republican terms. In this sense, for these authors the debate about criminalization can start only after we have addressed the more fundamental question of how we should understand political societies (although presumably they would agree that which conception of political society we should adopt is partly determined by how plausible the theory of criminalization that it generates is). However, not every attempt to characterize the public nature of criminal wrongs is necessarily married to a specific political theory like Kantianism, Contractarianism, or Republicanism. Some have argued in more general terms that the public wrongfulness of the kinds of conduct that we have good reason to criminalize consists, for instance, in their tendency to cause 'social volatility', or to undermine the trust on which the possibility of social life depends.[86]

[84] T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge: Cambridge University Press, 1996); D. Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); P. Vallentyne (ed.), *Contractarianism and Rational Choice* (Cambridge: Cambridge University Press, 1991).

[85] Braithwaite and Pettit, *Not Just Deserts* (n. 14); P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 2007), and *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

[86] L. C. Becker, 'Criminal Attempts and the Theory of the Law of Crimes', *Philosophy & Public Affairs*, 3 (1974), 262; R. Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), 65–71; S. Dimock, 'Retributivism and Trust', *Law and Philosophy*, 16 (1997), 37.

A familiar objection to such approaches is that they distort the character of the wrongs with which the criminal law deals (at least when those wrongs can be classed as *mala in se*): that our primary reasons for criminalizing murder, rape, and other attacks on the person lie in the (pre-legal, pre-political, pre-institutional) character of such wrongs as serious attacks on their individual victims, rather than in their impact on, or implications for, 'the public' or the polity as a whole. A major challenge for those who would begin in this way with the political is to show how they can do justice to what they take to be the essentially political character of the wrongs that can be the business of the criminal law, whilst at the same time explaining how the criminal law—in its definitions of such crimes, in the way that those who commit them are called to account and censured—is properly focused on the substantive wrongs that are done to the individual victims of crime.

The claim that criminal law theory must begin with the political, and with the character of criminal law as a particular kind of state institution, raises further, methodological issues that we noted in Section I. If we are to theorize criminal law not in the a priori abstract, but as a concrete political institution, we must see it as always being situated in some particular legal system, some particular political and social order, with a particular, contingent history. Normative theorizing about criminal law must also itself begin from within some particular tradition of thought, rooted within a particular political, social, and legal context. The question then is whether, or how far, it can hope to transcend such historical contingencies: either, at its most ambitious, towards a universal and a priori grounding for such institutions, and thus for the criminal laws that they structure; or, more modestly, towards some larger normative conception of criminal law and its institutional setting that, while still falling well short of universality, can make possible a critical appraisal of any particular set of legal and political institutions.[87]

That question also brings us back to the question of the relationship between criminal law theory and political theory. Whether criminal law theory should 'begin with the political' or not, it is clear that political theory must figure prominently in any theory of criminalization: even if we begin by thinking about moral wrongdoing and the kinds of response that it might invite or require, we must at some point ask what kind of interest the state can properly take in what kinds of wrongdoing. If we are to begin with the political, however, political theory must figure much earlier in the discussion, since we must begin with an account of the state, and of the structure and institutions of a political community. One question then concerns the proper ambitions of normative political theory: how far can political theorists sensibly aspire to a universalist account of the form that political community must take; how far should they instead aspire, more modestly, only to articulate what are admittedly historically contingent accounts of the forms that it

[87] Compare Lacey's comments ('Historicising Criminalisation' (n. 46), at 941) on 'the conditions of existence of social practices'. A related question concerns the extent to which a theory of criminalization should be substantive, specifying the proper content and scope of the criminal law; or procedural, concerned with the political processes through which issues bearing on criminalization are deliberated and decisions reached. For a move towards a more proceduralist account, see Duff, 'Towards a Modest Legal Moralism' (n. 66).

might take? A more relevant question for our present purposes, however, concerns the closeness of the connection between political theory and criminal law theory, in particular theories of criminalization. How far, in what ways, will different kinds of political theory have different implications for the aims, structure, and scope of the criminal law? Can liberal-minded criminal law theorists simply appeal, as many are prone to appeal, to an under-specified notion of 'liberal democracy' to work out what kind of criminal law could be appropriate for the citizens of such a polity: or do they need a more substantive picture of what a liberal democracy might be, and of the relationships between its citizens and between citizens and state, if they are to reach tolerably determinate conclusions about the role and the scope of a liberal criminal law?[88] Thus, in this volume, Marshall, for example, discusses the roles which citizens, in particular the victims of crime, inhabit in the criminal law process, and the civic duties of participation which those roles involve. In this context she also raises questions about how we should understand the relationship between these citizen roles and the roles and responsibilities of officials.

We must turn now, however, to a further kind of complexity with which any theory of criminalization must deal.

IV. Criminal Law and Other Modes of Regulation

Discussions of criminalization are sometimes conducted as if the choice facing legislators, or other officials whose decisions determine what is treated as criminal, is simply to criminalize or to do nothing; but that is, of course, far from the truth. Even when we have got to the point of identifying a social problem, or a socially problematic kind of conduct, that it would be possible to bring within the reach of the criminal law, the question is not simply whether or not we should do so, since criminalization is just one among many possible kinds of response to social problems; just one among other kinds of legal regulation and control. Legislators deciding what kinds of conduct they should formally criminalize, and officials deciding whether to treat as criminal conduct that has been formally criminalized, and citizens deciding whether to mobilize the criminal law in response to formally criminal conduct that they have suffered or witnessed, all face choices not between criminalizing and doing nothing, but between criminalizing and a range of other possible responses; a theory of criminalization must have something to say about the kinds of principle or consideration that should guide such choices.

We noted this point above as one of the complicating factors that face any attempt to develop a theory of criminalization;[89] in this section we will say a little more about some of these other kinds of response to problematic conduct, and about what is involved in the choices that have to be made between them.

[88] Compare M. Philips, 'The Justification of Punishment and the Justification of Political Authority', *Law and Philosophy*, 5 (1986), 393, against M. Davis, 'The Relative Independence of Punishment Theory', *Law and Philosophy*, 7 (1989), 321, on the relevance of political theory to theories of punishment.

[89] See text at nn. 10–12.

On one view, those choices are theoretically fairly simple—though in practice of course highly complex. The question to be answered is: which kind of response will be most cost-effective or efficient as a means to the relevant goals, the most obvious goal being to reduce the incidence of social harm or mischief, or to repair such harm or mischief as has been done. Criminal law is, on this view, one among other kinds of regulatory mechanism, to be used as one among other instruments to achieve our social goals; when and how it is to be used thus depends on decisions about its efficiency as compared to other available instruments.[90] This view does seem to characterize the way in which governments often respond to perceived social problems, but it leaves a number of questions unanswered. In particular, it leaves no room for the thought that the criminal law might be intrinsically, rather than instrumentally, appropriate (or inappropriate) as a response to some perceived social problem.

That thought might initially be suggested by the common slogan which has achieved the status of a legal principle in some jurisdictions, that criminal law should be a matter of 'last resort' (*ultima ratio*).[91] There are different ways of understanding this slogan: read literally, it requires that criminal law not be used until every other kind of available measure has been tried and found wanting; read less literally, it could be taken to mean no more than that the criminal law should be used only if and when it amounts to a proportionate response, or that the use of the criminal law carries a heavier burden of justification than other kinds of legal regulation.[92] The strict literal reading is not obviously plausible: we should at least consider whether criminalization cannot sometimes be an appropriate first resort, for instance because of the symbolic importance of such a response to some egregious kinds of wrong. Other, less literal readings might be taken as no more than useful reminders for legislators or prosecutors of the seriousness of the step that they are taking by criminalizing conduct. But they might also, by emphasizing the need for proportionality or the distinctive burden of justification, be pointing to something distinctive about criminal law as compared to other modes of legal regulation: although the criminal law does, of course, seek to regulate conduct, it is misleading to describe it simply as one among other systems of regulatory prohibitions that aim to reduce the incidence of the conduct that it prohibits.[93] We should rather, on this view, recognize that the criminal law operates in a quite distinctive way: for instance that it performs a particular kind of communicative function, speaking in a moral voice to define a range of public wrongs and to censure those

[90] See e.g. Law Commission of Canada, *What is a Crime? Challenges and Alternatives* (Discussion Paper) (Ottawa: Law Commission of Canada, 2003); N. des Rosiers and S. Bittle (eds.), *What is Crime? Defining Criminal Conduct in Contemporary Society* (Vancouver: UBC Press, 2004); also Horder's chapter in this volume.

[91] See K. Nuotio, 'Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach', in *The Boundaries of the Criminal Law* (n. 1), 238, at 255–7.

[92] See generally N. Jareborg, 'Criminalization as Last Resort (*Ultima Ratio*)', *Ohio State Journal of Criminal Law* 2 (2005), 521; D. Husak, 'The Criminal Law as Last Resort', *Oxford Journal of Legal Studies*, 24 (2004), 207.

[93] See the discussion in N. Lacey, 'Criminalization as Regulation: The Role of Criminal Law', in C. Parker et al. (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004), 144.

who commit them.[94] This suggests, however, that when we ask whether we have reason to mobilize the criminal law as a way of dealing with some social problem or mischief, we should attend not simply to its likely efficacy or inefficacy as a means of control or regulation, but rather to its intrinsic or non-instrumental appropriateness as a response to that mischief: given its distinctive character, given the way in which it characterizes the kinds of conduct that it defines as criminal (as public wrongs) and the nature of the response that it provides to such conduct (formal prosecution and punishment), is this an apt way to portray and respond to that mischief?

We can see the importance of this sort of question, and of this dimension of debate about criminalization, by looking briefly at some of the other ways in which we might collectively respond to problematic kinds of conduct or situation that might seem to be apt candidates for criminalization: this should help us to identify more clearly the kinds of question that must be answered, the kinds of choice that must be made, on the path towards criminalization.

Some would argue that we should, in principle, not even embark on that path. If, for instance, part of what is distinctive about criminal law is its connection to criminal punishment (that to criminalize conduct is to make it liable to punishment), and if criminal punishment cannot be justified, then criminalization cannot be justified.[95] Or, if to criminalize conduct is to condemn it authoritatively as wrong, and we should refrain from such would-be authoritative condemnation, criminalization cannot be justified.[96] We will not discuss such radically abolitionist ideas here,[97] but will instead look briefly at some of the alternatives that face us even if we are in principle willing to criminalize.

