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THE CONSTITUTION OF CRIMINAL LAW†

I argue that modern criminal law was constituted to rationalize and humanize punishment. To do so, modern states need a constitutional framework that protects the rule of law and the separation of powers. In this context, criminal law protects individuals against arbitrary and cruel punishment by creating very strict conditions on the use of punishment and by limiting its abuse by authorities. Part II of the article tracks the evolution of crime and punishment and argues that criminal law only came to maturity when crime was distinguished from sin during the Enlightenment. Once crime had been freed from its theological shackles, it could be reconceptualized as one of the main instruments of the state to maintain the secular political order. Part III of the article sketches the main traits of a system of criminal law that aims to minimize crime and punishment; it also promotes peace as the harmony of mind – that is to say, a collective mental state in which individuals and groups can trust the state to create an environment in which interpersonal and institutional violence is reduced to the bare minimum and people can focus on their individual flourishing.

Keywords: constitutional law, criminal law, criminal law history, institutional violence, punishment

I *Introduction*

The practice of punishment has not always been regulated by law. In fact, this is just a fairly recent phenomenon that coincides with the emergence of the modern state; criminal law as we know it is intimately linked with that historical development that introduced constitutional guarantees against arbitrary and cruel punishment. In its constitutional form, criminal law rationalizes punishment and guarantees the protection of political freedom and equality. A well-functioning system of criminal law minimizes legal intervention and maximizes peace and security. This is the gist of the account of criminal law that I want to defend here; this account is distinctly political and can be contrasted with moral and instrumental conceptions of criminal law.[1] Broadly speaking, moral accounts hold that

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1 Prominent moral accounts of criminal law include John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007); Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, 1997); Andrew Simester & Andrew von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization* (Oxford: Hart Publishing, 2011); Victor

criminal law tracks and implements into law pre-existing norms against moral wrongdoing. Instrumental accounts hold that criminal law is a mere tool that serves whatever goal the legal system defines.

Political accounts of criminal law maintain instead that crimes are those acts that undermine civil peace or civil order; they are defined by political institutions in a way that does not fully track moral wrongdoing. Rather, the criminal law should be the object of a full political justification.[2] There are several candidates for the job: criminal law is presented as securing civil order;[3] as stabilizing cooperation;[4] as defining jurisdictions;[5] or as delimiting the realm of criminal law by focusing on public wrongs as defined by the civil order.[6] I find all of these political theories of criminal law plausible, but I believe that none of these political accounts fully succeed in explaining the way in which criminal law is central to the regulation of public power. In particular, I believe that none of these political accounts offers a satisfactory understanding of the way in which criminal law is central to the protection of political freedom and of the political order.

I conceive of the political order as a garden in need of nurturing. And the role of the state is comparable to a gardener. Any intervention should be done with the intent of making the society blossom and grow strong healthy. Of course, that growth is spontaneous and accommodates a great amount of free blossoming, just like political freedom blossoms in a healthy political order. The gardener's conception of political order can be contrasted to the carpenter's conception, according to which the state interferes to manufacture the political order according to a precise design. The carpenter is heavy-handed, and his goal is to impose onto the society a precise shape.[7] The tool to achieve that goal is criminal law. I argue instead that the political order is to be regarded as a garden, and criminal law is best conceived as an artificial instrument with which the state rationalizes punishment and corrects the abuses of power so as

Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011); Antony Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018) [Duff, *Realm of Criminal Law*] – in this book, Duff has moved much closer to political accounts while trying to preserve intact his legal moralism.

2 Vincent Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press, 2018) [Chiao, *Criminal Law*].

3 Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016) [Farmer, *Making the Modern*].

4 Chiao, *Criminal Law*, supra note 2.

5 Malcolm Thorburn, 'Criminal punishment and the right to rule' (2020) 70:Suppl UTLJ XXX [Thorburn, 'Criminal punishment'].

6 Duff, *Realm of Criminal Law*, supra note 1.

7 This distinction was already present in ancient Greek thought – namely, that between spontaneous and artificial order, *kosmos* and *taxis*. Traditionally, *kosmos* is the order of the universe, whereas *taxis* is the order created by men – for example, the order of an army. Now, most political accounts of criminal law insist that the political order is an artificial order and criminal law is one of the instruments with which the state creates and secures political order. The distinction is used by Friedrich Hayek, *The Constitution of Liberty* (London: Routledge Classics, 2006), to distinguish spontaneous economic order from the artificial order of politics.

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to allow spontaneous growth and flourishing. My conception of criminal law stands in contrast with all those political accounts that believe that the political order needs to be artificially constituted.[8] Instead, I claim that political societies need to constitute criminal law in order to police the spontaneous growth of the political order.

The political account of criminal law that I defend begins with a genealogical story of punishment and criminal law. Originally, punishment is conceived as being instrumental to cosmic order; its implementation in the human world is decentralized, diffused, and unregulated. Prior to the development of criminal law, punishment is wielded as a sword by the ruling classes; fear, cruelty, and uncertainty were the most common feelings associated with the practice of punishment. Criminal laws existed, but they did not form a coherent whole with a clear mission; in fact, I shall maintain that criminal law as a coherent system only appeared with the emergence of the modern state. Indeed, this article is an exercise in historically informed legal philosophy. For I do believe that we can only understand legal and political institutions as evolving to meet the challenges of societies. Moreover, the philosophical account of criminal law presented here does not want to limit itself to the Anglo-American understanding of crime and punishment but aspires to be true to all jurisdictions or at least to those that have evolved into a fully constituted system of criminal law.

