Criminal Law as an Institution:

Rethinking Theoretical Approaches to Criminalization

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I. Introduction: the criminal law vanishes

In section 1.02-(1) of the US Model Penal Code (MPC) the drafters address the question of the purposes of criminal law.\(^1\) As the very first principle they state that the objective of the law is to prevent the commission of offences, and that the principle which should guide the definition of offences is “to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.” The substance of the law is thus taken to be composed of a combination of individual and public interests, while the purpose of the law is the prevention of offences, or more precisely the prevention of harm to the identified interests. While this precise formulation here might be open to criticism, we can see

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\(^1\) The full section reads:

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
(c) to safeguard conduct that is without fault from condemnation as criminal;
(d) to give fair warning of the nature of the conduct declared to constitute an offense;
(e) to differentiate on reasonable grounds between serious and minor offenses.

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\(^1\) Earlier versions of this paper have been presented at seminars in Uppsala, Edinburgh, Queen’s University, Kingston and at the Criminal Law Sciences Club at the University of Toronto. I am very grateful to the participants in those seminars for their comments. I would particularly like to thank Claes Lernestedt and Markus Dubber. As ever this would not have been possible without my collaborators on the Criminalization project – Antony Duff, Sandra Marshall, Massimo Renzo and Victor Tadros.
in its structure the type of questions that have shaped contemporary thinking about criminalization. These issues – the type of interests to be protected, the type of harms that they are to be protected against, the relation to the dominant aim of the criminal law understood as deterrence or retribution, and the relation between wrongdoing and defences – are those that have been taken to be the necessary elements of any theory of criminalization.

However, it is striking that in spite of the certainty around the identification of the required elements, there is a certain vagueness around the question of the nature of the criminal law as a particular type or field of law. The resort to criminal law must be understood in terms either of prevention or as a response to the quality of the harms to the protected interests – that is to say those harms which are serious or substantial. However, this does not explain any specific qualities of the criminal law or why certain types of harm should be regarded as criminal. The point here is not so much that other areas of the law may aim at the prevention of, even serious, harms, but that there is a failure even to attempt to specify the nature of the criminal law (what is criminal law and why should it be used in these instances). This might have been understood in terms of some sort of public or community interest in preventing crimes or censuring harmful conduct, but there is no attempt to articulate this kind of general interest. The only mention of public interests is as a species of harm. The section states that the aim of the law is to prevent substantial harm to individual or public interests, with the former understood to be such things as the person or property and the latter as such things as the family or the state, and so independent of, or more than the aggregate of, individual interests. The important feature of this is that public interests are seen as analogous to private interests, and do not seek to express a public
interest in the use of criminal law as such. Thus, in the section which seeks to define
the purposes of the criminal law there is only vagueness and evasion. There is a sense
in which the criminal law vanishes just at the point at which we would expect to see it
come into focus.

I will argue in this paper that this failure to reflect on the nature of the criminal law is
a characteristic not only of the MPC but of theories of criminalization more generally,
and that theories of criminalisation need to give more attention to the question of what
makes the law criminal, or to the distinctive character or aims of the criminal law.\(^2\)
This, I will argue, cannot be understood in terms of the quality of the harms or the
nature of wrongdoing, as something independent of law, but must be understood as
being bound up with the institutional practices of law. It is therefore not be
approached as an abstract question, as something that can be defined \textit{a priori}, but in
terms of the development of the modern criminal law. Acknowledgement of this point
requires that normative theories of criminalisation need to refocus and give greater
weight to the nature and function of criminal law.

The paper is in three main parts. In the first part there is a discussion of different
approaches to theories of criminalization which will develop the claim made in the
introduction that there has been a failure to attend to the place of law in
criminalisation. In the second part I shall then go on to set out an understanding of
criminal law as an institution. However, I am concerned here that this not be read as a

\(^2\) I am aware of the extensive literature on the definition of crime but, as I shall argue below, this
reproduces the structure of the above argument. This is because it starts by trying to identify the nature
of a crime rather than the nature of criminal law. And if, as is taught in introductory criminology
lectures, crime is first and foremost a legal or social construct, it would make more sense to start with
the law. See also M.D. Dubber, “Criminal Law between Public and Private Law” in Duff et al.,
\textit{Boundaries of Criminal Law} (Oxford 2010) p.191 “This means that an account of criminalization
needs an account not of crime \textit{simpliciter}, but of law in general, and of criminal law within it.”
call that can collapse into an extreme positivism – the criminal law is whatever the state declares and be criminal and falls under the jurisdiction of the criminal courts. Accordingly, the account of criminal law as an institution seeks to set out a framework for understanding the nature and purpose of criminal law that can incorporate a normative perspective – both in the sense of accounting for its legal quality and as a critical normative perspective on particular practices. I shall do this through a reading of Neil MacCormick’s theory of law as an institution – though I shall note certain problems with MacCormick’s account of the criminal law. In the concluding section I will then return to the question of how this account which gives more weight to the nature and function of the modern criminal law could then reshape normative theories of criminalization.

