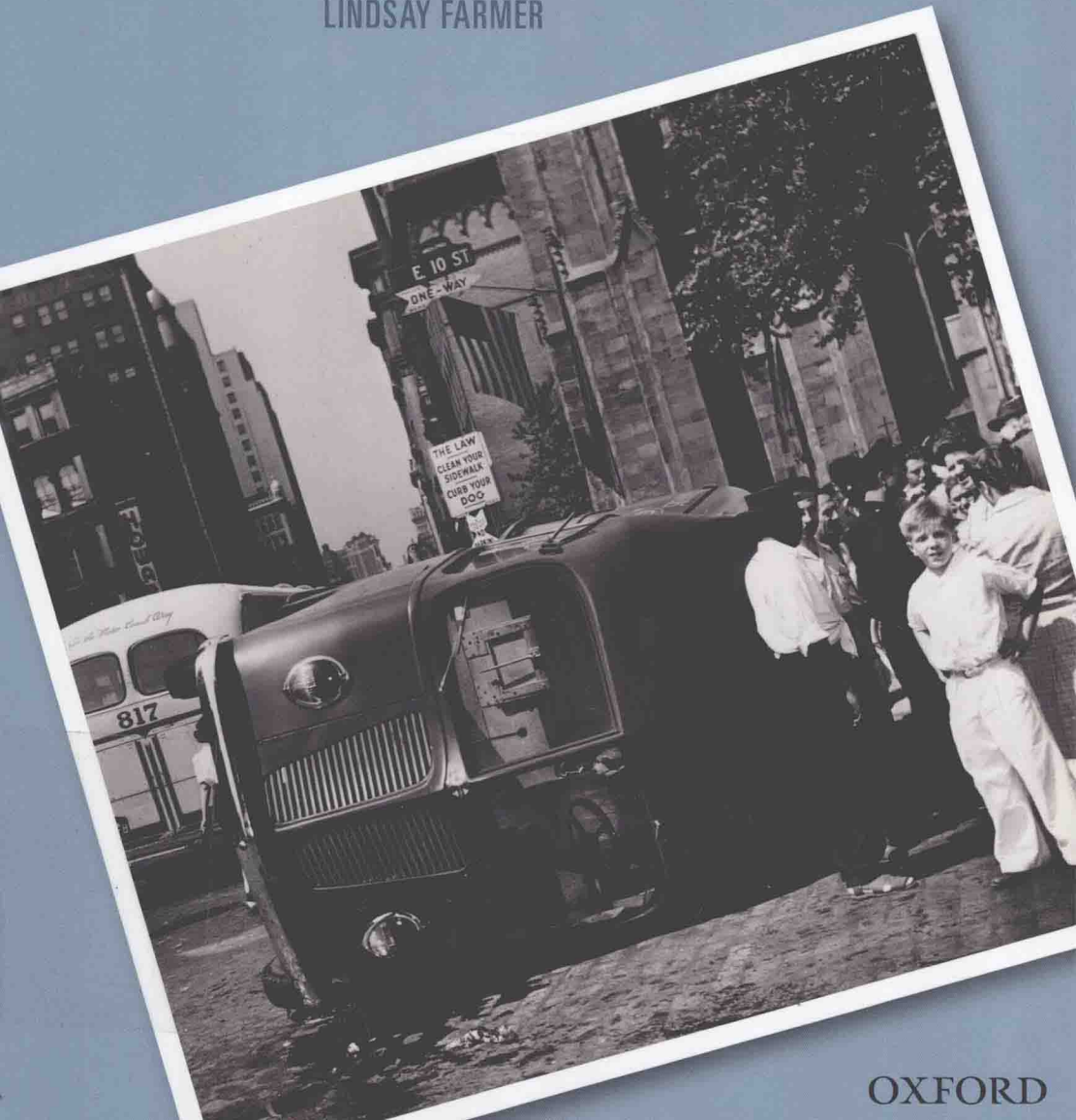
Making the Modern Criminal Law

Criminalization and Civil Order

LINDSAY FARMER



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LINDSAY FARMER
Professor of Law, University of Glasgow

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Introduction

This is a book about criminalization—what and who should be treated as criminal under the law and the ways that this can be justified. It is thus about making criminal law in the conventional sense. It aims to make a contribution to the vital and important contemporary debates about the proper scope of the criminal law and of the kind of principles that should guide legislatures, courts, and other law enforcement agencies in determining that scope. My starting point, though, is rather different from most of the contributions to the recent debate. Instead of beginning by asking what principle or principles should guide us in defining or limiting the scope of state action, I ask what I see as the prior question of how it is that the question of criminalization has come to be framed in these terms. And, going further, I want to look at the development of the institutional conditions that underpin and make possible our contemporary understanding of criminalization. This is a matter of placing the emergence of this question in an account of the development of the modern institution of criminal law. The book is thus about the making of the modern criminal law in this much broader sense.