The article is divided into two parts: Part II of the article will explore the evolution of punishment in relation to the political order from its theological roots to its role in the modern state. While the original understanding of political order offers important insights on the role of law and institutions in an immanent society, the problems that it faces has to do with arbitrary and decentralized punishment. Part II concludes by showing that the emergence of criminal law in the eighteenth century changed the constitutional structure of punishment in the following way: punishment was no longer a unilateral, vertical, and arbitrary exercise of power; instead, it became a legal instrument that addressed both political authorities and individuals and guaranteed that political authorities and individuals would be held accountable if they pursued their private interests in a way that was incompatible with the common interest of the society.

Part III is designed to present a Copernican revolution in the understanding of criminal law as an effective tool of regulation of punishment with the intent of nurturing the political order as a spontaneous order. The success of criminal law, I claim, can be measured by how well it fares in promoting peace and security, which are only met when the political order affords equal political freedom to every member of the society. In this account, peace is not merely the absence of war but also the presence of all the conditions necessary for a blossoming freedom. To flesh out my constitutional account of criminal law, I discuss the connection between criminal law, freedom, and peace. I conclude by pointing out the appeal of a constitutional conception of criminal law.

8 Duff, *Realm of Criminal Law*, supra note 1.

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II *A genealogy of punishment: from cosmic order to political order*

A COSMIC ORDER AND PUNISHMENT

In Heaven there will be no law, and the lion will lie down with the lamb. ... In Hell there will be nothing but law, and due process will be meticulously observed.[9]

Christian thought prioritizes cosmic order over political order: the former matters normatively, while the latter is purely contingent. The Church has always felt the responsibility of orienting human actions toward the good of salvation. And if human actions strayed from the right path, then eternal punishment would await those souls. Punishment responds to sin in the world, and sin is conceived as that behaviour that brings chaos and disorder in human affairs. Punishment has been linked to cosmic order since at least Dante's *Divine Comedy*.[10] In Dante's Inferno, divine justice is handed down with the highest degree of precision and ruthlessness. To begin with, crime is defined as sin, which is an offence against God's will. More precisely, the paradigmatic idea of criminal offence in Hell is *Malizia* or, as we would put it, intentional wrongdoing.

In Hell, there is no risk of under- or over-criminalization since crime perfectly matches sin. Furthermore, there is no concern as to the process: every soul has a chance to unburden their conscience before a judge. In Dante's Inferno, damned souls feel compelled to rush to their judge and confess the full burden of their sin. Confession is the royal proof in the middle age, and, in Hell, it does not have to be extracted with violence. It is a spontaneous and full account of the individual's deeds on Earth. The soul's confession is matched with a sentence that identifies exactly the corresponding sin, its emplacement in Hell and its punishment. The judge in Dante's Inferno is Minos; instead of handing down a verbal sentence, he responds to the soul's confession with the movement of his tail. The individual soul will count the number of times the tail has circled Minos's body and that will correspond to the exact place of punishment in Hell.

Dante's scholastic and taxonomic mind is obsessed with mathematical and architectural order, which results in a depiction of Hell as a perfectly organized and hierarchized place where every soul knows exactly her standing. Punishment also works according to arithmetic precision and follows the law of '*contrappasso*': punishment will mirror the sin either analogically or by contrast with it. For example, the sin of gluttony is punished, by analogy, with the life of pigs – that is to say, animals purely focused on bodily pleasure. Damned souls will spend eternity lying on the ground grovelling in the dirt and in the mud. The mathematical precision of divine criminal justice highlights both the appeal and the drawbacks of a strict retributivist model. The appeal is clear: first, crime is easier to define and identify. It is wholly pre-legal and a-temporal in the sense that

9 Grant Gilmore, *The Ages of American Law* (New Haven, CT: Yale University Press, 1974), as cited in William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2011) at 1.

10 Dante Alighieri, *The Divine Comedy* (London: Penguin Classics, 2012).

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it has no connection with actual societies. Intentional wrongdoing that offends God's will justifies punishment, the application of which restores justice and order. The trial is not plagued by the uncertainty related to human fact-finding and evidence: '[D]ue process will be meticulously observed.' Finally, there is no doubt as to the finality of the process. Divine justice is strictly teleological and eschatological: those who deserve salvation as a reward will get it, the others will be punished in eternity.

Human justice, by contrast with divine justice, is wrought with epistemic, ethical, and political dilemmas. Human societies – and Dante's Florence was no exception – are divided into factions that vie for their own private interest rather than seeking the public good. The moral good is out of sight, while political factionalism creates a growing number of violent conflicts. There is epistemic uncertainty as to how to define the common good as well as how to design political institutions that represent the concerns of the whole society. Social disorder and political chaos are predominant; in these societies, there is no authority strong enough to set up a system of criminal justice that would bring back a sufficient degree of political order. Dante envisages the advent of an enlightened monarch as a cure for the authority vacuum.[11] In Dante's political philosophy, only an emperor could bring order and stability to Earth since the Catholic Church had no sufficient political authority to do so. An emperor could also bring peace between, and inside, city states that had been corrupted by the pursuit of faction interests.