A. 'Restorative' responses

One kind of alternative is exemplified by 'restorative justice' programmes and processes, though it also includes other kinds of informal response that might not be included under that label.[98] Restorative justice procedures can of course figure within the criminal justice system: they can operate after conviction, as alternatives to or alongside punishment; they can operate as modes of diversion from

[94] See e.g. Duff et al., *The Trial on Trial (3)* (n. 5), part II; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), ch. 1.

[95] For recent abolitionist arguments about criminal punishment, see D. Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* (New York: New York University Press, 2005); D. Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008); and M. Zimmerman, *The Immorality of Punishment* (Peterborough: Broadview Press, 2011).

[96] This is a dimension of one central strand of abolitionist thought: see e.g. N. Christie, 'Conflicts as Property', *British Journal of Criminology*, 17 (1977), 1; L. Hulsman, 'Critical Criminology and the Concept of Crime', *Contemporary Crises*, 10 (1986), 63; H. Bianchi, *Justice as Sanctuary: Toward a New System of Crime Control* (Bloomington: Indiana University Press, 1994).

[97] But see R. A. Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2011), 30–4, 56–74.

[98] See generally G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (2nd edn.; London: Routledge, 2011); G. Johnstone (ed.), *A Restorative Justice Reader* (2nd edn.; Cullompton: Willan, 2012).

prosecution, after a person has been arrested for, and perhaps charged with, an alleged criminal offence. To the extent that they are available, criminal justice officials need to decide whether and when to divert cases from the criminal process into a restorative justice process. But such processes, whether formally organized or purely informal, can also constitute more radical alternatives to criminalization: problems that could in principle be treated within the framework of the criminal law, as involving criminalized or criminalizable conduct, can instead be treated outside that framework altogether. A decision that this is the best way to respond to a problem can be made quite informally by those most directly involved: rather than calling the police, they decide to deal with the matter informally among themselves. Or it could be made by officials: those with the authority to mobilize the resources of the criminal law might decide not to do so, either in particular cases on the basis of ad hoc decisions, or in classes of case as a matter of general policy; they might instead offer a state-supported restorative justice programme, or encourage those involved to seek their own informal resolution. Or the decision could be made by a legislature, which may decide not to formally criminalize a certain kind of conduct, or to make formal provision for a non-criminal, restorative response to certain crimes. In some cases, the process will still be focused on what is formally defined and perhaps seen as a crime: the decision will be to seek a non-criminal response to that crime. In other cases, the participants might adopt a more radically non-criminal perspective: rather than seeing the situation as one in which what is salient is a criminal wrong that merits condemnation, they see it as one in which people have a 'conflict' that must be resolved, or have 'trouble' in their social relationships that needs to be addressed in a way that might repair those relationships.[99]

To decide between a criminal law response and a restorative justice response (whether as a basis for legislation, or as a matter of official policy or in relation to a specific situation), we need to ask not just which kind of response is likely to be a more efficient means to some agreed end, but which is more appropriate to the salient features of the conduct or situation in question. In fact, it is not even clear that these different processes can be seen as means to the same end. To answer our question, then, we need to gain a clearer idea of the central or defining features of each response. We might think, for instance, that a criminal response focuses attention on an alleged wrong that was committed, and on the alleged perpetrator of that wrong as someone who should be called to account and censured for it; whereas, by contrast, a restorative approach focuses on some harm that has been caused or suffered, and seeks a less confrontational or accusatory process of mediation and negotiation to find ways to repair that harm and to reconcile those who were in conflict about it.

What matters here is not whether such characterizations of either a criminal law response or of restorative justice are apposite (and at least in the case of restorative justice there are by now so many different kinds of process claiming that title that

[99] See Christie, 'Conflicts as Property' (n. 96); Hulsman, 'Critical Criminology and the Concept of Crime' (n. 96).

it would be hard to find any non-vacuous general characterization that could apply even to most of them). The point rather is, first, that to decide whether or not to criminalize a particular type of conduct can involve deciding between criminalization and a range of other kinds of possible response; and second, that in order to make such a decision we must be able to grasp the characteristic features, aims and operations of each kind of response. If it is right to say that a criminal response is focused on calling the alleged perpetrators of public wrongs to punitive account, whereas a restorative justice response is focused on mediating between those who are in conflict, and on repairing harms that have been caused, we must ask which kind of response is appropriate to the situation at hand (a question which does not rule out the response 'both' or 'neither').[100]

B. Professional discipline

Many kinds of wrong that are, or could be, criminalized are actually dealt with, as wrongs, outside the criminal law. This often happens quite informally (when parents, for instance, discipline children within the family); but it also happens more formally when professional bodies or institutions operate their own disciplinary procedures. Doctors, lawyers, and many other professions have their own professional organizations, part of whose role is to lay down codes of conduct for members of the profession, and to discipline those who violate the code (indeed, it might be seen as one identifying feature of a 'profession' to have such a code and to enforce it).[101] Sometimes, of course, misbehaving professionals will find themselves facing both a criminal prosecution and a professional tribunal for the same wrong: a doctor who attacks a patient might be criminally prosecuted for assault and disciplined or struck off by his professional body (and it is worth asking why this does not amount to an improper kind of double jeopardy). In other cases, however, conduct that could be treated as criminal is instead dealt with as an 'internal' disciplinary matter for the professional body: either it is not defined as criminal at all; or, although it fits the criminal law's definition of an offence, it is left to be dealt with by the profession, rather than being put into the hands of the criminal law.

Consider, for example, plagiarism committed by students or by members of academic staff in a university. Arguably, at least some types of plagiarism fit the criminal law's definition of 'fraud': the plagiarist 'dishonestly makes a false representation' (that this essay or article is his own work), intending thereby 'to make a gain for himself';[102] and although in English law that 'gain' must be 'in money or other property',[103] that would be true when, for instance, the plagiarism is

[100] For some discussion of this question, see Marshall in this volume.

[101] We leave aside the armed forces, whose systems of military law administered by courts martial are even closer in character to the criminal law, though still separate from it: similar questions arise about which kinds of wrong should be left in the hands of the military, to be dealt with as a military matter, and which should instead (or as well) be put in the hands of the criminal justice system. Many employers will also have their own disciplinary procedures for dealing with 'internal' misconduct: these raise the same kinds of question.

[102] Fraud Act 2006, s. 2(1).

[103] Fraud Act 2006, s. 5(2).

intended to help the plagiarist win a prize or secure a promotion. Typically, however, even when the plagiarist fulfils the conditions of criminal liability, plagiarism is dealt with by the university concerned as an 'internal' disciplinary matter. The process might be analogous to the criminal process. Plagiarism is formally defined as an academic offence; a procedure is specified for dealing with allegations of plagiarism, including a hearing at which the alleged plagiarist is called to answer the accusation; if his plagiarism is established, there is then a formal finding that must be heard not just as a factual determination but as a condemnatory verdict; and this is typically followed by the imposition of a penalty (which, in the case of academic staff, could be dismissal). But why should such wrongdoing be treated in this way (with at least the tacit approval of the criminal law) as an 'internal' matter for the university, rather than as a criminal offence?

One answer to this question would appeal simply to considerations of cost-effectiveness in harm prevention: such wrongdoing is not so serious, or so threatening to people outside the academic institution, that it is worth expending the resources of the criminal law to deal with it; it is dealt with more efficiently and more economically as an internal matter. There might be more to it than that, however. Plagiarism, as seen through the academy's eyes, is not just a kind of fraud: it has a distinctive character as an attack on one of the institution's defining values. If it is that character, rather than its nature as one among other kinds of fraud, that is properly salient in our understanding of the wrong, we can see reason to leave ownership of the wrong with the academic institution itself.

Once again, our aim here is not to settle such questions about either the character or the proper allocation of the kinds of wrong with which professions might claim the authority to deal as internal disciplinary matters. It is rather to point out, first, that decisions about what to define or to treat as criminal can also involve deciding whether certain kinds of wrong are best dealt with under the criminal law, or as internal matters for an institution, a profession, or an employer; and, second, that such decisions about the proper allocation of wrongs might depend not merely on considerations of cost-effectiveness, but on a view of the character of the wrong and thus of whose business, whose wrong, it properly and primarily is.[104]

C. Government inspectorates

A common mode of regulation for complex activities in contemporary societies is for the government to create a specialized body—an inspectorate—one of whose central tasks it is to administer and enforce a body of regulations governing the conduct of those involved in that activity: obvious examples in England include tax inspectors who administer the regulations governing how individual

[104] It would in this context also be worth considering the reasons given by the Director of Public Prosecutions for his decision not to prosecute two doctors who had allegedly agreed to arrange 'sex-selection' abortions: the case was complicated, but among the reasons was the fact that the doctors had also been referred to the General Medical Council. <http://www.cps.gov.uk/news/latest_news/dpp_abortion_case_fuller_reasons/>.

and corporate tax is assessed and paid; and inspectors working for the Health and Safety Executive who administer the rules and requirements concerning health and safety that apply to a wide range of businesses and activities.[105] The regulations that such officials have to enforce might be quite separate from the criminal law—we discuss this kind of case in Section IV.D; or they might be backed by the criminal law in that it is made a criminal offence to violate the regulations or to impede or seek to undermine their implementation.[106] Even when the regulations are part of or backed by the criminal law, however, inspectors typically exercise a wide discretion about whether and when to bring a criminal prosecution: they may instead negotiate with the (alleged) violator to reach an agreement that avoids prosecution (and that involves no admission of liability).