It has become commonplace now to remark on the recent and rather sudden emergence of criminalization as a topic in criminal law theory. Writing in 1995, Niki Lacey noted the striking absence of questions of criminalization from academic discussion of criminal law theory, dominated at the time by discussions of theories of subjective liability and criminal responsibility, and remarked that many of the conceptual issues discussed in legal theory could, and perhaps should, be understood in terms of their implications for criminalization.[1] Some twenty years later it is equally striking that criminalization has now become one of the dominant themes of academic criminal law theory. There are a number of new monographs on the topic, which is also routinely addressed in textbooks; and the leading criminal law and theory journals have published special issues on aspects of criminalization.[2] Some

[1] N Lacey, 'Contingency and Criminalisation' in I Loveland, *Frontiers of Criminality* (London: Sweet & Maxwell, 1995).

[2] E.g. D Husak, *Overcriminalization* (Oxford: Oxford UP, 2008), AP Simester & A von Hirsch, *Crimes, Harms and Wrongs. On the Principles of Criminalisation* (Oxford: Hart Publishing, 2011); D Baker, *The Right Not to Be Criminalized* (Farnham: Ashgate, 2011). For textbooks, see AP Simester et al., *Simester and Sullivan's Criminal Law. Theory and Doctrine* (5th edn) (Oxford: Hart Publishing, 2013) Ch.16; J Herring, *Criminal Law. Text, Cases and Materials* (5th edn) (Oxford: Oxford UP, 2012) Ch.1. For special issues of journals, see e.g. Citizenship and Criminalization (2010) 13(2) *NCLR* 181; Overcriminalization (2011) 14(1) *NCLR* 1; Vice and the Criminal Law (2013) 7(1)

of this literature, taking its cue from the influential work of Husak, can be seen as responding to a process of 'over-criminalization'. For these writers, the question is framed in terms of the perceived recent growth in the criminal law, both in terms of legislation and enforcement, and asks the question of how this activity might be limited. Much of the literature takes a fundamental approach, arguing that in order to understand criminalization it is necessary to go back to basics: the approach is not to ask about how to limit state power, but more fundamentally how the relationship between state and citizen should be conceived, and about the proper place of the criminal law in this relationship.[3] What these approaches share is a common understanding of the problem of criminalization—as a problem of determining the proper scope of the criminal law—and of the kind of theoretical framework within which this topic should be addressed—that is, as a problem primarily of moral and political philosophy. As a general approach then, this places these approaches to theorizing criminalization firmly within a tradition of liberal theorizing about the role and limits of the state. This, however, is generally seen as an ahistorical question as neither approach demonstrates a particular awareness of its own history. There is a routine invocation of those theorists who are seen as predecessors—notably John Stuart Mill—with an acknowledgement that while Mill wrote on liberty and the limits of state action, he was not addressing the use of the criminal law specifically. That few other eighteenth- and nineteenth-century writers can readily be identified reflects the fact that 'criminalization', as we understand the term, was not an issue of concern. There was, it is true, a vast amount of contemporary discussion of the criminal law, but it did not discuss questions of criminalization as such. This, I shall show in this book, was for a reason, and if we are to understand the significance of contemporary debates, it is also important to understand why the 'criminalization question' was apparently neglected in earlier periods.

The contemporary understanding of criminalization as a problem of legal theory can more readily be traced to the revival of legal theory stimulated by the work of HLA Hart and others in the 1960s. In the United Kingdom, this was framed by the celebrated Hart-Devlin debate about the decriminalization of 'morals offences', principally the decriminalization of private homosexual conduct as recommended by the Wolfenden Committee in 1957. As is well known, Hart defended the idea, drawn from Mill, that the limits of the criminal law should be understood in terms of the 'harm principle': that the only reason the criminal law could intervene in private conduct was to prevent harm to others. He thus took the general Millian claim about the limits of state action and linked it specifically to a claim about the proper scope of the criminal law.[4] Lord Devlin, by contrast, adopted a position with its origins in a more traditional understanding of the

Criminal Law and Philosophy; Symposium on Law, Liberty and Morality (2013) 7(3) *Criminal Law and Philosophy*.

[3] For a review see RA Duff et al., 'Introduction' in RA Duff et al., *The Boundaries of the Criminal Law* (Oxford: Oxford UP, 2010); Duff et al., 'Introduction' in Duff et al., *Criminalization. The Political Morality of the Criminal Law* (Oxford: Oxford UP, 2014).