II. Criminalisation and Criminal Law.

In very general terms there are two main strands in liberal thought about criminalisation: those which begin from questions of harm and harm reduction or prevention, and those theories, often called legal moralism, centred around questions of wrongdoing and retribution. The first derives from, and is animated by, John Stuart Mill's famous ‘harm’ principle: that “the only purpose for which power can be rightfully exercised against any member of a civilised community, against his will, is to prevent harm to others.” In this tradition efforts have focused on attempting to define the concept of harm: what is it? does it include forms of potential as well as actual harm? Are forms of paternalism justified, and so on? This has achieved its most complete modern expression in the four volume work of Joel Feinberg in which harm

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4 On Liberty (1859)
was defined as a setback to interests and which took aim in particular at what he saw as the illegitimate criminalisation of various forms of non-harmful conduct simply on the basis that it was regarded as immoral or offensive. The alternative approach—legal moralism—argues that we should begin from the idea of wrongdoing, since it would be unjustifiable for the state to punish a person for conduct which is not morally wrong. This approach begins with a more explicit link to the ends of punishment, since punishment is understood as only being justified when imposed for wrongful conduct. Thus, for example, Moore asserts that the proper aim of the criminal law is to inflict deserved punishment on culpable wrongdoers. From this perspective then, if conduct is not wrongful in the first place, it would be unjustifiable either to criminalise that conduct or punish those who engaged in it.

While to advocates of these theoretical approaches the differences between the positions appear to be significant, it is arguable that the similarities are in fact greater than the differences. Defenders of the harm principle concede that a criminal law which punished all harmful conduct would be too broad, and therefore seek to introduce a limiting principle, which is that only ‘wrongful’ harms should be subject to criminal punishment – with the measure of ‘wrongfulness’ depending on either the rights that are to be protected or the mode of infringement. It is also acknowledged that the content of the law will depend to some extent on community values or standards as these are determined through the political and legislative process.

Conversely, legal moralists concede that not all prima facie wrongful conduct (lying, cheating at games) should be the subject of the criminal law because, once again, the law would be too broad. They accordingly argue the need for a limiting principle,

7 See M. Moore; Husak
such as that the criminal law should be concerned only with harmful wrongs. It is also worth noting that many legal moralists also concede that some conduct will be wrongful by virtue of having been made so by law, and so must either allow that the category of wrongs is broader than merely ‘pre-legal’ moral wrongs or that the criminalisation of non-wrongful conduct may in certain instances be justified. In either case – wrongful harms or harmful wrongs – the language and the structure of the arguments have a great deal in common. The initial category (harm or wrong) is defined independently of law; the aim of law is understood as an aim of punishment (deterrence or retribution) and has only a contingent relation to the content of the law; and in each case it is acknowledged that the initial organising principle is too broad, and that the conventional role of law will play some role in establishing limits. I shall say more about each of these points in turn as a way of developing my central claim about the failure of these theories to address the nature of the criminal law.

Most contemporary theories distinguish, implicitly or explicitly between the scope and the aim of the criminal law. The scope of the criminal law is understood primarily in terms of the (predominantly) private interests which require to be protected. On this view, criminal law appears as something adjunct to private law or private rights – the role of the law is to protect the pre-existing moral or legal rights. This approach is somewhat limited in that it takes wrongs against individuals as fundamental but accordingly struggles to explain collective or welfare interests – unless these are added in as something extra – or a public interest in resort to the criminal law.\(^8\) It is sometimes recognised (as in the Model Penal Code), that there are also public interests which must be protected, and that these are not simply reducible to private

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\(^8\) See e.g. Brudner, Lacey. Cf also Rechtsgut in German criminal law See infra
interests. However, where these are defined independently of the aim or function of the law. These would include crimes against public order or certain crimes against the state. And there are some interests, such as property, which appear to fall somewhere between public and private – they are directed either at the protection of individual interest in personal private property, or at the protection of the system of property rights or interests. The role of criminal law then appears as in some sense ‘adjectival’, protecting goods, interests or rights that have been defined elsewhere, or protecting them against certain kinds of ‘criminal’ interferences. This is also linked an account of the development of the law. Criminal law is understood as being founded in a core which was based on the protection of individual rights and then collective or welfare interests have been added on – and the problem of over-criminalisation is then understood as that of limiting these or pinning them back somehow. This account is of questionable historical accuracy, but more importantly it is actually a theoretical claim about the primacy of certain individual rights or interests, which consequently presents any kind of collective or general interest as alien to the criminal law.

If the content or scope of the law is thus seen as determined by individual rights, the function or aim of the criminal law is seen in terms of the ends of punishment,