B THE BIRTH OF POLITICAL ORDER

The church, the empire, and the city state are three forms of political authority that will eventually fail to secure control over the society. Political theorists of the calibre of Francesco Guicciardini and Niccolò Machiavelli revived Republican ideas to grapple with the impossibility of reconciling the political nature of man with a Christian framework in which secular achievement is not contemplated.[12] The Republican city state is the first attempt to secure a political order capable of managing conflicts and able to pursue the common interest. To do so, the Republic needed to set up institutions to facilitate the participation of all citizens to the political life. Such a way of life made possible by a secular political framework is called '*vivere civile*,' which means living within a Republic in a virtuous way, a way that embraced and reflected the stability of the political association called the city state: 'The virtue of the citizens was the stability of the politeia, and vice versa; politically and morally, the *vivere civile* was the only defence against the ascendancy of *fortuna*, and the necessary prerequisite of virtue in the individual.'[13]

The early republican conception of political order is shaped in opposition to cosmic order. In the latter, religious norms pervade every aspect of life, and

11 Dante Alighieri, *De Monarchia* (Milan: Garzanti, 2007).

12 John GA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 2003) at 157.

13 Ibid.

they are imposed on people from a higher authority that knows everything and judges everyone. Prosecution is not necessary because there is no need to gather any evidence, there is no epistemic uncertainty as to the culpability of individuals. The judge does not need to interpret religious norms, he just has to apply them strictly once the facts have been ascertained. Order flows directly from the strict application of religious law; punishment restores in Hell the order that has been lost on Earth. By contrast, political order in a city state has to respond to the chaotic confrontation of human emotions. Early republican theorists had a dim view of human rationality and converged toward a negative anthropology according to which humans are naturally led by their own personal interests and desires. In response to that problem, political order is conceived as the ability to craft institutions that aspire to a balanced government and to shape civic personality in a way that connects private interest to the common good. Indeed, politics was conceived as the art of bringing private interest under the umbrella of common interest.[14] However, city states proved incapable of building a stable institutional framework that could bring individuals together and put an end to social chaos. A great part of the responsibility lay in the hands of political authorities, whose arbitrary use of coercion and punishment instilled a sense of insecurity and fear that created more disorder rather than less.

C PUNISHMENT WITHOUT AUTHORITY

The problems of punishment throughout the Middle Ages and the Renaissance were threefold: first, there was no coherent criminal justice system since the political authorities were competing for the ultimate coercive authority. To be clear, I am not saying that there were no criminal laws; rather, I am claiming that there was no coherent organization to the system of criminal laws. This meant that punishment was decentralized and diffused; various authorities, both public and private, religious and secular would take it upon themselves to investigate, prosecute, and punish crime that was understood as sin. Second, religious disagreement and religious conflicts undermined the certainty intrinsic to the cosmic order. The sixteenth, seventeenth, and eighteenth centuries were characterized by ethical, political, legal, and economic uncertainty. There was no ethical framework of reference nor a political (constitutional) form that commanded full authority. The competition between various moral authorities was also reflected in the legal order. At the beginning of the seventeenth century in London, there were three sets of courts that claimed jurisdictional authority: common law courts, equity courts, and ecclesiastical courts. Legal enforcement was fragmented, and that only increased the people's feeling of insecurity *vis-à-vis* institutions that yielded punishment as a destabilizing instrument. Third, when they did exercise authority, they did so in an arbitrary way. Cruel and inhuman punishment, including torture and other violent means of interrogation, did not help to build a stable social order. On the contrary, the fear and the uncertainty linked to the arbitrary use of power

14 Contemporary political philosophy is alien from this approach. That is regrettable as political philosophy seems to become more and more detached from political reality.

spread more social chaos and unrest.[15] But this lesson was not learned until much later.[16]

D THE CONSTITUTIONAL STRUCTURE OF CRIMINAL LAW

The emergence of criminal law brought about a conceptual revolution, along with an evolution in the practices of punishment. In a nutshell, criminal law changed the constitutional structure of punishment. Criminal law did so by making the whole practice of punishment the object of legal regulation.[17] By doing so, it created a coherent system and a fully-fledged institution that could be used by a single authority – the modern state – as an instrument for its own purposes. The system created by criminal law is composed of two types of rules: one set of rules addresses wrongdoers and imposes a duty that is designed to conduct behaviour. We commonly call them duty-imposing rules. The other rules, more importantly, address authorities and instruct them as to their role in shaping the domain, and the implementation, of punishment.