Someone who is found to have evaded his taxes could face a criminal prosecution; but he might instead be offered an arrangement under which he pays the tax owed, plus a further substantial penalty payment, and avoids any criminal prosecution or liability. This is indeed the most common way of dealing with discovered tax evasion: in 2010–11 there were fewer than 500 criminal convictions for tax evasion, while 2,000 people were put in the 'Managing Deliberate Defaulters' programme (without being prosecuted),[107] and many others were dealt with through 'the cost effective Civil Investigation of Fraud (CIF) procedures'.[108]

Similarly, health and safety inspectors will often not prosecute firms which they believe have been violating health and safety regulations: they will instead seek to negotiate with the firm to work out effective agreements and procedures to improve safety and to guard against future violations—agreements that are likely to involve no admission of liability, even if they do include substantial payments to repair past harm or to put in place future precautions. An interesting procedure in this context is that of the 'Deferred Prosecution Agreement', under which prosecutors agree to suspend prosecution of a corporation so long as it avoids future commissions of the relevant kind of offence and makes such changes in its operations as the agreement requires.[109]

In both these kinds of case, officials have to decide whether to treat conduct that (as they have good reason to believe) constitutes the commission of a criminal

[105] See generally I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992); C. Wells, *Corporations and Criminal Responsibility* (2nd edn.; Oxford: Oxford University Press, 2001); J. Gobert and M. Punch, *Rethinking Corporate Crime* (Cambridge: Cambridge University Press, 2003), ch. 9; K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2003).

[106] See, for just one instance, the provisions of the Health and Safety at Work etc. Act 1974.

[107] See HM Revenue and Customs, *Closing in on Tax Evasion* (London: HMRC, 2012), 8 (also available at <http://www.hmrc.gov.uk/budget-updates/march2012/tax-evasion-report.pdf>).

[108] See e.g. *HMRC Code of Practice 9*, 2011 (available at <http://www.hmrc.gov.uk/leaflets/cop9-2011.htm>) on the CIF process; also *HMRC Criminal Investigation Policy* (<http://www.hmrc.gov.uk/prosecutions/crim-inv-policy.htm>) 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'.

[109] See D. N. Husak, 'Social Engineering as an Infringement of the Presumption of Innocence: The Case of Corporate Criminality', *Criminal Law and Philosophy*, 8 (2014), 353.

offence as criminal:[110] whether, in effect, to criminalize that conduct or to deal with it through some non-criminal negotiation and agreement (although of course the background threat of criminal proceedings can provide the supposed perpetrator with a powerful incentive to reach an agreement). So we must again ask not only what kinds of consideration should lead a legislature formally to define such conduct as a criminal offence, but also what kinds of consideration should guide officials in deciding whether to treat the conduct as criminal—i.e. whether to prosecute it in a criminal court. Practical considerations must clearly loom large in such decisions. Some will be the kinds of consideration that also apply in the context of criminal plea bargaining: what are the chances of a successful prosecution; what would it cost to pursue the case? Others are rather to do with securing future benefits or preventing future harms: is a CIF procedure more likely to result in the recovery of larger amounts of unpaid tax; what is likely to be the most effective way to persuade a company to improve its safety procedures? But, once again, we should not assume that such practical considerations are the only relevant ones—that criminal law should be seen as an instrument or technique alongside such other mechanisms, and that our choice of technique should be dictated purely by considerations of efficiency in pursuing the relevant social aims. We must at least ask whether there are other relevant considerations, for instance to do with the importance of calling public wrongdoers to public account, which bear on such decisions. To answer that question, however, we must attend more carefully to what is distinctive about the criminal law as a particular mode of regulation.

D. *Ordnungswidrigkeiten* and 'regulatory' offences

We have already noted the existence in some legal systems of a category of non-criminal, 'regulatory', or 'administrative' offences, such as the German *Ordnungswidrigkeiten*.[111] Such 'regulatory infractions' supposedly differ from 'real' criminal offences in at least three ways: they do not attract the formal censure that attaches to criminal convictions; while they may be sanctioned by fines, or disqualifications from the activities in which the infraction occurred, imprisonment is not a possible penalty; and the procedures through which they are dealt with are simpler than those of a criminal trial (and provide fewer protections for the alleged violator).

One question is whether, and on what basis, such a system of regulatory infractions is to be seen as genuinely distinct from criminal law. The European Court

[110] Which in the case of deaths at work, for instance, could involve prosecution either for a breach of health and safety regulations, or for corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007: see S. Antrobus, 'The Criminal Liability of Directors for Health and Safety Breaches and Manslaughter', *Criminal Law Review* (2013), 309. There are of course further issues, which we cannot address here, about whether it should be corporations, or individual managers or directors, or both, who are prosecuted.

[111] See at nn. 10–11. See also Law Commission of Canada, *What is a Crime?* (n. 90), and *Our Criminal Law* (Ottawa: Law Commission of Canada, 1976); for more critical discussion, see Duff et al., *The Trial on Trial (3)* (n. 5), 189–98.

of Human Rights had to discuss this question in relation to the application of article 6 of the European Convention on Human Rights. Is someone accused of a regulatory infraction facing 'a criminal charge', in which case he is entitled to the various protections laid down in article 6 as entailed by the 'right to a fair trial'? Or can it be argued that these protections are unnecessary, since he is not facing a criminal charge? The court held that a state could not render a law or an offence non-criminal simply by relabelling it: to determine whether it should count, for the purposes of the ECHR, as a criminal offence attention must also be paid to the nature of the offence, and to the nature and severity of the available penalty; and the court had the authority to hold that what a member state had classified as a non-criminal infraction should be treated as a criminal offence.[112] This introduces a further complication to debates about criminalization, and to the question of what it is to criminalize a type of conduct: if we attend not (merely) to the formal classification of a regulation as 'criminal' or as 'non-criminal', but also to the substantial role that it plays in the legal system, we might see reason not only to argue that some offences formally classed as criminal are not 'real' crimes,[113] but also to argue that some offences formally classed as non-criminal are or should be treated as 'real' crimes, in virtue of their character, or the reasons for defining them as offences, or the kinds of penalty that they attract.[114]

However, suppose that a suitably designed system of regulatory infractions can be clearly distinguished from criminal law. The next question is whether we should create or maintain such a system alongside the criminal law; and, if we should, how we should determine which kinds of violation should be defined as criminal, and which as (merely) regulatory. But we cannot answer these questions without getting a clearer idea of the proper aims of either kind of system. If we could see both in purely instrumental terms, as means of regulating conduct and preventing future harmful or wrongful misconduct, our task would be theoretically quite simple. We might argue, for instance, that while the criminal law, with its stigmatizing or censuring significance and the seriousness of the sanctions that it imposes, could be efficient as a means of dealing with seriously wrongful or harmful kinds of conduct, it is too coercive and costly an instrument for dealing with less serious kinds of conduct that we nonetheless need to regulate or deter; and that, while due respect for the rights of those facing criminal charges requires us to construct a criminal process that offers them the kinds of protection captured in article 6 of the ECHR, we would not need to provide such costly protections for those facing only a regulatory or administrative charge. This line of thought could favour the creation of a distinct system of regulatory infractions, as a cheaper and more efficient way of regulating less seriously harmful or wrongful kinds of conduct.

As we have suggested before, however, such a purely instrumentalist perspective seems inadequate. We need to ask more carefully about the proper aims of each kind of system (are they both best understood as institutional techniques serving the same ends?), and about the meanings and value that they can be seen to

[112] See *Öztürk v Germany* (1984) 6 EHRR 409; *Lauko v Slovakia* (2001) 33 EHRR 40.
[113] See at n. 29. [114] Compare also Ashworth and Zedner, 'Preventive Orders' (n. 12).

embody. For instance, should we see a system of regulatory infractions as serving a primarily deterrent purpose—as imposing penalties whose primary aim is to make compliance with the regulations prudentially attractive? Or should we see it instead, or also, as a way of making sure that the costs of various kinds of dangerous or harmful conduct are exacted from those engaging in such conduct?[115] In either case, is this an aim that we should pursue in this way? Only when we have a clear view of the aims that such a system can properly serve, and of the proper aims of a system of criminal law, can we tackle the questions of whether we should maintain both kinds of system and, if we should, how we should decide the proper scope of each.

E. Private or public law?

The different kinds of regulatory regime discussed so far belong to the realm of public law: regulations are laid down by a public body, and are enforced by public officials; cases are brought by those officials, acting in the name and on behalf of 'the public', the polity as a whole. However, we must also attend to the realm of private law, most obviously tort law and contract law: for here we face yet further questions about the relationship between criminal law and other types of law. We can focus here on tort law, although similar questions arise about aspects of contract law (including the question of why breach of contract should be criminal only when it involves fraud or coercion).

Some torts are of course also crimes: if by recklessly lighting a bonfire, you burn down my garden shed, the police could charge you with criminal damage, and I could sue you to recover the cost of replacing my shed. Others are not: in many countries defamation and libel are not criminal offences, but those who are defamed or libelled can bring a tort suit;[116] and if you cause me harm by conduct that falls below the appropriate legal standard of care, but that does not involve the kind of fault that is required for criminal liability, you may be tortiously but not criminally liable. So we need then to ask about the proper scope of each kind of law, and about the proper relationships between them. Which kinds of case are apt (only) for tort law, and which should fall (instead or also) within the criminal law? If such distinctions are important, we need an account of the proper aims of each kind of law.[117]

Suppose, for instance, that we see tort law as being primarily concerned with allocating the cost of harm that has been caused: it enables those who have suffered

[115] See generally Tadros, 'Criminalization and Regulation' (n. 30); also Horder, in this volume.

[116] Article 19, a body which campaigns for 'freedom of expression and information', has data about the ways in which different countries treat defamation as a criminal or as a civil matter (<http://www.article19.org>).

[117] See generally M. Dyson (ed.), *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014). There are further questions about the ways in which tort law and criminal law can interact or interweave: for instance about the ways in which victims-plaintiffs can become involved as prosecutors of, or as parties to, criminal cases, or can join their claims for civil compensation to the criminal prosecution of the person who wrongfully harmed them.

harm to transfer the costs of that harm (the cost of repairing it, or of compensation for it) onto the person whose faulty conduct caused it. There would then of course be further questions about the basis on which these allocations should be made: should they be based on considerations of economic efficiency, for instance, or of justice? But if we could say that that is the proper concern of tort law, whereas criminal law is rather concerned with calling to public and punitive account those who commit what it defines as public wrongs, we could see how the two kinds of law differ quite radically in their aims, and thus see how we could begin to determine which kinds of case should belong to which of them. But suppose we instead see tort law as theorists of 'civil recourse' portray it:[118] as enabling those who are wronged to call those who wronged them to account, and to obtain redress? Now the task of distinguishing criminal law from tort law becomes much harder: both are dealing with wrongs, and with wrongs that are 'public' in the sense that they are formally recognized as wrongs that merit some legal response;[119] both make it possible to call a wrongdoer to public account for his wrong. So how would they now differ in their proper aims, and how should we decide which kinds of wrong belong to which?