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9 See discussion in Dubber, “Between Public and Private” at p.
10 See MPC s.220.1-230.5. See also e.g. S. Shute, “Appropriation and the Law of Theft” 2002 Crim LR 445-58. See also S. Gardner, “Property and Theft” 1998 Crim LR 35. See generally Dubber, “Criminal law” pp.206-7. Although it is worth noting that this kind of formulation might apply more generally – offences against the person could be understood as protecting the system of personal rights etc.
12 This also implicitly underpins the account of over-criminalisation in Husak, Overcriminalization. The Limits of the Criminal Law (Oxford, 2008). See also AP Simester and A von Hirsch, Crimes, Harms and Wrongs (Hart Publishing, 2011) ch.1 where they make the claim that these kind of individual wrongs are “archetypal” – joining the sense of historical priority to that of being theoretically fundamental.
whether for retributive or deterrent, or some combination of the two. As I suggested above, in these type of accounts the aim or function of the criminal law, then, is regarded as being largely independent of the content of the law. This is clearest in deterrence based accounts, where the aim of prevention or harm reduction does not depend on the content of any particular harms. It is, however, no less true of wrong-based accounts. These accounts can generate strong reasons why we should only punish morally responsible actors, and in certain cases (homicide, rape) can clearly identify wrongs that might uncontroversially be criminalized. However, absent further specification of the content of those ‘wrongs’ the ends of punishment will generally give us little guidance as to how the wrong might be expressed in the criminal law. The identification of the wrong thus needs to be supplemented by reasons, such as harm or the effectiveness of a particular mode of enforcement or definition, that have little to do with the aim of retribution as such. It is, though, this step – the identification of the legal wrong and its definition in criminal law – that is the central step in criminalization and that whose theoretical significance requires proper acknowledgement. In addition, we might ask the question of whether the ends of criminal law can be reduced to those of punishment. Writers such as Duff have suggested that the relation between punishment and criminal law is at best historically and culturally contingent; that is to say that the aim of the law is primarily to censure or condemn conduct of which the community disapproves of and that this does not necessarily require punishment. Overall then, while consideration of the ends of punishment might explain the moral or political justification for the exercise of the criminal law, it does not tell us much about the particular form or nature of the criminal law.\footnote{See comments in Duff et al, “Introduction” in Duff et al, \textit{Boundaries}, (Oxford, 2010) pp.6-7. See}
In recognition of these limitations, some accounts of the criminal law seek to identify a public interest which is more than just the aggregate of individual wrongs or harms. Thus, for example, Duff identifies the public interest in terms of the requirement that crimes be ‘public wrongs’.\footnote{See RA Duff, \textit{Answering for Crime} (Hart 2007) 3 esp. chs.4 & 6. See also S.E. Marshall & R.A. Duff, “Criminalization and Sharing Wrongs” (1998) XI \textit{The Canadian Journal of Law & Jurisprudence} 7-22; R.A. Duff & S.E. Marshall, “Public and Private Wrongs” in J.Chalmers, F. Leverick & L. Farmer (eds), \textit{Essays in Criminal Law in Honour of Sir Gerald Gordon} (Edinburgh: Edinburgh UP, 2010).} On his account crimes should be understood as wrongs which concern us all as members of the community, and can thus be distinguished from private wrongs, which concern only those individuals directly involved (and so would be a matter only of private redress). These are wrongs for which “we are criminally responsible as citizens to our fellow citizens”.\footnote{\textit{Answering}, p.142.} However, this also leaves open questions about whether this approach can say anything about the specific nature of criminal law. First, by starting from the investigation of the quality of the wrong, as opposed to looking at the wrong as recognised in the criminal law, this kind of approach is unlikely to identify any specific ‘public’ features of the criminal law.\footnote{See also Dubber here criticising the move to the publicness of wrongs as ignoring the “lawness of criminal law” (p.206).} These might be seen by this approach in ideas of processes of norm formation or public interest, but these will not really answer the question of why or when criminal law might be used (as opposed to other forms of regulation or other forms of legal redress). A wrong must be worthy of condemnation, but the question of which wrongs might fall into this category will depend on a separate process for working out the content of the criminal law. Duff acknowledges this when he argues that:

A justification of criminalisation will need to begin by specifying some value(s) that can be claimed to be public, as part of the polity’s self-definition;

show how the conduct in question violates that value or threatens the goods that it protects; and argue that that violation or threat is such as to require or demand a public condemnation.\textsuperscript{17}

However, there will still remain questions about the latter part of this process – why condemnation is the relevant feature of criminal law and the sense in which this can be described as an appropriately legal response. The general conclusion to be drawn from this is that while these theories of criminalisation have clarified the kind of moral framework within which decisions to criminalise certain conduct or practices might be analysed, they have so far had little to say about the nature of the criminal law either as practice or in terms of explaining the nature of criminal law. As Dubber has argued:

“This inquiry will generate a more or less coherent account of ‘crime’ and ‘punishment’ in an alegal realm occupied by wrongs, public and private, criminal and civil, that cannot hope to capture criminal law as a historical or current practice, institution, concept, or ideal.”\textsuperscript{18}

These approaches can be contrasted with criminological approaches to criminalisation which tend to focus more broadly on the social function of the criminal law and so help to identify specific qualities of the criminal law in practice. Here there are broadly two kinds of approach. The first focuses on the practice of criminal law, while the second is more broadly concerned with the question of the social function of criminal law. With the first, criminologists look at the question of who is criminalised

\textsuperscript{17} Op. cit. n.3, p.143.

\textsuperscript{18} Dubber, “Criminal law between public and private” p.206. See also L. Farmer, “Criminal Wrongs in Historical Perspective” in \textit{Boundaries} (Oxford 2010) for more detailed discussion of this point.
and how this process is exercised, seeing both over- and under-criminalisation.\(^\text{19}\) Over-criminalization focuses on the criminalisation of particular groups, communities and locations. This has looked at the police practices of using stop and search powers against particular ethnic communities or groups defined by gender or age. It examines the use of powers, such as those under the anti-terrorism legislation to police public order and so on. Or it looks at the intersections between, for example, housing or immigration policy and the criminal law to trace the increasing use of the criminal law in these areas.\(^\text{20}\) Under-criminalisation, by contrast, has generally argued that certain areas of social life, typically those connected with certain forms of economic activity conducted by relatively powerful social groups, have been under-criminalised. It has been argued that the ‘social harm’ caused by certain activities – typically in financial markets or business practices – matches or exceeds the harm caused by more ‘traditional’ criminal activities, and that this is evidence of double standards in the recognition of the harms caused by, or censure of, certain activities.\(^\text{21}\) ‘Harm’ is understood as a means of illustrating the symbolic equivalence of certain types of activities and as a potentially powerful argument in support of criminalisation.

There are a number of important features of this kind of approach. First, and importantly, the focus is not usually on legislation or the law-making process, but on how the law is used and enforced, or the use of police powers – even when this does

\(^{19}\) See e.g. the discussion in C. Pantazis, “The problem with criminalisation” (2008) 74 Criminal Justice Matters 10-11. See also Muncie in the same issue (pp.13-4) tracing the roots of the analysis of criminalisation within criminology. See also P. Scraton, Power, Conflict and Criminalisation (Routledge, 2007).