The system of criminal law changed the constitutional structure of punishment by creating a stable framework in which coercive authorities could be held accountable. The most important constitutional change took place with the separation between the legislative branch – empowered with the task of defining criminal behaviour – and the judicial branch, whose task was reduced to the application of criminal laws and the sentencing power. Of the utmost importance was also the creation of a new power that was in charge with policing, evidence

15 The problem of social and political chaos was so predominant that Shakespeare himself treated it as a central question throughout his work; in fact, this could be the leitmotiv of his work. Shakespeare identifies several ills of criminal punishment: the arbitrary nature of judgment and the cruelty of punishment. The two problems together pointed to a larger issue: the hypocrisy of any authority that claimed final and infallible moral objectivity. Shakespeare's *Measure for Measure* (London: Arden Shakespeare, 2015) explores the problem of criminal justice in a Christian commonwealth. It can be interpreted in three different ways: it can refer to the Old Testament's idea of retaliatory justice: 'an eye for an eye.' It also refers to the New Testament's idea of 'being judged with the measure with which you judge.' Finally, it refers to the pagan idea of doing justice by finding a middle ground though the virtue of temperance. The three models of criminal justice stumbles against human vices. But there is a final important twist: however virtuous temperance may be, it may still overlook what is truly important about human relations. In each of the three models mentioned above, the city state is trying to coerce people into behaving in a sexually appropriate way, but the truth may lie elsewhere: sexual encounters are examples of the most natural human activities, and they do not call for regulation or restriction. Political institutions do not have legitimate authority to interfere in this realm of human activity. Thus, Shakespeare represents the conflict between the spontaneous order of nature that covers sexual relations and the artificial order of law that punishes sexual encounters outside of wedlock. Thus, Shakespeare leaves the door open to a more radical reading of criminal justice and paves the way for a secular space where sexual relations are altogether removed from the political domain.

16 It is only with the French Revolution that we can begin to talk of a modern state and, with it, of the emergence of a system of criminal justice. In order to fulfil its goal of making life in common possible, a constitutional theory of criminal law must highlight the necessity of a constitutional framework to regulate the exercise of coercive authority.

17 Penal captures more precisely the fact that the law is about punishment.

gathering, and the prevention of crime: the police force was created to assist the judicial branch and to secure the daily implementation of criminal laws.[18] Each institutional actor is part of the system of criminal justice, and, as such, it is subject to legal constraints and legal boundaries. By creating a legal-constitutional framework, the criminal law rationalized the practice of punishment and changed its arbitrary and chaotic routines into a well-organized institution with a precise structure and increased efficiency.

Even though the evolution of criminal law as a system was slow and gradual, the conceptual revolution began at a point that can be identified – namely, the point at which the conceptual distinction was made between sin and crime, as suggested by Cesare Beccaria in 1764: 'I write only of crimes which violate the laws of nature and the social contract, and not of sins, even the temporal punishments of which must be determined from other principles than those of a limited human philosophy.'[19] By drawing this distinction, Beccaria carved out an immanent and secular domain of human justice that is conceptually independent from divine justice and religious authority. Crime is the preserve of the immanent human society. If sin is a wrong against the order created by God, then crime is a wrong against the political order, which is partly spontaneous and partly constituted by society. That helps parliament in its quest to define crime, even though its work requires a steep learning curve, and the opportunity to abuse that power is manifold.

The French Declaration of the Rights of Man and of the Citizen (DRMC) enshrined some of the constitutional limitations on crime suggested by Beccaria.[20] Article 5 of the DRMC is a substantive limitation on criminalization: 'The law has the right to forbid only those actions that are injurious to society.' Society is defined here as a free political association, and the (criminal) law can only prohibit those public actions that wrong the political association; any other action is free and cannot be the object of legal regulation. Indeed, Article 5 needs to be read in conjunction with Article 4, that states: 'Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.' The DRMC asserts the principle of freedom of action within the free political association, unless the action wrongs society, in which case the criminal law can set the appropriate prohibitions.

The constitutional nature of criminal law could not be highlighted more clearly.[21] Men freely associate to create a society that protects freedom for all and punishes those who want to wrong the society. Prohibitions are strictly determined by the law, which is the expression of the general will as framed by representative

18 Of course, this happened gradually, but its origin can be located at the moment in which the state begins to discipline punishment through criminal law.

19 Cesare Beccaria, *On Crimes and Punishments* Kindle edition (Cambridge, UK: Cambridge University Press, 1995) at 100–1. Beccaria's book was blacklisted by the Catholic Church, but that did not prevent it from becoming a work of reference.

20 *Declaration of the Rights of Man and of the Citizen*, 1789, online: <www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789>.

21 Ibid, art 6–9 define other aspects of the criminal system.

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institutions that are open to any person in the society without distinction.[22] The principle of legality strictly regulates prosecution, arrest, and imprisonment.[23] The principle of necessity guides the law in determining the minimum amount of punishment as a consequence of a clear defined crime.[24] The principle of presumption of innocence is also enshrined in the DRMC.[25]

III *The constitution of criminal law*

Criminal law is a fundamental instrument of the modern state to rationalize, secularize, and humanize punishment. As we saw in the previous Part, it comes with a set of foundational principles that regulate the production and implementation of criminal law. To put flesh on the bone of criminal law's constitutional aspiration, we need to say more about its foundational principles and how they apply; for criminal law is a double-edged sword: the state can use it to protect society, but it can also use it to repress society.[26] The act of constituting criminal law, therefore, has a double meaning: to enhance the protection of society and to limit its oppression. Needless to say, the right balance is hard to achieve, and, in practice, most states tend to fall in the trap of enhancing oppression through criminal law. But, in what follows, I will focus on the constitutional guarantees that might help to prevent oppression and to promote peace.