We do not suggest that either the simple cost-allocation model or the civil recourse model provide adequate accounts (either descriptive or normative) of tort law—indeed, we doubt that they do. But the point here is, again, that a normative theory of criminalization must include an account of the criminal law's relationship to other modes of legal regulation, other kinds of legal process through which legally cognizable harms or wrongs might be addressed; and that any such account must involve an explanation of the proper functions of these other kinds of legal provision. If we are to work towards a decision about which kinds of wrongful, harmful, or otherwise undesirable conduct should be criminal, we must ask not only which kinds should attract the law's formal attention, but which should fall within the purview of the criminal law, rather than being assigned, for instance, to the realm of private law, or to a regime of non-criminal regulation. But to answer that kind of question we must understand what these other modes of law are or should be for, as well as what criminal law is or should be for. This is not to suggest that a normative theory of criminalization must be a normative theory of all of law (as well as of all the kinds of extra-legal process and provision noted in this section). It is, rather, to emphasize that the criminal law cannot be theorized in isolation; and to suggest that it would be a mistake to view all these different modes of regulation in simple instrumentalist terms, as so many techniques through which states can seek to control the conduct of their citizens. The different 'techniques' have their own distinctive characters and purposes; we must therefore ask not just which is more likely to be cost-effective as a means, but also which is appropriate to the character of the mischief that is to be addressed.

[118] See B. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts', *Vanderbilt Law Review*, 51 (1998), 1; J. Goldberg and B. Zipursky, 'Torts as Wrongs', *Texas Law Review*, 88 (2010), 917.

[119] See A. Y. K. Lee, 'Public Wrongs and the Criminal Law', *Criminal Law and Philosophy*, 8 (2014).

V. Blurring the Boundaries: Preventive Justice

A discussion of the relationship between criminal law and other modes of legal regulation or control must include or presuppose an account of the distinctions between the different kinds of law or process. We have already noted that those distinctions—for instance, that between criminal law and non-criminal 'administrative' regulation—might not be sharp or clear: they might not be formally distinguished; and even if they are formally distinguished in the law, there might be room for argument about whether they are substantively distinct. What is also worth noting is the way in which governments can blur such distinctions in practice, by introducing measures and policies that in effect interweave or even merge criminal law with others modes of regulation and control.

One example of this phenomenon which has become more significant in recent years is the way in which criminal law and immigration law are used together: criminal law is used increasingly to enforce immigration restrictions and controls; immigration law (notably the power to deport) is used increasingly to back up the criminal law; immigration and criminal officials work closely together as if engaged in the same enterprise.[120] But we will focus here on another example: the range of practices captured by the label 'preventive justice', which threaten to disrupt our traditional understandings of criminal law itself and of the boundaries between criminal law and other forms of legal regulation and control.[121]

Some idea of prevention is inextricably bound up with any system of criminal law: for to define a type of conduct as criminal is to mark it as conduct in which those bound by the law should not engage, and therefore as conduct that they collectively have reason both to eschew and to prevent. Such prevention might not itself be a matter of criminal law: we can seek to prevent crime in a variety of ways, including education, 'early interventions' in contexts in which we can identify criminogenic factors, improvements in welfare provision and in social justice, 'situational crime prevention',[122] and so on. But the criminal law itself can plausibly be seen as having two kinds of preventive aim.

First, some idea of prevention is intrinsic to the operations of a legal system. Once a type of conduct is defined as criminal, the law permits or prescribes measures that aim to prevent it: part of the function of a police force is crime

[120] See e.g. D. A. Sklansky, 'Crime, Immigration, and ad hoc Instrumentalism', *New Criminal Law Review*, 15 (2012), 157; A. Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement', *Theoretical Criminology*, 16 (2012), 417; A. M. McLeod, 'The U.S. Criminal-Immigration Convergence and Its Possible Undoing', *American Criminal Law Review*, 49 (2012), 105.

[121] See especially A. J. Ashworth and L. Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law', in *Philosophical Foundations of Criminal Law* (n. 41), 279, 'Prevention and Criminalization: Justifications and Limits', *New Criminal Law Review*, 15 (2012), 542; 'Preventive Orders' (n. 12); A. J. Ashworth, L. Zedner, and P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).

[122] On which see A. von Hirsch, D. Garland, and A. Wakefield (eds.), *Ethical and Social Perspectives on Situational Crime Prevention* (Oxford: Hart Publishing, 2000).

prevention; and the police (and others) may intervene, if necessary coercively, to prevent the commission of crime. The criminal process of trial and punishment to which those accused of committing crimes may be subjected might not be theorized in primarily preventive terms, since some will explain its justifying purposes as responsive rather than preventive: but at least part of the aim of this aspect of a criminal justice system must be to reduce the incidence of future crimes. Many of the provisions made for those undergoing punishment are quite properly aimed at preventing reoffending (even if such prevention is not the primary justifying purpose of their punishment); if an offender who has been punished reforms himself because, as he sincerely says, his punishment brought him to recognize the need for such self-reform, we would count that as a success. These remarks are not intended to deny the importance of the long-running debates between 'retributivist' and preventive accounts of criminal punishment; they are simply intended as reminders of some of the ways in which a system of criminal law cannot but aim at prevention.[123]

Second, prevention can also figure as the, or an, aim of criminalization: if we ask why we should criminalize a certain type of conduct, one answer will be that we should do so in order to prevent…; but to prevent what? Skating over the important substantive differences between various answers to this question, we can say that this conception of criminalization as serving a preventive purpose must begin with an account of some 'non-trivial harm or evil' that is to be prevented:[124] we then have reason to criminalize a certain type of conduct if doing so will effectively prevent (or at least reduce the incidence of) that harm or evil. Already, however, a complication should be noted—a disjunction between two ways in which the notion of a non-trivial harm or evil could function as a ground for criminalization. First, it might be that what gives us reason to criminalize Φ is that by criminalizing it we will prevent a non-trivial harm or evil (or that if we do not criminalize it some non-trivial harm or evil will ensue): the focus is on whether the criminalization itself is efficiently harm preventive. Or, second, it might be that what gives us reason to criminalize Φ is that Φ itself constitutes or causes a non-trivial harm or evil: the focus is on the harmfulness of the conduct to be criminalized. Orthodox renditions of the harm principle typically express it in the first way;[125] but when the principle is actually applied, it is often implicitly interpreted in the second way. These two readings will of course often generate similar conclusions: an efficient way of reducing the incidence of a harm or evil is often to criminalize, and thereby reduce the incidence of, conduct that constitutes or causes that harm or evil. But they can diverge, in particular when (which will be important in what follows) we

[123] Although there is much more to be said about the very idea of prevention, and about the significance of the differences between various modes of prevention: for instance, between normative persuasion that prevents by showing the person good reasons why she should not offend; deterrence that prevents by making crime imprudent; and incapacitation that prevents by making crime impossible.

[124] See Husak, *Overcriminalization* (n. 22), 65–72, for the argument that we can find within the criminal law a principle that '[c]riminal liability may not be imposed unless statutes are designed to prohibit a nontrivial harm or evil'.

[125] See n. 62 and references given there.

can more efficiently reduce the incidence of a non-trivial harm or evil by criminalizing conduct that might not, or not directly, constitute or cause it. Speed limits and other kinds of driving regulation, backed by the criminal law, illustrate this possibility: what justifies imposing a strict speed limit is not that everyone who drives at a speed in excess of the limit either causes harm or creates an unreasonable risk of harm, but that this is a more efficient way of preventing the harms that dangerously fast driving causes than by criminalizing only driving that can be shown to have been dangerously fast.

Our concern in this section, however, is not with these familiar ways in which prevention might figure in normative theories of criminal law, but with some ways in which a concern to prevent what are perceived as non-trivial harms of evils has fuelled significant changes in the scope and operations of the criminal law—changes on which the study of 'preventive justice' focuses. As we will see, the phenomena captured by 'preventive justice' are not wholly new; but they have expanded significantly in recent years, in ways that raise difficult normative questions about the proper scope and aims of the criminal law. We can identify two kinds of 'preventive' strategy that have been adopted by governments anxious to address (and to be seen to address) some kind of harm, evil, or threat that is perceived as serious and for which (it is thought) orthodox criminal law responses are inadequate.[126] The perceived threats that have, in Britain, driven a number of such strategies are terrorism and 'anti-social behaviour': we can illustrate the problems raised by 'preventive justice' by provisions addressing each of these two kinds of perceived threats.

One kind of provision involves expanding the scope of the substantive criminal law—the creation of new offences, or the expansion of existing offences. On a traditional view of the criminal law, the paradigm offence consisted in conduct that itself constitutes, or that directly causes, the non-trivial harm or evil (the mischief) at which the law is directed: this was true of the most salient *mala in se*, such as murder, rape, and other injuries to the person.[127] Now the criminal law's reach has commonly extended far beyond that paradigm to capture conduct that is in some appropriate way related to the relevant mischief, but that does not or might not constitute or directly cause it: we criminalize attempts, conspiracy, and incitement—the three standard inchoate crimes;[128] we criminalize many kinds of

[126] On these two kinds of strategy, in relation to terrorism, see also V. Tadros, 'Justice and Terrorism', *New Criminal Law Review*, 10 (2007), 658.