\(^{20}\) See e.g. essays by Rodger, Hancock, Hallsworth & Stephenson and Hirschfield in 74 CJM

\(^{21}\) See e.g. P. Hillyard et al., Beyond Criminology. Taking Harm Seriously (Pluto 2004). See also essays by Pemberton, White and Snider in 74 CJM. On the weaknesses of the social harm perspective see B Harcourt, “The Collapse of the Harm Principle”
not lead to prosecution. This then produces a powerful empirical picture of state practices of criminalisation (or of the social consequences of the failure to criminalise). Second, this kind of approach is highly sensitive to questions of social exclusion and the exercise of social power. It looks at the groups or communities who are either criminalised or, conversely, neglected by the law or the ways that criminal law supports these broader processes of social exclusion. This allows the linking of questions of criminalisation to broader trends and developments not only in the use of the criminal law but in social and economic development that are often hard to detect or absent from the perspective of more traditional normative approaches to criminalisation. And finally, and above all, it points to the fact that crime does not pre-exist law or other processes of censure but is created through a process of social interaction, including both the definition and enforcement of the criminal law. Crucially, then, it directs attention to the institutions and processes through which criminalisation occurs.

However, notwithstanding these undoubted strengths, there are some problems for this approach in terms of thinking about criminalisation more generally. The first is that this kind of approach can sometimes seem narrow in focus, looking at particular instances or areas of the application of the criminal law in such a way that it can be unclear what this might tell us about the application or use of the criminal law in general. If certain communities are criminalised through the use of stop and search powers this does not necessarily tell us anything about the acceptance of norms of criminal law more generally, or about the attitudes of the criminalised community to those broader norms. Another problem here is that there has been a marked reluctance

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22 See e.g. Shute & Simester ch.1 who define criminalization solely in terms of the legislative decision, suggesting that such an approach is “uncontroversial”

23 See e.g. Young, The Exclusive Society etc; Wacquant
on the part of criminologists to engage with the normative literature (matching the failure of criminal law theorists to engage with the implications of the criminological analysis). As has recently been pointed out by Andrew Millie, there has been little attempt in this literature to engage with the value judgments behind processes of criminalisation. Overall, then, while the focus on social power and the uses of the criminal law is important from this perspective, it can also be argued that the criminal law as a whole does not come clearly into focus.

The second kind of approach is focused on the social function or meaning of the criminal law. Here criminal law is seen as distinctive in terms of its social functions. Thus, for example, the French sociologist Emile Durkheim argued that punishment played the particular social function of articulating and expressing forms of social disapproval for the breach of particular social norms. Thus the criminal law allowed for the continual process of social reintegration of communities. Here again, though, it is worth distinguishing between the aims of the criminal law and those of punishment for, as penologists such as Garland have pointed out, criminal law and punishment are distinct social and cultural practices.

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24 A. Millie, “Value Judgments and Criminalization” (2011) 51 BJ Criminol 278-95. Interestingly, though, he wants to expand beyond moral judgments (or moral philosophy) to include prudential, economic and aesthetic judgments.


26 Garland op. cit p.??. See also D Garland & P Young, The Power to Punish (Heineman 1983) ch.1
a distinct social practice. This is a point recognised implicitly by some Marxist analyses of criminal law, which point to the role of criminal law in protecting the interests of particular social classes or repressing others in certain historical periods. However, such approaches tend to analyse the law at a high degree of generality and so have less to say about criminalisation in general, so much as providing an account of why, say, property is accorded particular significance by the criminal law in certain periods or how the criminalization or decriminalization of certain conduct might serve the interests of the particular social class. However, their importance surely lies in pointing out that the origins and function of the criminal law at particular points in time might depend less on moral theory than the ability of social groups or classes to harness the power of the law. In short, an account of criminalisation must be open to this particular combination of understanding of the law is used and enforced, the interests that it might serve and the social functions that it might perform, in addition to an understanding of the nature of particular wrongs and harms.

This brings us then to the question of how we might begin to integrate insights from the different approaches in such a way as to retain sight of the distinctive social and legal character of criminal law. I shall argue in the next section that one way in which we might do this is through MacCormick’s account of law as an “institutional normative order”.

III. The Institution of Criminal Law

27 See e.g E.B. Pashukanis, Law and Marxism (Pluto, 1977) ch.8 [?]. See also D. Hay, Property, Authority and the Criminal Law etc
MacCormick argues that law must be understood as a form of institutional normative order. This is to argue that an understanding of law cannot be grasped primarily through an understanding of norms, such as right and wrong, alone but through the way that these norms have become institutionalised in particular forms, agencies and rules of law. He contends, moreover, that an explanation of the institution requires an account of the relevant rules set out in the light of the point or end of that institution. The account thus proceeds from an investigation into the quality of norms and how these are ordered and make interpersonal conduct or social life to some extent orderly, towards an explanation of how these norms become institutionalised in different ways, and in particular in law. Institutionalisation occurs, on MacCormick’s account, whenever we encounter a ‘two-tier’ normative practice – that is, when there is not only the practice, but also rules for ordering the practice. In the case of law, this institutionalisation has taken place in a particular way. This is understood in part through a kind of ‘armchair sociology’ which seeks to identify and explain first how basic forms of obligation and duty arise between persons, and then how the process of institutionalisation requires recognition of particular powers and competences on the part of those enforcing the norms and managing the institutional order. We should note that the formulation of law as an institution is deliberately broad, to include to include rules, institutional arrangements and competences, practices and values. This, however, is also linked to a more schematic history of legal persons, rights and things, and the development of modern forms of law, the modern state and civil society. The point of this, MacCormick argues, is to recognise that while law might be (and indeed has been) institutionalised in many different ways, the dominant form of

28 *Institutions of Law* pp.34-7. See also “Law as Institutional Fact” 1974 LQR 102-29 etc. See the essays in M del Mar & Z Bankowski (eds.), *Law as Institutional Normative Order* (Ashgate 2009).