A LEGALITY AND LIBERTY

> Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. *These limits can only be determined by law.*
>
> – Article 4 of the DRMC (emphasis added)

Law is the instrument through which punishment is regulated and tamed. The unequivocal rule of law over punishment addresses two fundamental problems of the

22 Ibid, art 6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities and without distinction except that of their virtues and talents.

23 Ibid, art 7. No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offence.

24 Ibid, art 8. The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence.

25 Ibid, art 9. As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

26 Duff, *Realm of Criminal Law*, supra note 1.

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practice of punishment before the modern state: the lack of a coherent system of criminal punishment and the widespread feeling of uncertainty that was associated with it. The modern state centralized and rationalized the practice of punishment through the principle of legality. No more question of competing authorities vying for the right to punish. The law became the only source of legitimate criminalization, and it did so independently from religion: the point was no longer to punish sin but, rather, to punish behaviour that undermined social cohesion. In continental Europe, the principle of legality inspired the reformist movement of the penal code, the aim of which was to provide a unitary and systematic point of reference.

When a system of criminal law is well designed and well organized on the basis of the principle of legality, then it contributes to enhance liberty. Montesquieu insisted on the centrality of criminal laws to protect political freedom: 'Political liberty consists in security; or, at least, in the opinion that we enjoy security. . . . It is therefore on the goodness of criminal laws that the liberty of the subject principally depends.'[27] Criminal laws must protect against interpersonal use of violence as well as against the abuse of power of authorities. When these two guarantees are met, then the criminal laws enhance the feeling of security in individuals and contribute to the sense of political liberty. It is important here to stress the psychological aspect of political freedom. Legal theorists and political philosophers do not insist enough on this point, which I believe is central to understand the role of the principle of legality in regulating punishment. What people fear is not punishment itself; they fear arbitrariness and, most of all, uncertainty. If an authority is arbitrary, then no behaviour is free from the threat of punishment. Psychologically, not one single act is free because every act is liable to being prohibited and punished on a whim. The revolution ushered in by legality is connected with the idea of certainty: the law, speaking as one, defines prohibited behaviour and attaches to it certain consequences. Outside of the realm of criminal law, there is no prohibition. The reigning principle becomes freedom. Law can protect against crime, but it can also easily stifle spontaneous action. Thus, criminal law should strive to achieve the balance between coercion and freedom, which is the essential feature of a well-functioning political order.

B CRIMINAL LAW'S POLITICAL GOAL

Thomas Hobbes famously argued that the solution to social chaos and decentralized punishment was to institutionalize the political order and put the sovereign at the centre of the architecture of power. Hobbes contributed to shaping the modern understanding of political order as immanent and artificial by deliberately prioritizing artificial order over spontaneous order. Thus, the political space would be the product of the human activity of ordering.[28] Since Hobbes, this way of thinking about

27 Montesquieu, *The Spirit of the Laws*, translated by Thomas Nugent (New York: Hafner, 1949), Book 12.

28 Alice Ristroph, 'Criminal law and Public Ordering' (2020) 70:Suppl UTLJ XXX, presents a very Hobbesian understanding of order: 'Order, the noun, is intelligible to us only after we have engaged in the activity of ordering, only after we have invented or been instructed in some principle of organization' (at XXX).

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order has become deeply engrained in the language. But there is nothing obvious about the idea that order is only intelligible as the product of artificial ordering. A snowflake has a beautiful and spectacular shape, a structured order that is not the product of any human ordering. The same could be said for human societies: their origin and development does not depend on a precise human activity of ordering.[29]

Criminal theorists often defend an understanding of order that is close to Hobbes, despite their effort to distinguish their own views. Antony Duff, for example, argues that 'cruder versions of "law and order" politics may suggest that "order" is achieved simply by forceful repression, but that is not what is urged by criminal theorists interested in civil order. The order that concerns them is a structured, normative order: it involves a stable arrangement of institutions and practices that allow people to know where they stand, where they should stand, and where they will stand.'[30] Duff points out that criminal law contributes to buttress and support a general sense of order in the society that does not equate with the crudest versions of law and order. However, it is hard to understand in which way their understanding of civil order can be distinguished from 'plain order.' Civil order as a category is too wide and too little discriminating. This is not to say that it may not be descriptively sound, but, then again, it is easier to be descriptively correct if the category uses a very wide net.

Since civil order is a very broad church, it is capable of capturing a very wide range of institutional combinations. Duff explains that, '[i]n non- or anti-democratic politics, the civil order will be hierarchical: each class or caste will have its appropriate place in the hierarchy, and its members will know their place – their station and its duties.'[31] The problem is that the more encompassing civil order is, the less normatively discriminating it becomes. As it stands, the following propositions are true:

- a society has a well-established criminal law system that secures the civil order;
- the civil order protected by criminal law allows for great injustice and is compatible with a great degree of social inequality.