[127] Although even here there are complications. Theft, for instance, might require an intention to deprive the owner permanently of the property that one appropriates, but not an actual permanent deprivation (see e.g. Theft Act 1968, s. 1): unless the mischief at which the law is aimed is simply such dishonest appropriation with such an intention, the conduct criminalized will not always bring about the relevant mischief (that of actually permanent loss of property). Similarly, the common law offence of assault in English law consists in conduct that causes another 'to apprehend immediate and unlawful personal violence' (see D. Ormerod, *Smith and Hogan's Criminal Law* (13th edn.; Oxford: Oxford University Press, 2011), 619): we must then either argue that the mischief at which the law is aimed is simply such apprehension of immediate violence, or recognize that this offence also criminalizes conduct that might not bring about the relevant mischief, but need only arouse apprehension of it.

[128] See Ormerod, *Smith and Hogan's Criminal Law* (n. 127), ch. 13.

dangerous conduct, even when it does not in fact cause harm;[129] and we criminalize conduct that makes it easier for others to commit crimes, or that is preparatory to the agent's own intended crime.[130] But recent years have seen a further expansion in the range and reach of such offences, especially in relation to terrorism. There are offences consisting in possessing 'an article in circumstances which give rise to a reasonable suspicion' that the possession is for terrorist purposes, or collecting, recording, or possessing 'information of a kind likely to be useful to a person committing or preparing an act of terrorism';[131] a broadly defined offence of 'encouraging' terrorism, which requires no intention to do so;[132] offences of facilitating or handling what is or is suspected of being terrorist property;[133] offences of belonging to, professing to belong to, or supporting, or wearing the uniform of, a proscribed organization;[134] and offences of failing to report information bearing on terrorist activity.[135] The creation of these kinds of offence is purportedly justified as making the early detection and thus prevention of (potential) terrorist activities easier—as assisting the state's discharge of its duty to ensure the security of its citizens: but they raise some obvious questions that bear more generally on the conditions under which it can be legitimate to use the criminal law to prevent such prospective harms or wrongs.[136]

Such measures cannot be justified merely by claiming that they are efficient means to the end of ensuring security or preventing terrorist activity (even if that claim is true): those who are convicted of such offences are censured as wrongdoers who deserve, or are liable to, the punishments they receive; we must therefore ask what punishable wrongs they could be thought to commit. In particular, can it be argued that the conduct thus criminalized is already pre-legally wrongful; or that once it is legally prohibited, it becomes wrongful as a breach of the duty that

[129] See D. Husak, 'The Nature and Justifiability of Nonconsummate Offenses', *Arizona Law Review*, 37 (1995), 151; Duff, *Answering for Crime* (n. 32), ch. 7; Simester and von Hirsch, *Crimes, Harms, and Wrongs* (n. 7), 86–88.

[130] Including the criminalization of many offences of possession, either with or without the intent that what is possessed will be used to commit a substantive crime: see M. D. Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law', *Journal of Criminal Law and Criminology*, 91 (2001), 829; A. J. Ashworth, 'The Unfairness of Risk-Based Possession Offences', *Criminal Law and Philosophy*, 5 (2011), 237.

[131] Terrorism Act 2000, ss. 57–8. In both cases, whilst the offence is defined strictly, the law allows a defence of innocent purpose or reasonable excuse: such burden-shifting provisions, which spare the prosecution the burden of proving what would normally (on a classical view of the structure of criminal offences) count as an element of the offence, and instead lay on the defence the burden of 'disproving' it (a burden that might, however, involve no more than adducing evidence 'sufficient to raise an issue with respect to' the matter in question; see Terrorism Act 2000, s. 118(2)), are another common feature of recent preventively oriented legislation; see further Tadros, 'Justice and Terrorism' (n. 125), 670–5.

[132] Terrorism Act 2006, s. 1.

[133] Terrorism Act 2000, ss. 14–18.

[134] Terrorism Act 2000, ss. 11–13.

[135] Terrorism Act 2000, ss. 19, 38B (as amended by Anti-terrorism, Crime and Security Act 2001, § 117(2)).

[136] They also, of course, raise questions about the very idea of 'security', which looms so large in the rhetoric of anti-terrorist measures: see L. Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law & Society*, 32 (2005), 507; *Security* (London: Routledge, 2009); P. Ramsay, 'Preparation Offences, Security Interests, Political Freedom', in *The Structures of the Criminal Law* (n. 1), 203.

the law, in prohibiting it, legitimately lays on citizens to contribute in this way to the prevention of terrorism? If the conduct cannot be shown to be in one of these ways wrong, should we then conclude that its criminalization is illegitimate? Or should we recognize that the criminal law must be adapted in the face of this kind of threat, and that what some portray as principled constraints of justice on its scope must now be compromised?

The second kind of preventive justice measure to be noted here involves a kind of hybrid of criminal and non-criminal provisions, and is best exemplified by the notorious 'anti-social behaviour orders', which were billed as a more effective way of dealing with various kinds of anti-social conduct that, though at least very often criminal, was hard to prosecute.[137] Other provisions, most notably the 'control orders' that could be imposed on people suspected to be involved in terrorist activities,[138] display the same logical structure. The structure of this kind of provision is that there is an initial, formally non-criminal process, in which a court is given reason to believe that a person has been engaged in, and/or is likely in the future to engage in, some kind of undesirable, usually criminal, activity (anti-social behaviour; terrorism), and that it is necessary to subject him to restrictions in order to prevent (or to reduce the risk of) future behaviour of that kind. The court can then impose a range of restrictions: on where the person may go or when he may travel (including imposing a curfew), on whom he may meet, and on a range of activities in which he might otherwise engage. Once the restrictive order is made, it is a criminal offence to breach it.

Such individualized orders, aimed at preventing future offending, imposed by a court and backed by the criminal law, are not unusual;[139] indeed, one could see the ancient procedure of binding someone over to keep the peace as such an order.[140] We should note, however, first, that the conduct from which the person is 'bound over' to refrain is itself criminal conduct—whereas what contemporary orders like ASBOs prohibit might well be non-criminal conduct; and second, that breach of the requirements of a binding over cannot by itself render a person liable

[137] See Crime and Disorder Act 1998, ss. 1–4 (ASBOs are to be replaced by 'criminal behaviour orders': see Anti-Social Behaviour, Crime and Policing Bill 2013–14, Part II). The literature on ASBOs is voluminous, but see especially A. J. Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?', *Law Quarterly Review*, 120 (2004), 263; Ashworth and Zedner, 'Preventive Orders' (n. 12); Simester and von Hirsch, *Crimes, Harms, and Wrongs* (n. 7), 212–32; P. Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012); R. A. Duff, 'Perversions and Subversions of Criminal Law', in *The Boundaries of the Criminal Law* (n. 1), 88; A. Cornford, 'Criminalising Anti-Social Behaviour', *Criminal Law and Philosophy*, 6 (2012), 1.

[138] Prevention of Terrorism Act 2005; see Tadros, 'Justice and Terrorism' (n. 125), 666–70. Such orders have now been replaced by 'Terrorism Prevention and Investigation Measures' (TPIMs); see Terrorism Prevention and Investigation Measures Act 2011.

[139] For just two other examples, see 'non-molestation orders' and 'restraining orders' (Domestic Violence, Crime and Victims Act 2004, ss. 1, 12); see A. J. Ashworth and L. Zedner, 'Defending the Criminal Law', *Criminal Law and Philosophy*, 2 (2008), 21, at 29–31, 35–7.

[140] The power to bind over 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), Magistrates' Courts Act 1980, s. 115 (when it is not a sentencing matter: see Powers of Criminal Courts (Sentencing) Act 2000, ss. 1, 12): see the CPS guidance on Binding Over Orders (<http://www.cps.gov.uk/legal/a_to_c/binding_over_orders/#a02>).

to imprisonment (the breacher simply forfeits the amount of the recognizance on which the binding over was conditioned), whereas the breach of an ASBO can bring a sentence of up to five years in prison. However, these kinds of order have become more draconian, both in the severity of the restrictions that can be imposed and in the punishments that may then be imposed on those who breach such an order; and they pose another serious challenge to the classical conception of the criminal law as an enterprise of defining various kinds of wrongful conduct for which perpetrators would be liable to public censure and punishment. For, first, the criminal law is now being used to respond to breaches not of general and public laws, but of individualized orders prohibiting conduct that is often itself entirely harmless. Second, instead of subjecting a person to coercive restrictions only if and when he is proved to have committed an offence, in line with the classical conception of the criminal law, the law (a law beyond the criminal law) is now used to restrict individuals because of what it is thought they might otherwise go on to do.[141] We must therefore ask both whether this is an appropriate use of the criminal law, and whether it is legitimate in these ways to bypass the limits that a classically conceived criminal law sets on the state's use of its coercive powers.

VI. The Shape of a Theory of Criminalization

One point that should have emerged from the previous sections is that a normative theory of criminalization must begin by locating the criminal law—the criminal law understood not just as a legislated code or set of criminal statutes (the law in the books), but as it is deliberately created and developed, interpreted, applied, and enforced by all the officials and citizens upon whose agency it depends for its real existence. A theory of criminalization must locate the criminal law within the larger framework of a political theory of political community, of the state, of citizenship, and of the relations between community, state, and citizens. It must also locate the criminal law within the larger structure of the law, as one among other modes of legal regulation, and offer an account (which will necessarily be a partly normative account) of its distinctive character or role. And it must address the fact that the criminal law is always the law of a particular polity, located within its own particular, contingent history. Only once we have in these ways located the criminal law can we ask the kinds of question with which many normative discussions of criminalization begin (and with which we also began): what are 'the principles and values that should guide decisions about what to criminalize?';[142] 'What can give us good reason to criminalize a type of conduct?' (bearing in mind now that such values, principles, and reasons will need to be grounded in some appropriate

[141] The use of these and other kinds of pre-emptive restriction, including the indefinite detention of those who are judged to be dangerous, might also (and dangerously) come to seem more palatable if we are impressed by the potential of developing accurate predictive techniques, especially those that draw on neuroscience: on this see M. Hildebrandt, 'Proactive Forensic Profiling: Proactive Criminalization?', in *The Boundaries of the Criminal Law* (n. 1), 113.

[142] See at n. 4.

political theory, and will need to point us towards criminal law in particular rather than merely towards some kind of legal regulation).