29 Op. cit ch.2
institutionalisation is through state law and that it is accordingly necessary to acknowledge its central importance.\textsuperscript{30}

While it is not possible to give a full account of this approach here, we can identify certain core features. At risk of over-simplification this approach seeks to combine a positivist recognition that particular legal systems develop in distinctive ways, such that the content and mode of expression of norms may vary between legal systems, with the view that there are, notwithstanding this, certain features and values of modern law that are in some sense irreducible.\textsuperscript{31} This is captured in the idea of law as ‘institutional fact’. Here MacCormick argues that the ascription of legal personality or the recognition of the existence of a legal relationships requires the interpretation and application of the relevant legal norms. This requires not only knowledge of the law in a given system, but also of the values or ends to which the institutions were oriented. It is not possible to understand rules of contract or property, without also understanding them as part of system of rules, including all areas of law, that strives towards a basic coherence, and which is oriented towards the intrinsic ends of the enterprise of governance under law. Thus he argues that “a coherent account of the character of any modern legal system [will] have to take seriously the very general values that are inherent in the character of the legal enterprise.”\textsuperscript{32} The values that are associated with modern law are the commitment to the rule of law, understood as the articulation and adjudication of express and binding rules for the governance of social conduct, and somewhat more vaguely, a commitment to justice and the common good.


\textsuperscript{31} See pp.289-93 where he acknowledges the similarities to Luhmann’s systems theory, in which each functionally differentiated social system is organized according to its own code. See Luhmann, \textit{Law as Social System} (Oxford ).

\textsuperscript{32} Op cit p.294
“according to some reasonable conception of these.” 33 Two further points should be noted. First, ‘institutional facts’ require to be interpreted in a basic hermeneutic that seeks always to reconstruct – whether from the position of a judge or an academic – the best possible understanding of the rule and its place within the institution. It is key to this claim that such reconstructions acknowledge the systematicity of law and the values or ends to which the institution is (or should be) oriented. This is a complex undertaking in which there is always a critical mediation between the rules identified, the consistency with other rules in the system, the principles of the particular system, and the values and ends of the institution of law more broadly conceived. 34 Second, while MacCormick contends that this process of interpretation and reconstruction cannot be value free – that is, that it must recognise both the values to which law is committed and the commitment to value in the process of reconstruction – he is insistent on the recognition of the separation of law from morality and that we recognise the ‘posited’ character of modern law. This requires that when we are dealing with legal institutional facts we must recognise that, even where these are shaped by, or recognise certain moral values, these must be understood primarily from the perspective of the institution of law.

In general terms, then, there are certain features of this approach that I want to stress. First, it begins from the social fact of law not morals. Second, the hermeneutic account of law then gives an important place to values in self-understanding of legal system and looks at the way mechanisms for institutionalising a commitment these values have been built into modern legal systems. Third, while recognising certain irreducible features of law as a mode of governance, this does not seek to produce a

33 P.304. The argument around justice and the common good is articulated in chs.14 &15 (see esp pp.274-7.
34 Pp.290-8
stipulative definition of the nature or scope of law or particular areas of law, but rather acknowledges that this is continually in the process of being worked out within the institution. Finally, this points to a necessary element of temporality and change. MacCormick focuses on certain features of modern law as positive law, while recognising that the paradigm of modern sovereign states is itself in the process of evolution and change. It is then, in an important sense a ‘post-positivist’ theory.  

What does this mean for the criminal law? MacCormick gives only a brief and rather sketchy account of the criminal law, but this contains significant pointers as to how the argument might be developed. His suggestion is that in thinking about the conditions for a justifiable system of criminal law we should not start from the requirement of a wrong (that punishment can only be justified when an individual has committed a public wrong), such that securing civil peace is only a side effect of the imposition of justified punishment on individuals. Instead, he argues that peace and civility should be seen as preconditions for justice among citizens, and that the just imposition of punishment can only take place once institutions of law have been established. His account of criminal law begins not from the aims of punishment, but with an attempt to specify the aim of the criminal law. He argues that it is necessary to start with this because even if we acknowledge the existence of a right to punish, whether in terms of retribution or deterrence, this does not tell us much about the forms through which this right is exercised. What is important on his account is to establish not only the existence of the right to punish but also the ends to which the exercise of this right has been put. These are seen as ending forms of private vengeance and bloodfeud, securing a state monopoly over the legitimate use of
violence, further institutionalised through the development of a specialised body of
criminal law and agencies to enforce it.\textsuperscript{38}

The aim of the criminal law is, thus, understood for MacCormick in terms of securing
the conditions of civil society.\textsuperscript{39} This, it is argued, is a matter of facilitating relative
peace and mutual trust between strangers:

“\textquote{The collective sense of security and solidarity in a relatively peaceful society
is likely to depend on a fairly high degree of confidence among law-abiding
persons that those who do not abide by the law, engaging in violent or
dishonest behaviour will be effectively restrained.}”\textsuperscript{40}