[4] HLA Hart, *Law, Liberty and Morality* (Oxford: Oxford UP, 1963).

common law. In his view, society was bound together by certain common moral understandings or standards. It was the function of the criminal law to reflect and preserve those understandings; and if the law failed to do so then there was a risk that society would disintegrate.[5] Whatever the rights and wrongs of these views, it is clear that Hart's views were more closely in tune with the emerging 'permissiveness' and modernizing ethos of the period and were drawn on in support of further liberalizing reforms, notably the decriminalization of some forms of homosexual conduct in 1967. However, whatever its significance at the time, the Hart-Devlin debate more generally could be packaged and taught to students in the ever-expanding number of university law degrees as a problem of jurisprudence that could be applied to a range of different areas and problems. Most importantly for our purposes, it came to be understood as framing the question of criminalization in terms of a debate between consequentialist conceptions of 'harm' and non-consequentialist theories of 'legal moralism'—even if, as we shall see, the content of these terms has shifted considerably in recent discussions.

Notwithstanding the attractions of Hart and Devlin as a simple framework for illustrating some conceptual issues, this story is plainly inadequate as an account of the origins of our modern understanding of criminalization. But this is not a minor issue for, as we shall see, it has significant implications for how we might go about theorizing criminalization. My first concern is that it finesses the gap between recent debates and the longer liberal tradition. The period between the 1860s, when Mill wrote, and the 1960s of Hart and Devlin is elided, with the writers treated as though they are addressing an identical set of issues. And this is then presented as part of a longer liberal tradition running from Hobbes and Locke to the present day. This allows the question of criminalization to be presented as an ahistorical question of the limits of state power. The kind of issues that this theory might apply to then appear as purely contingent—be it sedition and treason in the 1840s, 'morals' offences in the 1960s, or 'preventive' offences or over-legislation at the turn of the twenty-first century. The questions of how and why these topics get framed as problems for the criminal law is not addressed and, more importantly, the question of how the role or function of the criminal law is understood in particular periods—and hence how this might shape understandings of what is 'proper' for the criminal law—is passed over. Second, this understanding offers neither a particularly convincing explanation of its own contemporary significance nor of the place of criminalization within a broader tradition. Between the 1960s and the 1980s, theories of criminalization were concerned with the *de*-criminalization of morals offences. By contrast, much of the recent debate is about problems of 'over-legislation', with a theory of criminalization being understood in terms of how to limit the legislative capacities of the state or of how constitutional constraints or courts might restrain legislation. How should we understand these differences? Is criminalization just about limits and morals offences, or do these changes reflect more fundamental shifts in

[5] P Devlin, *The Enforcement of Morals* (Oxford: Oxford UP, 1965).

the function and scope of the criminal law? But to present the question in these terms is to raise a further set of questions about how criminal law relates to the modern state.[6] Finally, as I shall suggest below, the concept of criminalization is itself linked to the emergence of a certain modern understanding of the criminal law, and for this reason it cannot properly be understood except in this kind of historical perspective.

The *Oxford English Dictionary* gives two main meanings for the verb 'to criminalize'.[7] The first is, 'to turn a person into a criminal, esp. by making his or her activities criminal'. This draws a direct analogy with the French term *'criminaliser'*, meaning to accuse, and most of the early usages listed relate to the accusing of particular individuals with having committed crimes. It is not until the middle of the nineteenth century, that it takes on a more modern (and sociological) sense of defining individuals or groups as criminal or deviant in some way.[8] The second meaning is more familiar from philosophical writings on the topic and is 'to turn (an activity) into a criminal offence by making it illegal'. However, this 'legislative' understanding is relatively recent in origin. The first recorded usage in this sense listed dates only from 1832 and is (not surprisingly) from Jeremy Bentham. What is surprising, though, is that in using the term he is not referring to a legislative process, or at least not directly: 'Asceticism has sought to brand and criminalize the desires to which nature has confided the perpetuity of the species'.[9] It is not until the end of the century that it is listed as being used to refer directly to a formal legislative process, in a statement taken from the *Columbia Law Review* in 1906: 'it may confiscate the goods... or criminalize the selling of them'.[10] What tentative conclusions can be drawn from this? The first is that to understand criminalization in this sense is connected to the emergence of a certain kind of modern legislative mentality. The world was seen in accordance with certain principles of order that could be known and manipulated if there were adequate knowledge and understanding.[11] The criminal law could thus be seen as a kind of instrument which might produce positive or negative social effects, and which should be used accordingly. Second, this understanding of the term does not pre-date the existence of modern legislative bodies that actively pass laws to make certain activities

[6] Cf A Ashworth & L Zedner, *Preventive Justice* (Oxford: Oxford UP, 2014) and P Ramsay, *The Insecurity State* (Oxford: Oxford UP, 2012) both of which analyse the contemporary criminal law in terms of changes in the form of the state. These are discussed further in Ch.3 Section V.