A normative theory of criminalization must, however, tackle such questions: it must be a theory of *criminalization*—an account of how we should determine what kinds of conduct we should criminalize (which must include some account of who this 'we' are). But that 'how' is ambiguous: it can be answered either procedurally or substantively. A proceduralist account focuses on the processes through which criminalization decisions should be made, rather than on the substantive content of those decisions. One kind of proceduralist account is political: it aims to specify the political processes (processes, for instance, of public deliberation, or of expert scrutiny) through which such decisions should be made. Another kind is rational: it aims to specify the logical structure of the deliberations that should lead to such decisions. A substantive account, by contrast, focuses on the substantive principles, considerations, criteria that should determine the content of decisions about criminalization, whoever makes those decisions and through whatever processes they are made.

We should not expect to find *purely* proceduralist accounts: accounts that set *no* limits on the possible content of the decisions made, in this context, any more than we should expect to find purely proceduralist accounts of political deliberation and decision making in general:[143] but we can identify accounts that lie towards the proceduralist end of the spectrum. One such recent account is Douglas Husak's.[144] He identifies seven 'constraints' that proposed criminal statutes must satisfy if they are to be adequately justified. One constraint is purely procedural: 'the burden of proof [that criminalization is justified or required] should be placed on those who favour criminal legislation'.[145] Others point towards substantive conditions: for instance that criminal statutes must be designed to proscribe a nontrivial harm or evil', that conduct may be criminalized only if it is wrongful, and that criminalization must serve 'a substantial state interest'.[146] But 'nontrivial harm or evil', 'wrongfulness', and 'substantial state interest' are not yet substantive constraints: they are relatively formal ideas which must be given their substantive content by, presumably, a process of political deliberation. Husak's account is in that way proceduralist: it tells us the rational process through which a legislature should go in deciding whether to criminalize a type of conduct; it is thus both politically proceduralist, in that it focuses on the legislative process through which criminal law is made,[147]

[143] For a useful discussion, see D. Archard, 'Political Reasonableness', *Canadian Journal of Philosophy*, 35 (2005), 1.

[144] Husak, *Overcriminalization* (n. 22): see also his chapter in this volume, applying that account to the question of whether polygamy should be criminal; also 'Convergent Ends, Divergent Means: A Response to my Critics', *Criminal Justice Ethics*, 28 (2009), 123; 'Repaying the Scholar's Compliment', *Jerusalem Review of Legal Studies*, 1 (2010), 48; 'Reservations about Overcriminalization', *New Criminal Law Review*, 14 (2011), 96. For another proceduralist account see Schonsheck, *On Criminalization* (n. 68), ch. 3 on the three 'filters' (principles, presumptions, pragmatics) through which criminal laws must pass.

[145] See *Overcriminalization*, 100–2.

[146] See *Overcriminalization*, 66–77, 132–45.

[147] Although Husak emphasizes the important role played by prosecutors, and prosecutorial discretion, in determining the effective scope and impact of the criminal law (see e.g. *Overcriminalization*, 19–32), his theory of criminalization is focused on the legislative process of passing criminal statutes.

and rationally proceduralist in that it specifies the logical structure of the proper legislative deliberations.

A normative theory of criminalization should be at least partly proceduralist: it should, that is, have at least something to say about the processes, both political and rational, through which the scope, content, and structure of the criminal law should be determined. But it must at some point turn from procedure to substance: what kinds of substantive principle, value, or consideration should guide the decisions of those who make and enforce the criminal law? More precisely, there are at least two kinds of substantive question that we must ask at this stage. First, what can give us good reason to criminalize a type of conduct (or, for that matter, what cannot give us good reason to criminalize)? Second, what other kinds of principle, value, or consideration must come into play in deciding whether a good reason to criminalize is, all things considered, a conclusive or good enough reason? The first question is the 'in principle' question: it focuses on the kinds of consideration that could (or could not) give us any proper reason to contemplate criminalizing a type of conduct. If we determine, via our answer to that first question, that we have no good reason to criminalize a given type of conduct, we will not need to turn to the second question, since criminalization is off the table. If, however, we see that we do have good reason to criminalize a given type of conduct, we must then turn to the second question: we must consider, in particular, whether there are other values or principles that give us countervailing, and perhaps better, reason not to criminalize it;[148] and whether it is practicable to criminalize it (a question which itself encompasses a range of more precise questions about the practicalities and costs of legislation and enforcement).

Normative theories of criminalization typically focus on the first kind of question, asking what can give us good reason, in principle, to criminalize: thus both Mill and Feinberg couch their principles in the logic of reasons.[149] It is here that we will find the kinds of consideration that bear directly and specifically on criminalization, since the considerations that bear on the second kind of question are likely to be relevant not so much to criminal law in particular as to the state's exercise of its powers, especially its coercive powers, more generally. It is also here that we find the attempts that dominate so much normative theorizing about the scope or boundaries of the criminal law—the attempts to find the key to criminalization, that principle or set of principles which will tell us precisely when we have good reason to criminalize. The best known of these would-be master principles remains the Harm Principle, to which some would add an Offence Principle allowing the criminalization of (grossly) offensive conduct even if it is not harmful.[150] Alongside the Harm Principle, we can set the German doctrine of *Rechtsgüter*, according to which criminalization must be aimed at protecting those legally

[148] The value of liberty, for instance: see Moore's chapter in this volume and, far more extensively, his *Placing Blame* (n. 15), chs 16, 18; see at nn. 66–9 in this chapter.

[149] Mill: 'The only purpose for which power can be rightfully exercised' (*On Liberty*, ch. 1, para. 9). Feinberg's 'liberty-limiting principles' are set in terms of what constitute 'good' or 'morally relevant' reasons for criminalization: see *Harmless Wrongdoing* (New York: Oxford University Press, 1988), xix–xx.

[150] See especially Feinberg, *Offense to Others* (n. 63).

recognized interests that constitute the set of *Rechtsgüter*.[151] In the same camp we can place Alexander and Ferzan's argument that the criminal law serves the aim of harm prevention by proscribing and punishing conduct that culpably (recklessly) creates an unjustified risk to a legally protected interest.[152] Another would-be master principle, with the same generality and abstraction, is Moore's version of Legal Moralism: 'criminal legislation must exclusively aim at preventing or punishing moral wrongs, and this it can do by prohibiting all and only those behaviors that are in fact morally wrong'.[153] Other candidate principles include the Dignity Principle, that 'the main goal of the criminal law ought to be to defend the unique moral worth of every human being';[154] the Sovereignty Principle, that 'the legitimate basis for criminalization' lies in 'violations of equal freedom' or sovereignty;[155] and the Dominion Principle, that the 'target…for the criminal justice system should be 'the maximization of the dominion of individual people'.[156]

We will not discuss these principles in any detail here, but will just indicate, briefly, why we do not think that the search for such an overarching principle, or set of principles, offers a promising way of developing a substantive theory of criminalization. The values to which these principles appeal (values such as freedom from harm, sovereignty, dignity, autonomy) might indeed have a role to play in deliberations about criminalization, but not as master principles which can determine the scope, even the 'in principle' scope, of the criminal law. Their role would rather be as providing non-exclusive signposts or frameworks for those deliberations: by trying to give such concepts more determinate meanings, by thinking about their possible implications (which are matters for political deliberation), we might come to see reasons for (or against) criminalizing certain kinds of conduct.

One question, of course, concerns the grounding of such principles: why should we posit the protection of dignity, of sovereignty or dominion, or the prevention of harm, as the proper aim of the criminal law? Given our earlier discussion, it should be clear that an answer to this question must be political: these principles or values are relevant to criminalization because they are, or should be, integral to the political structure of the polity whose criminal law is in question. They might even figure explicitly in the constitution of the polity: thus dignity, for instance, figures as a central, indeed 'inviolable', value in the German, Swedish, and Polish constitutions.[157] Constitutions are certainly

[151] See R. Hefendehl et al. (eds.), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* (Frankfurt: Nomos Verlag, 2003); N. Persak, *Criminalising Harmful Conduct* (Dordrecht: Springer, 2007), ch. 5; C. C. Lauterwein, *The Limits of Criminal Law* (Farnham: Ashgate, 2010), ch. 1.

[152] Alexander and Ferzan, *Crime and Culpability* (n. 16).

[153] Moore, in this volume, p. 192; see at nn. 65–9 above.

[154] Dan-Cohen, 'Defending Dignity' (n. 64), 150; for critical discussion, see D. Baker, *The Right not to be Criminalized* (Aldershot: Ashgate, 2011), ch. 4.

[155] Ripstein, 'Beyond the Harm Principle' (n. 64), 216; for critical discussion, see Bird, 'Harm Versus Sovereignty' (n. 77); Baker, *The Right not to be Criminalized* (n. 154), 164–71. Compare Thorburn on the goal of 'secur[ing] for all of us the conditions of freedom as independence' (text at nn. 80–1 above), and Dubber's espousal of an Autonomy Principle in M. D. Dubber, *Victims in the War on Crime* (New York: New York University Press, 2002).

[156] Braithwaite and Pettit, *Not Just Deserts* (n. 14), 54; see also Pettit's chapter in this volume.

[157] See *German Constitution*, art. 1 ('Human dignity is inviolable. To respect and protect it is the duty of all state authority'); also *Swedish Constitution*, art. 2, *Polish Constitution*, art. 30.

one way in which polities can formally declare, and seek to entrench, their constitutive values—values that will presumably have implications for their criminal laws; they might also be a source of constraints on the criminal law, both substantive and procedural.[158] We still need to ask why, or how, a constitution should come to include these particular values (a question in political theory); but, more appositely for our present purposes, we also need to ask why it should be these values that govern the criminal law. To ask this is to ask two questions. First, given that constitutions typically declare the polity's commitment to a fairly large set of principles, values, and goals,[159] why should we pick out these particular value(s), such as dignity, to guide the criminal law? Second, do the specified value(s) point us towards the *criminal* law, as a distinctive method of securing or protecting them?