The civility of civil society is, then, at least partly dependent on the existence of a fair
and effective system of criminal law. This is conceived of as comprising rules
criminalising serious and wilful wrongdoings. However, the criminal law in turn
operates within the broader framework of institutional normative order that is state
law, and this provides limits to the criminal law both in terms of functional
competence (establishing boundaries between areas of private and administrative law)
and through the increasingly widespread application of values such as the restraint of
public actors which are developed in public law. Security and civility are thus key
themes running through his analysis. Indeed he goes on to argue that this sense of
securing the civility of civil society is key to understanding the nature of criminal law
as an institution for dealing with public wrongs. Criminal law, on this view, is always
expressive, or even constitutive, of the prevailing social morality adopted by the state
– that is to say that it makes sense to conceive of criminal law as speaking in a moral

\textsuperscript{38} pp.207-6
\textsuperscript{39} p.207 & chapter 12 more generally
\textsuperscript{40} p.208 Going on to point out that it also requires confidence that wrongdoers will be tried and
prosecuted fairly.
voice, expressing community disapproval of conduct – but this moral voice is always mediated through the institutions of law.\(^{41}\) This accordingly grounds the idea of public wrong in the aim of the institution and formulates it in a way which potentially has implications for the content of the criminal law.\(^{42}\) Crucially, however, it starts from the claim that criminal law has some specific public institutional purpose which is more than a right to punish or respond in some way to individual wrongs.

Overall then I see the potential of this approach as a mean of historicising our understanding of the institution of criminal law. However, while MacCormick presents the aim of the legal theorist as that of rational reconstruction, developing the most coherent possible account of the rules, principles and aims of institution, this might also be read as requiring a more radically historicised account.\(^{43}\) It is central to this account that we are dealing with the modern criminal law, as this has evolved and is evolving in relation to certain political forms and forms of social organisation. An account of the criminal law can only reflect this at a particular point in time, and criminal law theories are rational (to a greater or lesser degree) reconstructions of the institution. Thus, if we are looking at the institution of criminal law within the modern constitutional state this should be done by exploring how the modern institution of criminal law developed – the habits, customs, theories and practices of criminal law that shaped the modern. However, this is more than just a matter of establishing the contingency of particular understandings of crime, or even wrongdoing, or even of particular institutional arrangements or practices – important as it is to be aware of

\(^{41}\)“Criminal law is always and inevitably expressive, or perhaps it is better to say constitutive, of a prevailing social morality adopted and enforced by the state” MacCormick p.211.
\(^{42}\) p.216. He also seeks to formulate this in terms which pull it away from a connection to something like the harm principle because the protection of peace or civility might include instances of criminalising conduct where there is no clear harm (though recognising that wrongful intention will be required).
\(^{43}\) See ch.16. See also “Reconstruction after Deconstruction”
these factors. It is more that it is central to the idea of taking account of the
developing values of the legal system. There is a double exercise here. We are not
only rationally reconstructing our best account of the criminal law, but we must
understand it as a rational reconstruction of the institution of criminal law at a
particular point in time. And in doing this we must also recognise that our account of
the ideal law also changes over time. That is, it is not a matter of an inexorable
progress towards an underlying truth or understanding, but of recognising the
limitations of our theory – precisely because criminal laws are institutional facts and
as the institution evolves, so too does our understanding.

This is particularly important in relation to the idea (and theories) of criminalization.
In an important sense criminalisation only emerges as something capable of being
theorised with the development of the modern criminal law. Criminalisation, in the
sense of asking if the criminal law should apply to certain conduct, requires the prior
emergence of a sense of the criminal law as unified body of rules with a distinct aim
and character. In England the idea of criminal law first emerged only in the late
eighteenth century as a way of organising groups of laws relating to the King’s Peace
and the police power. It brought together treasons, felonies and misdemeanours that
had previously dealt with in different jurisdictions and under different procedures, and
the label ‘criminal law’ emerged from a range of alternative formulations, such as
pleas of the crown and penal law. The best known way of thematising criminal law
from this period remains Blackstone’s idea of criminal law as ‘public wrong’, and the

44 cf N. Lacey, “Criminalisation in Historical Perspective” Mod LR; Constituting Criminal Law in Duff
et al., The Constitution of Criminal Law (Oxford UP) forthcoming
45 This is also reflected in dictionary definition of the term, with the word criminalisation not being
used in its modern sense until the mid-nineteenth century. See
46 See discussion in D Lieberman,
importance of this is that it captures the sense of the need to explain what makes this field of law distinctive, and the need to identify a unifying concept capable of capturing the diverse practices of the emerging field. Later writers have taken up this challenge in different ways, and this modern understanding of the criminal law has developed together with an understanding that it was an area that was itself structured by values or principles. Explicit debates over a theory of ‘criminalisation’ did not themselves emerge until the latter part of the nineteenth century – notably in the clash between JS Mill and Stephen over liberty – perhaps as the idea of a criminal law became more settled, and certainly in response to changes in state function. But the central point here is that criminalization does not make sense in isolation from an understanding of modern character of the institution of criminal law.