29 The driving idea behind all of these conceptions is that order is the product of ordering and not a spontaneous phenomenon. The same is true for other contributors in this special edition. Chad Flanders, 'Criminal Justice and the (Liberal Good of "Order")' (2020) 70:Suppl UTLJ XXX, for example, claims: 'We can't have the possibility of inherent order if we don't, first, have an imposed order.' Here, imposed order is another name for artificial order, or *taxis*, and its priority over inherent order, or *kosmos*, could not be stated more clearly. The same conception of artificial order can also be found in those who focus on civil peace. Thorburn, 'Criminal punishment,' supra note 5, for example, focuses on the king's peace, which is defined as 'the exclusive right of the sovereign to determine the content of the law, and through it, the legal rights and obligations, powers, and liabilities of its subjects.' The king's peace is imposed by the exercise of the right to rule. Finally, Darryl Brown, 'Civil Order, Criminal Justice, and "No Justice No Peace"' (2020) 70:Suppl UTLJ XXX, claims there is a minimal conception of civil peace which 'merely describes the ordinary state of society in which riots and rebellions are absent, crime is held to tolerable levels and civil courts and government institutions operate.' Here again, civil peace amounts to an artificial construction upon which one can build.

30 Antony Duff, 'Criminal Law and the Constitution of Civil Order' (2020) 70:Suppl UTLJ XXX.

31 Duff, *Realm of Criminal Law*, supra note 1 at 153.

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If that is correct, then it becomes very difficult to discriminate between order and civil order, for there is no meaningful difference between the two. Duff suggests that, to put flesh on the bones of civil order, we can turn to constitutions as the documents defining the central elements of a polity's civil order. Now, to be clear, when Duff speaks of constitutions in this context, he is making a reference to formal written constitutions. He even goes on to use the constitutions of Poland or Iran as an illustration of what a state might define as its core commitments to a civil order. But it is clear to me that, when you take these examples, it will not be difficult to see the discrepancy between the formal constitution and the material constitution. The former represents the norms expressed in a formal text, while the latter stands for all of the norms and practices that are not written and yet are essential for a well- functioning constitutional system.

Criminal law's goal must be more demanding and discriminating than civil order and more attuned to understanding and responding to chaos in the society and in the mind: criminal law's goal should be peace, where peace is not merely defined as the absence of war. Rather, peace has two dimensions: one external and one internal. The external dimension is more immediately visible and measurable: criminal law should help to lower the overall amount of crimes committed; we can call this the physical security dimension of peace. The internal dimension is harder to measure, and yet it is equally important: criminal law should help the state to promote the feeling of psychological security, which is a fundamental ingredient for a healthy political order. I will call this goal peace as harmony of mind to differentiate it from other conceptions of mere peace or order, as it adds a psychological dimension. The idea here is to stress the role of criminal law in removing the feeling of fear and distrust so as to make people individually and collectively capable of enjoying a life of freedom. Not only is political freedom protected, but also everyone can reasonably hold the belief that political freedom is the highest aim of the political order.

Peace as harmony of mind is a normative ideal that is never fully realized in political societies. But it can be regarded as a polar star toward which a political association should strive. Also, it can help us to understand when and under which conditions criminal law is performing a successful job. The point of a political association is not, as Tacitus put it, 'to make a desert and call it peace.' To achieve this goal, it is clearly not sufficient to follow the path suggested by Hobbes. Nor does this goal overlap with civil order, which has less stringent criteria and is compatible with a political association that is hierarchical and that coerce people into respecting order rather than attempting to create an environment in which the political order nudges individuals toward compliance as the rational default option.

Here is an example to illustrate the difference. After the Iraq war, Mosul became a very dangerous city, and criminality levels rose considerably. One solution that was compatible with civil order was to use the army as a police force to enforce strict prohibitions and a curfew. You could call this civil order, or a desert, but you would not call it peace as harmony of mind. To achieve such peace, the administration would have to build streetlights and infrastructure to make people feel more inclined to re-open their activities and businesses. If and when the city started to live according to its own light, then the necessity of having the army

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FIGURE 1. Evolving goals of criminal law

in the streets would vanish. The presence of people in the streets would in itself guarantee more physical security, which, in turn, would engender psychological security and peace. Peace as harmony of mind requires the state to do much more than simple policing: the state must build the framework that makes flourishing possible (see Figure 1).

An effective political association builds a polity from the insights of a negative anthropology. Humans are drawn to pursue their private interests, but a well-designed constitution can make them feel and act as part of a greater whole. To do so, it cannot simply assume that individual freedom will naturally contribute to the common good. It is only when individuals invest their time and skills in the life of the polity that they can begin to feel that their liberty is inextricably linked with the stability of the state. If it were possible to educate all citizens to feel as though they active members of society, then we probably would need much less criminal law. Institutionalized reason can only achieve realistic goals, beyond which we need some other instruments to regulate the conflicting passions of people. Benedictus de Spinoza put it sharply: 'We showed too, that reason can, indeed, do much to restrain and moderate the passions, but we saw at the same time, that the road, which reason herself points out, is very steep; so that such as persuade themselves, that the multitude or men distracted by politics can ever be induced to live according to the bare dictate of reason, must be dreaming of the poetic golden age, or of a stage-play.'[32] We have to focus on constitutional design so as to devise institutions that can minimize private calculation and maximize the pursuit of common good. Criminal law can help to target that conduct that is undermining the common interest.