These questions can be illustrated by reference to the Harm Principle, which (although it has been much criticized) remains the most prominent and popular master principle for those who seek a theory of criminalization. The classic modern discussion remains Feinberg's four-volume *The Moral Limits of the Criminal Law*,[160] although he did not believe that the Harm Principle is the *only* principle that gives us reason to criminalize: he thought that we also need an Offence Principle (we have reason to criminalize if this would be a necessary and effective way of preventing serious offence to others);[161] and he remained uncertain about whether the prevention of non-harmful, 'free-floating' evils could give us good reason to criminalize.[162] More recently, others have revived more ambitious claims that the Harm Principle specifies a *necessary* condition of criminalization.[163]

Our first question is why we should initially specify the prevention of harm as one of the proper aims of a polity. The problem is not that such a declared aim lacks the grandiloquence to which constitutional declarations typically aspire, but that it is radically indeterminate until we are given some clearer idea of what is to count as 'harm', and of what kinds of harm it is to be the polity's business to prevent—since it is surely not plausible to suppose that it should aim to prevent every kind of harm. If, with others, we follow Feinberg's lead and define harm in terms of setbacks to interests, we make some progress, though we still face questions about whose interests are to count, and whether we are to attend not only

[158] See e.g. Baker, *The Right not to be Criminalized*, drawing on the US constitutional tradition, and V. Tadros 'A Human Right to a Fair Criminal Law?', in J. Chalmers et al. (eds.), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010), 103. Husak also draws on the US constitution for his 'external' constraints on criminalization: *Overcriminalization*, ch. 3.

[159] As a glance at e.g. the German, Swedish, and Polish constitutions (see n. 157) will show.

[160] New York: Oxford University Press, 1984–8 (*Harm to Others*, 1984; *Offense to Others*, 1985; *Harm to Self*, 1986; *Harmless Wrongdoing*, 1988).

[161] See *Offense to Others*.

[162] See *Harmless Wrongdoing*, especially 318–38.

[163] See e.g. Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7; although they argue for an Offence Principle along with the Harm Principle, they also think that only harmful offence should be criminal; see ch. 7); Persak, *Criminalising Harmful Conduct* (n. 151); Baker, *The Right not to be Criminalized* (n. 154). Husak now also seems to take this view: what was the 'nontrivial harm or evil' constraint in *Overcriminalization* (n. 22, at 66–72) now appears simply as 'the harm constraint' in his chapter in this volume (p. 220).

to the interests of humans, but also to those of other animals;[164] but it still seems implausible to say that we should make it our collective business as a polity to protect *all* the interests of all the beings in question against setbacks. So we may need to specify the interests that are to be protected rather more precisely: for instance by distinguishing 'welfare' from 'ulterior' interests,[165] or by talking of 'resources',[166] or providing a list of the interests that the polity (or its laws) should protect.[167]

But why should the prevention of harm, the protection of interests against setbacks, point us towards the criminal law? It is worth recalling that Mill's classical Harm Principle was not about the criminal law: the prevention of harm was 'the only purpose for which power can be rightfully exercised over any member of a civilized community against his will'; and 'power' meant any kind of 'compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion'.[168] Even if we attend only to legal power or coercion, there are many kinds of legal provision through which the polity can seek to prevent many kinds of harm: so why look to the criminal law? Part of the answer is, of course, that since the criminal law operates by guiding human conduct, it can help towards the prevention of those kinds of harm that are caused, or can be prevented, by human action; but that is only the start of an answer, since we still need to know what makes this distinctive mode of legal regulation appropriate, and when. Similarly, if we hold that a polity should aim to protect and promote dignity, or sovereignty, or autonomy, or dominion, we have as yet no reason to think that it should use the criminal law for this purpose.

Another more promising answer to our question brings in wrongfulness. Advocates of the Harm Principle often build a wrongness requirement into their specification of the Principle itself: thus Feinberg defines 'harm', in the sense relevant to criminalization, as 'setbacks of interests that are wrongs';[169] Simester and von Hirsch point out that '[t]he Harm Principle provides for protection against only those setbacks that D was not entitled to inflict on V';[170] Husak argues that '[i]n the clearest cases, the bad consequence that a person suffers through human agency should not be regarded as a *harm* unless his rights are implicated'.[171] Now this does bring us closer to criminal law, if criminal law can be identified in part by its distinctive concern with wrongs: although there are other ways than criminalization of responding to, or trying to prevent, wrongful setbacks to legally protected interests (including tort law), we can say that we have some reason now to consider

[164] Not to mention, as some ecological theorists would add, the interests of other aspects of the non-human natural world.

[165] See Feinberg, *Harm to Others* (n. 61), 37–8.

[166] See Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), ch. 3.

[167] See Alexander and Ferzan, *Crime and Culpability* (n. 16), 269–77: if crime consists in recklessly creating unjustified risks to legally protected interests, 'the criminal law must identify those interests that it will protect'—though they do not themselves then identify those interests completely or in detail. Compare too the German doctrine of *Rechtsgüter* (see n. 151), which must be grounded in a specification of the goods that are to count as *Rechtsgüter*.

[168] Mill, *On Liberty* (n. 62), ch. 1, para. 9.

[169] *Harm to Others* (n. 61), 36.

[170] *Crimes, Harms and Wrongs* (n. 7), 38–9.

[171] In this volume, p. 220. But see Tadros, 'Wrongness and Criminalization' (n. 60).

criminalization as an appropriate response. In talking of wrongful harms rather than simply of wrongs, however, we slide from one version of the Harm Principle to a different version.[172] It is plausible to insist that, if we are going to criminalize harmful conduct, conduct that causes or might cause setbacks to legally protected interests, we should criminalize it only if it is wrongfully harmful; if we can provide a list of those interests that should be legally protected, it is also plausible to say that we have reason to criminalize conduct that wrongfully harms or threatens to harm them. However, the Harm Principle, in its canonical formulations, talks not about criminalizing harmful conduct, but of criminalizing conduct in order to prevent harm; and whilst we can indeed hope to prevent harm by criminalizing and thus reducing the incidence of harmful conduct, we can also do so by criminalizing conduct that might not itself be harmful.

For instance, if our aim is to reduce the number of harmful road accidents, it is plausible that we can do this more efficiently by setting strict speed limits, and criminalizing breaches of them, than by simply criminalizing dangerous driving; but in doing so we will criminalize some instances of speeding that do not in fact create any wrongful risk of harm. If our aim is to reduce the number of harmful accidents in factories, it is plausible that we can do this more efficiently by creating regimes of safety regulation that impose detailed duties on employers (including duties of record keeping and inspection), and criminalizing breaches of them, than by simply criminalizing the creation of dangerous working conditions; but in doing this we will criminalize some breaches that do not in fact create any risk of harm. These kinds of law (many so-called *mala prohibita* are of this kind) would be sanctioned by the Harm Principle in its canonical formulations, but are much harder to justify if the Harm Principle is read as sanctioning the criminalization only of wrongfully harmful conduct: partly because the harms to be prevented need not be wrongful harms, and also because the conduct criminalized need not itself be harmful or dangerous. One response to such examples would be to insist that we may criminalize conduct only if the conduct itself can be shown to be both a source of harm and wrongful in virtue of its connection to harm: we might in this way be able to justify some offences involving conduct that is only 'indirectly' or 'remotely' connected to harm, but will no doubt also have to reject many existing offences, at least as they are currently defined.[173] The fact that a theory of criminalization would condemn as unjustified large swathes of our existing criminal law is not itself, of course, an argument against the theory; indeed, if the frequent claim that we are suffering a crisis of overcriminalization is right, that is just what we should expect of a normative theory. However, such a swift dismissal of so

[172] See nn. 62, 125, and accompanying text. For more detailed discussion of this topic, and the suggestion that we should talk not about 'the Harm Principle', but about the two Harm Principles, see R. A. Duff and S. E. Marshall, ' "Remote Harms" and the Two Harm Principles', in A. P. Simester, Ulfrid Neumann, and Antje du Bois-Pedain (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart Publishing, 2014), 205.

[173] See Husak's discussion of *mala prohibita* in *Overcriminalization* (n. 22), 103–19; and Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), chs 4–5, on 'remote harms' and the need to be able to 'impute' responsibility for such harms to the agents whose conduct is to be criminalized.

much criminal law seems hasty, especially since we can offer a different, but still harm-based, justification for at least some such offences by appealing to the other, canonical version of the Harm Principle. For if we can justify the creation of regulations of the kind noted above (such as speed limits and factory regulations), on the grounds that they will efficiently reduce the incidence of serious kinds of harm without imposing unreasonable burdens on those subject to them, we can then say that individuals ought to obey such regulations, and do wrong if they fail to do so; why then should we not also say, by appeal to the Harm Principle and the requirement that only wrongful conduct be criminalized, that we have reason to criminalize such wrongs? We need not say that the conduct itself is wrongfully harmful; its wrongfulness rather lies in the failure to obey regulations that are themselves aimed at promoting safety and preventing harm: but it is consistent with the spirit of the Harm Principle to recognize it as an (in principle) candidate for criminalization.

A similar issue arises for other would-be master principles noted above. If sovereignty, or dignity, or dominion, is the master value, we could argue that we have reason to criminalize conduct that wrongfully violates or threatens sovereignty, or dignity, or dominion: that would seem to give us a very limited criminal law; but surely if our concern is with the protection of such values, we also have reason to criminalize kinds of conduct that do not directly violate or threaten them. For we should, surely, aim not merely to protect such values, as instantiated in human lives, against direct violation: we should also be concerned to promote them, and to seek to secure the conditions under which they can be fully actualized and recognized;[174] and we might sometimes best do that by creating regulatory systems that citizens ought to obey, and breaches of which will be in principle criminalizable wrongs.

Our comments so far are not intended as critiques of, or as reasons for rejecting, any such master principles: the point is simply that even we begin with an apparently unitary principle, we will find more than one way in which it could give us reason to criminalize conduct, more than one route from the specified value to criminalization. This does then lead on, however, to the three kinds of criticism that any such monolithic theory of criminalization must face.

First, there is the charge that even when developed in the way suggested above, any such theory will be *under-inclusive*: it will not be able to show that we have reason to criminalize some kinds of conduct that we surely do have good reason to criminalize. In the case of the Harm Principle, purported counter-examples of this kind include conduct that is profoundly offensive but could not plausibly be described as harmful;[175] coercively paternalistic conduct that infringes the autonomy of the person coerced precisely in order to prevent him harming himself;[176] conduct that violates other rights without causing harm;[177] desecration of

[174] See e.g. Braithwaite and Pettit, *Not Just Deserts* (n. 14), 54; see at n. 156 above.