Notwithstanding these arguments, it is important to recognise that MacCormick’s account of criminal law as an institution is undeveloped in certain key respects, and can at best be a starting point for theoretical development. I want to take up three points here as a way of trying to build on these basic methodological foundations. These are first, the appropriateness of taking securing civil society the end of criminal law; second, the question of whether this offers an adequate foundation for identifying the distinctive character of criminal law; and lastly to comment on how I see this kind of account feeding into normative theories of criminalisation. I should also stress that my aim here is less that of clarifying MacCormick’s theory than to show how it might

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47 Commentaries vol. IV p.??
48 Though the idea of ‘principle’ was itself still evolving. See Farmer, “The Idea of Principle” in Chalmers et al (eds), Essays in Criminal Law in Honour of Sir Gerald Gordon (Edinburgh 2010)
offer a basis on which I can develop a new kind of approach to thinking about criminalization.

\[\text{i) Securing Civil Society.}\]

There is some confusion about the nature of the claim about the role of the criminal law in securing civil society. It appears in part to be a threshold claim, drawing on Locke, about the need to establish peace in order to prevent private vengeance and provide the base from which institutions of law might develop. However, in addition to this it is then treated as though it is also a specific aim of the institution of the modern criminal law and can shape its content in some way. The first version of the claim would deny any specific role to civil peace, seeing it only as a basic condition for establishing institutions of law: once civil peace was established by the entering into of a social contract, then the criminal law would require an independent justification. This has led Ulvång to express the concern that in fact the justification of the right to punish is more central to this account that MacCormick wants to concede – for this becomes the operative aim of criminal law once civil order has been established.\[50\] I shall explain below why I think that there are good reasons for holding onto the second type of claim – that securing civil peace is a continuing aim of the criminal law – but before doing so I want briefly to address this point. My response to this is that it is not denying the need for the justification of punishment, but that by treating public peace rather than punishment as the aim of the institution it suggests that questions about the justification of punishment are primarily institutional in character. This has two dimensions. First, as I have already argued, on this account civil order does not appear as a side effect of justified punishment, but as an aim of

\[50\] Ulvång, pp.133-6..
the institution. It may then turn out that the best way of sustaining civil society is through just punishment, justified through law – so that the ends and the means combine in a way that acquires a force or weight of its own. This does not mean that the demands of justice should be neglected, but that these demands should, at least in the modern criminal law, be seen as a central part of the institution.\textsuperscript{51} As has been recognised from Hobbes on, there is no necessary connection between the right and the power to punish.

A second set of concerns then cluster around the generality of the aims of the criminal law in relation to criminalisation.\textsuperscript{52} On the one hand, it can be argued that the general aim of securing civil order is simply too thin to contribute to any meaningful justification of why we might criminalise particular acts or omissions, and or to explain why we might resort to criminal law rather than other forms of regulation. On the other, it is so broad as to be incapable of generating any limits to criminalisation: almost any measure might be justified on the grounds that it contributes to securing civil order, and thus this can do no work in setting limits to the scope of the criminal law.\textsuperscript{53} Thus, for example, if we talk about securing civil peace this might mean anything from the establishment of the basic conditions of social life to the micro-

\textsuperscript{51} In the modern criminal law, the requirement for just punishment has been institutionalised in some codes and human rights instrument, regulated by appeal courts and review commissions. The values, and the demand for justice are important, but this should not obscure the fact that both the demand for just punishment and the particular form of its institutionalisation are relatively recent, and followed on from the establishment of law.

\textsuperscript{52} A further question is whether we should see the aim of the institution as being fixed, or whether this also changes over time – and what this might mean for this theory. Luhmann – coding is fixed, but cognitively open.

\textsuperscript{53} See Ulväng pp.136-40. See also Tadros’ claim that this is inherently conservative – justifying existing institutions p.84. See also F Pollock & FW Maitland, The History of English Law (2\textsuperscript{nd} edn reissued 1968) (Cambridge: Cambridge UP) vol 2 p.453. cf Dubber who regards this lack of limits as a characteristic of police power rather than the criminal law: MD Dubber, The Police Power (Columbia UP, 2007).
management of civility in contemporary society. However, rather than seeing this as a weakness, I am inclined to view this as a potential strength as it opens up a range of questions about how ideas of peace and civil order have shaped the criminal law, how criminal law as an institution has sought to secure these ends, and how the criminal law has interacted with other areas of law or forms of regulation. At one level, the generality of the claim is important as it is broad enough to allow us to group together the wide range of social practices that have been called criminal law, but to see how the aim of securing civil order has been thematised in different historical periods and the level of specificity with which it has been pursued. Once again, questions of values and justice are an important part of this story, but the approach would be to look at the particular ways that these have been institutionalised – and how certain values have come to be seen as setting limits on scope or form of the criminal law. In addition, it directs us to look at how the law has sought to secure these ends. For MacCormick, this is presented as a narrative of public institutions replacing private vengeance and the monopolisation of force. This is clearly an important dimension of the emergence of modern criminal law, but it is not the only dimension, and recent research suggests that the movement from private to public is not uni-directional. But once again this potentially opens up questions about the relationship between private and public, as forms of law and as more general questions of the distribution of social and political space that need to be explored. This also brings us to the question of limits. Once again the question here is the priority given to the institution: it is not that values are not needed, but how they have developed. Thus we must address the

54 See, for example, Bottoms essay for the Criminalisation volume.
55 Central to this kind of account must also be an awareness of how ideas about civility have themselves been transformed over the modern period and how law has been used in advancing the civilising project. See e.g. N. Elias, The Civilising Process (2 vols).
56 Thus he is not seeking to answer the general question of ‘why punish’ but merely that of ‘why states punish’.
question of how criminalisation becomes formulated as an issue for criminal law theory, or how concerns about limits become institutionalised with the development of the modern criminal law.

ii) The distinctiveness of criminal law

As noted above, a criticism of taking the aim of securing civil society as an aim of criminal law is that it is too general. Can it not be said that all forms of law are in some sense directed towards the end of securing peace or civil order? If this is the case then this account is vulnerable to the same criticisms that I made of other theories in the first part of the paper – that it cannot identify anything that is distinctive about criminal law, or that in order to provide an account of the distinctiveness of criminal law it must fall back on something like the ends of punishment, as the only distinctive feature of criminal law is routine application of punishment. This is a serious criticism, and in addressing it we need to turn to the literature on the nature of crime and criminal law.