C CRIMINAL LAW AND A BALANCED CONSTITUTION

The criminal law is an important component of a balanced government, which means that no political authority has the unilateral right to inflict punishment that is unchecked by other authorities. In a balanced constitutional regime, the criminal law is a guarantee against the abuse of power as much as it is a guarantee against wrongdoing. Instituted power must be kept in check by other institutions and must be accountable to the people. Moreover, a balanced constitution will seek to minimize punishment and maximize the prevention of crime: criminal law should work as the last resort. The state can prevent crimes through welfare enhancement in the form of education, for example. More generally, a functioning system of criminal law must avoid discrimination between individuals and between groups at all costs. When a criminal constitutional framework allows for disparities in the treatment of people, it fails its fundamental mission of guaranteeing the possibility of peace as harmony of mind.

32 Benedictus de Spinoza, *Political Treatise* (Raleigh, NC: Alex Catalgoue) at 3.

The connection between crime and social welfare has been empirically demonstrated. But the idea of necessity provides a rational justification for it: criminal punishment is a necessary evil to tackle deviance, and it is only justified when it fulfils this role. Because it is a necessary evil, the state is required to minimize its use whenever it is possible to do so. Punishment can only be justified if there is no other means to nudge people to comply with the laws that are supposed to protect the general interest. Those who worry about the cost of the relation between crime and welfare should consider first the cost of naked criminalization. Legislators are very keen to show they are working to defeat crime by constantly creating new prohibitions. The immediate cost of creating these prohibitions is low for legislative institutions, but it is enormous for the state in the long run: enforcement must be funded, priorities must be reassigned, and, more importantly, poor and vulnerable sections of the society will be hard hit, which, in turn, will entail more crime and ultimately more criminalization and all the costs that are connected with it. It is a lose-lose situation in which the state becomes poorer, criminality increases, and the inequality gap becomes unbridgeable. The principle of necessity requires instead a fully clothed criminalization. By this I mean that whenever the legislator embarks on a new criminalization spree, he or she has to put in place corresponding measures that address the prevention of crime by investing in social welfare and educational initiatives.

One fundamental issue of the constitutional division of competences in matters of criminal law concerns the relation between the local enforcement of criminal law and the central (or federal) power of crime control. Peace as harmony of mind can be desired at a local level, but it becomes increasingly more challenging as we move away from the community. This is fundamentally a question of trust, and it is hard to trust a law enforcement officer who does not represent the cultural values of the community on the ground. While a criminal legal system is designed centrally, its implementation desperately needs to be devolved to local communities that are more attuned to what risks undermine the basis of social harmony. Here is another important way in which peace as harmony of mind can be superior to civil order that is understood as a normative order created and upheld by centralized institutions. Peace as harmony of mind directs state institutions to be more respectful of local arrangements that preserve a civil order and that constrain the intervention of centralized authorities only when the principle of necessity points in that direction. To create trust in law enforcement institutions, the cultural values of local communities must be represented, and they must be seen to be represented. So, for example, a Sikh policeman will be more easily trusted in a Sikh community. He will also be in a better position to understand what is likely to undermine social harmony within that community.

D THE CONSTITUTIONAL LIMITS OF CRIMINALIZATION

> The law has the right to forbid only those actions that are injurious to society.
>
> – Article 5 of the DRMC

A behaviour should be criminalized if it harms society and if there is no other means to promote peace as harmony of mind. The challenge that all modern

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constitutional democracies face is to formulate policies that bring together widely disparate private interests. The art of politics is to make private interests converge toward a common interest. Criminal law is best conceived as a tool to minimize the role of disruptive private interests, in particular, if these private interests attempt to capture political institutions. Whenever the state entrenches private interests and discriminates against one part of the society, then it is immediately clear that the society is going in the opposite direction of peace. My account is less preoccupied with over-criminalization and more focused on the correct categories of crime. The reduction of criminalization is a side effect of my account as it requires that such behaviour be criminalized only as a last resort and after other solutions have been attempted to prevent the socially harmful behaviour.

The legislative branch has the exclusive power to define the scope of crime, but is there any guidance that can be sought to guide the task of the lawmaker when criminalizing conduct? Philosophical accounts of criminal law have tried to theorize what can be deemed to be criminalizable. The principal disagreement in the last thirty years was between moral and instrumental conceptions of criminal law. Moral theories insist on a connection between crime and pre-legal wrongs, whereas instrumental theories argue that criminal law should serve the goals of the community efficiently, whichever they are. It may be that some societies will feel more satisfied and secure if criminal law tracks pre-legal wrongs and attempts to punish all those who are morally culpable in the eyes of the society. Retribution assuages the moralists in our societies and makes them feel at ease with the idea that the central value of the criminal system is one of desert. Political theories of criminal law suggest that the scope of criminal law should be connected to the idea of civil order or civil peace. Duff, for example, suggests that civil order should be regarded as a limiting principle on criminalization: moral wrongs are within the realm of criminal law if and only if they are public wrongs which violate civil order. For Lindsay Farmer, the scope of criminal law is a function of its protection of the civil order.[33]