[175] Hence the addition of the Offence Principle to the Harm Principle: see Feinberg, *Offense to Others* (n. 63); but also Simester and von Hirsch, *Crimes, Harms and Wrongs* (n. 7), chs 6–8.

[176] See Feinberg, *Harm to Others* (n. 61), 78; *Harm to Self* (n. 159), chs 18–19.

[177] e.g. Ripstein, 'Beyond the Harm Principle' (n. 64); Gardner and Shute, 'The Wrongness of Rape' (n. 62—though they also argue that we must criminalize because not to do so would be harmful); H. Stewart, 'The Limits of the Harm Principle', *Criminal Law and Philosophy*, 4 (2010), 17.

corpses; and what Feinberg calls (misleadingly) the kind of 'free-floating evil' that is exemplified by commercial gladiatorial combat to the death.[178] Other kinds of counter-example could also be offered to the other candidate principles, to the same effect.

Committed advocates of a master principle might well be able to argue that, on carefully closer inspection, we can find in the principle grounds to criminalize the kinds of conduct that figure in the counter-examples. If we look carefully at the longer term or less direct effects of such conduct, for instance; or provide a richer, more expansive account of the relevant value (of what should count as 'harm', or what could be said to violate or undermine sovereignty or dignity); or think about the wide range of regulations that might serve to protect or promote that value, and that might then be backed by the criminal law: we will find that we can have reasons to criminalize at least many of the kinds of conduct that the critic offers as counter-examples. No doubt this will often be possible; but such a strategy will also face two further, familiar kinds of objection.

The second kind of objection is that under-inclusiveness is replaced by indeterminacy or over-inclusiveness. As we expand the conception of the core value, or the range of kinds of conduct that can be portrayed as somehow threatening it, in order to meet the charge of under-inclusiveness, we risk depriving the principle of any determinate meaning, and thus of any real efficacy as guide to, or a constraint on, criminalization. This is a familiar complaint about the way the Harm Principle has been developed and applied in recent years:[179] the idea of harm has been stretched to cover wider types of mischief, conduct lying ever more remote from the harm that is to be prevented is argued to be criminalizable, and it begins to seem that the Principle could be (ab)used to justify the criminalization of any kind of conduct that we want to criminalize. Efforts to extend the scope of other candidate master principles, in order to meet the charge of under-inclusiveness, are likely to face similar objections.

Third, such expansions of the master principle, so that it can capture cases that seemed to constitute counter-examples, will also be vulnerable to charges of distortion. By insisting that what makes any kind of conduct criminalizable must be, for instance, its connection to harm, or that it violates or threatens dignity or sovereignty; by insisting that it is always that feature that characterizes a type of conduct as a criminalizable wrong: theorists face the charge that they are distorting the character of many of the wrongs that we have reason to criminalize, by trying to make them all fit this single specification. That charge might be forcefully brought, for instance, against Alexander and Ferzan's account, according to which 'we have only one crime—manifesting insufficient concern for others' legally protected interests'; they would 'do away with the special part of the criminal code', which defines the different substantive crimes, since every criminal action consists,

[178] See Feinberg, *Harmless Wrongdoing* (n. 160), 318–38; and, more generally, Duff, *Answering for Crime* (n. 32), 128–35.

[179] See e.g. B. Harcourt, 'The Collapse of the Harm Principle', *Journal of Criminal Law and Criminology*, 90 (1999), 109.

qua crime, in recklessly creating an unjustified risk of harm to a legally protected interest.[180] One question is whether all and only the types of conduct that create such a risk are types of conduct that we have good reason to criminalize: that question underpins the first two kinds of objection noted above. But even when a type of conduct that we see good reason to criminalize can be said to create such an unjustified risk to another's interests; even if there is to this extent an extensional equivalence between the types of conduct that their principle gives us reason to criminalize and the types of conduct that we do have reason to criminalize: we might still object that such an abstract specification does not reveal the varied substantive reasons that we have for criminalizing different kinds of wrong. It might be true, for instance, that a violent attacker and someone who recklessly creates a risk of serious physical injury to another person both 'manifest insufficient concern for others' legally protected interests' (just as it might be true that both poisons and deep-fried Mars bars are 'insufficiently nutritious'); but it does not follow, and seems implausible to claim, that we have just that same reason for criminalizing both types of conduct.[181] Similar kinds of objection are likely to be brought against other efforts to ground criminalization in single master principles: that they distort or conceal, rather than revealing more clearly, the reasons we have to criminalize different types of conduct.

We have not tried in this section to show that the search for a master principle, or a set of master principles, of criminalization is doomed to fail, or to show that the principles we have noted all fail: we have not provided a detailed enough account of the kinds of objection that such principles will face, or examined the responses that their proponents might offer to such objections. Our aim has rather been to raise more general doubts about this kind of approach to criminalization: why should we expect to be able to produce a plausible normative theory of criminalization that grounds all the in principle reasons we could have to criminalize types of conduct in a single principle, or in a small, ordered set of principles? Given the wide range of values that we can expect to figure in the public realm of a contemporary, pluralist polity, as values that require legal recognition and protection; given the diversity and complexity of the social and institutional formations of such a polity; given the variety of ways in which the criminal law can figure as a possible method of addressing different kinds of legally defined wrong: should we not more plausibly expect to find a diversity of grounds for, and of routes towards, criminalization—a diversity that cannot be captured in any neat theoretical structure of coordinated principles? Such diversity would of course make for messy theory: we would end up not with a pleasingly ordered structure of principles from

[180] *Crime and Culpability* (n. 16); the quotes are from 246, 263.

[181] The issue here is connected to some familiar issues about the definitions of offences: should the criminal law's special part aim to define offences in terms that reflect the 'thick' ethical concepts which structure our extra-legal understandings of the wrongs involved; or should it seek a more austerely descriptive, and more general, mode of definition? Contrast e.g. J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person', *Cambridge Law Journal*, 53 (1994), 502, with P. H. Robinson, *Structure and Function in Criminal Law* (Oxford: Oxford University Press, 1997); see also R. A. Duff, 'Theorizing Criminal Law', *Oxford Journal of Legal Studies*, 25 (2005), 353.

which we could then derive conclusions about what we have in principle reason to criminalize, but with a more disorderly set of considerations that might bear on the question of criminalization (including, no doubt, some of the values that figure in would-be master principles), of starting points from which and routes by which we might be led to see reasons to criminalize certain types of conduct.[182] But perhaps such a messy theory is what the messy worlds in which we live require.

VII. Where Do We Go from Here?

As the previous sections of this Introduction should have made clear, our own work on this project has so far been largely of a preparatory, ground-clearing kind. We have not yet tried, either collectively or individually, to develop a complete theory of criminalization; rather, we have tried to gain a clearer view of the phenomena to be theorized, and of what any theory will need to include (the need, for instance, to ground it in political theory; the need to show what distinctive role the criminal law should play in relation to other kinds of law and other modes of legal regulation). The contributors to the four volumes of papers that the project has produced, including this volume,[183] have done substantial constructive work towards a more adequate theorizing of criminal law; our own constructive and systematic contributions will be made in the five monographs that will complete the project's published outputs. In this final section we therefore briefly describe these monographs, as they are currently planned, to give an idea of the directions in which we expect to progress from here.

Lindsay Farmer's *The Institutions of Criminal Law* has two main aims. First, it advances a theory of criminal law as an institution. Understanding criminal law as an institution requires that we recognize that it can in part be differentiated from other social and legal practices by its distinct aims and social functions. Criminalization is accordingly to be understood not only in terms of the interests or goods protected, but also in terms of the broader aims that the criminal law promotes and the way that the criminalization of particular practices or conduct contributes to those broader aims. Understanding modern law as an institution, however, also requires us to see it as a practice that is committed to certain kinds of values, such as the rule of law, respect for individual liberty. In criminal law these values have been institutionalized in distinctive ways—the commitment to legality or to requiring *mens rea*, for example—and these commitments have in turn come to shape the scope and aims of the law. The second aim of the book is to argue that understanding the practices and scope of criminalization in modern criminal law requires that we view the law in historical perspective. This is necessary in part because our understandings of interests or goods, how they must be protected, and what they must be protected against, have changed over time, and in part

[182] See Duff, 'Towards a Modest Legal Moralism' (n. 66). [183] See n. 1.

because the aims and functions of the criminal law have themselves changed over the course of the modern period.

Antony Duff's *The Realm of Criminal Law* will ground an account of criminalization in a liberal-communitarian conception of the role that the criminal law should play in the political structures of a contemporary democratic polity. This will involve developing an account of the 'public' realm, the *res publica*, of such a polity—an account that will consist largely in an account of the process of public deliberation through which the polity's members will work out an understanding of the civic enterprise in which they are involved as citizens. Within that realm, the criminal law's distinctive role—the role that marks it out from other modes of legal regulation—is, first, to define a set of public wrongs that merit a formal collective, and public response which makes their wrongfulness salient; and, second, to structure that public response through the criminal process that culminates in the criminal trial and verdict. If we then ask, as a theory of criminalization must ask, how we are to determine what is to count as a public wrong, and which such wrongs are to be in principle criminalizable, we will need to recognize that no simple answer is available. The most that a normative theorist will be able to do is to sketch the different starting points from which, the different routes by which, and the diverse values in the light of which, the citizens of such a polity could come to see that they have good reason to criminalize a type of conduct.

Victor Tadros's *Wrongs and Crimes* will outline a non-consequentialist approach to criminalization. The book will consider a number of different relationships between moral wrongdoing and the criminal law. It will investigate the nature of moral wrongdoing, and the appropriate response to it. In the light of this, some familiar principles of criminalization will be found wanting. These include principles concerning harm, sovereignty, liberty, and wrongdoing. It will then explore the implications of some central non-consequentialist ideas for the decision whether to criminalize conduct. It will show that it is sometimes permissible to criminalize conduct even if doing so does more harm than good. The role of consent to criminalization will be investigated, as will the best way to understand and justify inchoate offences and *mala prohibita*.