As an initial point it is important to distinguish between two different possible senses of the claim about being distinctive. The first is general, and the second is the more specific one of seeking to identify the positive characteristics that might be unique to the criminal law. Distinctiveness in the first sense is the claim that criminal law is not just adjectival, protecting rights that are defined elsewhere. It has both a public function of its own – securing civil order – but it is also public law in a relevant sense. By this I mean that it is a means of protecting legally defined interests (rather than
either private rights or moral wrongs). Distinctiveness is this sense is intended to capture the difference between law and moral theory.

In relation to the second sense, we should begin by noting that attempts to produce a definition of crime and criminal law have largely struggled to identify satisfactorily characteristics which are unique to the criminal law. We might as a consequence be wary of this attempt to identify unifying features or organising principles, as it is not clear that this is a question capable of being answered in a straightforward way. Such attempts have routinely fallen into one of two traps. On the one hand, some definitions are too broad and positivistic. The most well known of these is perhaps Glanville Williams claim that a crime is an act capable of being followed by criminal proceedings. This has been criticised from the point of view that while it might be descriptively accurate, it is circular and says nothing about what might make proceedings criminal, and so is of little normative value. On the other, some theories have sought to define crime prescriptively, but have accordingly produced accounts, such as those discussed in the first part of the paper, which are narrow (crimes are species of moral wrongs), and which seem to ignore or define away a vast part of the contemporary criminal law. One way out of this dilemma, rather than focusing on the search for the single factor that is able to define the distinctive character of criminal law, is rather to note that there are instead a range of factors each of which has been accorded a certain weight and significance, and which might be capable of doing a certain amount of normative work in thinking about criminalisation. The focus of the

57 Cf. the idea of Rechtsmit, or legally protected interests in German criminal law. Criminal law is not about the protection against moral wrongs, but interests which have been defined in law. On the struggle to reconcile the descriptive and normative in this concept see MD Dubber, “Theories of Crime and Punishment in German Criminal Law” (2006) 53 Am. Jnl. of Comp. Law 679.

institutional theory is not to identify a single defining characteristic. Instead it is necessary to recognise that there are different kinds of norms in the criminal law and that range of regulation, the scope of wrongs that have been criminalised and so on, have changed over time. In doing this, however, we should recognise that there is not necessarily a single modern criminal law. There are different stages or periods of development and the current criminal law is a combination of different institutions, practices and so on from different periods. Rather than producing an *a priori* definition of criminal law, the first task of the theorist should be to trace the range of possible factors and justifications and their changing relation to the justification of punishment. However, while this might produce a descriptively rich account of criminalisation, it leaves open the question of how this would feed into a normative theory of criminalisation.

**iii) Rethinking theoretical approaches to criminalization**

In concluding I want to address this question of how the approach set out here might contribute to normative theorising about criminalisation. First of all, the approach set out in this paper has been to suggest that in thinking about criminalisation we need to pay more attention to questions of law, and specifically to the distinctive character or aims of the criminal law. In doing so I am not suggesting here that we should disregard the central moral questions that have dominated writing about criminalisation – wrongs, harm, punishment. However, I am arguing that neglect of these has led to certain odd features in the literature on criminalisation, and further that it may offer a way bridging the gap between this literature and important criminological writings on criminalisation. A recognition of the distinctive

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60 See Garland, *Culture of Control* (Oxford, 2001) ch.8
institutional features of the criminal law has been absent from existing normative theories of criminalization, and the approach set out here is intended in the first instance to be a corrective to this neglect of the law. The purpose of a theory of criminalisation is to come to terms with legal questions about the proper scope and limits of the criminal law. Moral theories have become an important resource in thinking critically about the limits and scope of criminal law, but should not necessarily be accorded any sort of priority.

Second, it is clear that the approach I am outlining here is one that aims to present a descriptively richer account of the modern criminal law, but we might ask whether this is likely to be theoretically useful. When building a theory, we might decide for proper reasons to picture criminal law in a certain way for strategic reasons, and provided that this is not too remote from ‘reality’, there are clear advantages to such selectivity in terms of reducing complexity – and indeed a description is not a theory. But the question here is that of how we can be sure that in doing so we are taking the most relevant or salient features of the criminal law. It is clear that a certain kind of orthodoxy has developed within criminalization theory – about there being a core of moral wrongs, about the relationship between general part and particular crimes and about the rational character of the criminal law. But does it make sense to see criminal law as a form of ‘rational coercion”, appealing to a subject’s responsible agency? Can or should all forms of criminal law fit the model of moral condemnation? Are there core or paradigmatic crimes? Many criminological and sociological accounts of criminal law would question such assumptions and so the aim of beginning with this

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kind of descriptively rich account of the criminal law to try and build up a more robust account of the relevant starting points for normative theory.

Finally, a concern that is addressed to positivist (or post-positivist) approaches such as this is that in defining the scope and aims of the law in terms in terms of a description of field of the criminal law, we must accept criminal law’s own account of its scope – a concern which can be seen to be linked to Tadros’ claim that MacCormick’s institutional theory generally neglects the demands of justice. The argument here is that this kind of approach will be incapable of generating the necessary critical bite when discussing criminalisation, as the tendency will be to produce an account which will describe and legitimate existing institutions. But the risk here is the same as that run by any theoretical account of law: that of falling between irrelevance and apology. The answer to this is in the critical space which is always opened between the institution and its values, and the process of reflecting on both the ideals and the practice in order to produce a critical understanding of the modern institution of the criminal law.

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62 Tadros, pp. 87-8.