The real problem of criminal law's scope is not over-criminalization but, rather, under-criminalization; some disruptive conducts by powerful actors are not even on the criminal radar. It is not helpful to look at criminalization in quantitative terms; a more meaningful analysis will have to be qualitative and should answer the question: who are the first addressees of criminal law and why? I believe that the first addressees of criminal law are political actors, on the one hand, and economic actors, on the other. Of particular importance is their relation; the criminal law must police that line very firmly since any political society is most seriously threatened when political institutions further private economic interests to the detriment of the public interest. Of course, corruption and other criminal conducts that involve the political protection of private interests are part and parcel of any human society. Early republican theories of civil order were already firmly aware of the risks connected with secular politics. The hope was to educate citizens by involving them directly. Participation and deliberation were central

33 Farmer, *Making the Modern*, supra note 3.

elements to the *vivere libero*,[34] and, to a certain extent, they contributed to create a more cohesive society in which private interests could be pooled together to form the common good.

Indeed, an effective political association builds a polity from the insights of a negative anthropology. Humans are drawn to pursue their private interests, but a well-designed constitution can make them feel and act as part of a greater whole. To do so, one cannot simply assume that individual freedom will naturally contribute to the common good. It is only when individuals invest their time and skills in the life of the polity that they can begin to feel that their liberty is inextricably linked with the stability of the state.

IV *Conclusion*

The constitutional conception of criminal law that I have presented belongs to the family of political conceptions of criminal law. Like other political conceptions of criminal law, it attempts to go beyond moral and instrumental understandings: criminal law neither perfectly tracks moral wrong, nor is it a mere instrument of the state whose goals are loose and changeable. Instead, criminal law is a complex institution that guarantees the existence and development of the political order and, at its best, helps the society to strive toward harmony. My account can be contrasted with other political conceptions of criminal law. The main difference lies in the understanding of order. Whether one follows Hobbes's idea of law ordering the society or believes that criminal law secures a civil order, there is a convergence on the idea that the order is produced and is, by and large, a normative institutional order. I argued instead that every society develops a spontaneous political order that pre-dates its legal framework. This spontaneous political order might in time require legal correctives and guarantees against the abuse of power and the use of violence. The constitution of criminal law, which is an artificial order, is there to address these problems.[35]

I have claimed that the historical emergence of criminal law performed a very important role in taming the practice of punishment by making it a central concern of the modern state and an object of legal regulation. It is necessary for the state to discipline punishment in order to incentivize compliance with, and disincentivize deviance from, the laws of the state. When the system of criminal law is well designed, the threat of punishment is equally felt by people in power and by ordinary people. In fact, modern constitutional democracies should prioritize the fight against white-collar crimes. A balanced constitutional regime would design institutions that are capable of imposing constant pressure to fight

34 Note that Machiavelli distinguishes between *vivere libero* and *vivere sicuro*. The people under the rule of a prince could only hope for security. It is only when they started taking part in the affairs of the republic that they could be guaranteed political freedom as self-rule

35 To avoid misunderstanding, I am not claiming that criminal laws only appear in the modern time. Societies have always had criminal laws, but they lacked an organized system of criminal law with a clear goal and a centralized set of institutions that would regulate the monopoly of violence

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corruption, bribery, and whatever harms state interests at the political echelon. This account has several advantages. First of all, it explains the emergence and speciality of criminal law as the instrument with which the modern state rationalized punishment: criminal law removed the arbitrariness of punishment and put it to the service of the political association by creating disincentives against behaviour that undermines the political association itself. Of course, punishment and criminal law are double-edged swords; they can be used to create the basic conditions of social harmony, but they can also be used to repress people and deprive them of the environment within which they can thrive. For this reason, I have suggested that punishment as regulated by criminal law can only be justified if it is used as the last resort. If we conceive it in this way, we can put a considerable amount of pressure on the state to come up with alternative ways to regulate behaviour. In fact, the test of strict necessity to justify punishment means that the state will be under an obligation to provide the people with the appropriate education and services that would enable them to behave in a way that does not call for punishment.

The challenge that all modern constitutional democracies face is to formulate policies that bring together widely disparate private interests. The art of politics is to make private interests converge toward a common interest. Criminal law is best conceived as a tool to minimize the role of disruptive private interests, particularly if those private interests attempt to capture political institutions. Whenever the state entrenches private interests and uses criminal law to discriminate against one part of the society, then it is immediately clear that the society is going in the opposite direction of peace. The goal of criminal law is peace as harmony of mind: conflicts are settled with accepted procedures, policies aim at the general interest in a way that keeps the whole society on board, and nobody is left behind. Disagreement is part and parcel of the political association, but it does not descend into a state of polarization whereby exchange of argument is no longer possible. Of course, we strive at best toward peace as harmony of mind; however, the complexity of contemporary societies can hardly allow the full achievement of the goal. It would mean that everyone would be happy with the way in which the state had created a space of flourishing for everyone. If the goal of peace as harmony of mind was fully achieved, then criminal law and punishment would become unnecessary. The full realization of such a goal seems out of reach, but it is very important to posit it in order to have a powerful normative, and critical, standard with which to judge the performance of criminal law in existing constitutional systems.

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