[7] 'criminalize, v.'. OED Online. December 2013 Oxford University Press, accessed 3 March 2014 http://www.oed.com.ezproxy.lib.gla.ac.uk/view/Entry/271579?redirectedFrom=criminalisation.

[8] Thus from the *Law Magazine* in 1854: 'Young offenders had better be reformed than criminalized' (1854) 20 (ns) *Law Magazine* at p.52.

[9] *Principles of Penal Law*, III, v, in (Bowring ed.), *Works* (Edinburgh: Wm Tait, 1838) I, 544/1.

[10] W Trickett, 'The Original Package Ineptitude' (1906) 6 *Columbia LR* 161 at p.169.

[11] Z Bauman, *Legislators and Interpreters. On Modernity, Post-Modernity and Intellectuals* (Cambridge: Polity, 1987). Bauman notes the emergence of other 'active' verbs in the same period: 'An action... turned upon an outside object; an action which aims at transforming the said object; and not just a random transformation, but one whose end result is known and approved in advance'. 'On the Origins of Civilisation: A Historical Note' (1985) 2 *Theory, Culture and Society*, 7 at p.7.

or conduct criminal, and indeed more positively can be associated with the emergence of modern parliaments. To be sure, conduct was made criminal by law prior to this, but the legislative sense implies some sort of choice about, and a certain kind of rational approach to, how or why this is done. Third, it seems clear that it implies the prior existence of an understanding of the criminal law as a distinct body of rules with a defined area of application—'crime' as a conceptually unified group of serious offences—such that to criminalize something is to bring that activity within the scope of what it means to be criminal.[12] Criminalization in this sense, and consequently a theory of criminalization, thus necessarily requires both a prior understanding of the existence of the criminal law as a distinct area of law with a discrete area of application (or jurisdiction) and an understanding of 'crime' as the object to be regulated. Since, as I shall argue, this did not exist in any meaningful sense before the end of the eighteenth or the beginning of the nineteenth centuries, criminalization (and theories of criminalization) must be understood as a distinctly modern phenomenon, linked to the emergence of this understanding of criminal law. It follows that being criminal in the modern sense is not, and cannot be, a quality of the conduct or activity itself, but must be understood as intrinsically linked to the emergence of the criminal law. Thus the meaning of any particular act of criminalization depends on our understanding of what the criminal law is and does. It is this question, of the emergence of an understanding of criminalization in this sense, which frames this work.

Central to this argument, then, is the claim that our understanding of criminalization is linked to the emergence of the modern criminal law, understood as a unified body of rules, organized according to a conceptual structure which is unique to itself, and which is understood as performing a distinctive social function. A substantial part of the argument of the book is thus focused on exploring the development of the legal concepts and the institutional structures that have allowed this understanding of criminal law to emerge and develop. Here I also argue that the emergence of the criminal law is linked to a more general aim of criminal law in securing civil order. This claim operates on two levels. First, it is part of an argument that the scope of the criminal law, and hence of criminalization, cannot be understood solely in terms of the interests which are to be protected, but also requires reflection on the purposes or aims of that protection, the kind of order that is being secured through law. And just as the criminal law in general is directed towards certain ends, so too particular areas of criminal law are shaped by the perception of the end that is to be secured by the protection of these goods or interests and their relation to the ends of the criminal law as a whole. In general, I shall argue that theories of criminalization have focused on goods or interests at the cost of considering the aims of the law and that a normative theory of criminalization needs to address the question of the ends that are to be secured by law.

[12] Just as family law applies to the family, contract law to contracts, or property law to property.

Second, this idea of securing civil order operates as a broad normative framework that allows us to understand how the modern law has developed. Civil order, I argue, represents a kind of ideal or social imaginary of modern law where self-governing individuals are guided by general rules and interact in civil society and the market. Law, and criminal law in particular, plays a key role in securing this civil order, as society is seen as rule-governed. This idea of civil order also has a certain content, whether it be in terms of ideas of civility, 'civilized' social conduct or the making of civil society: these institutions and the individuals and communities who populate them are made through law. And the fact that civil order is secured by law also means that it is subject to certain formal institutional constraints, that I shall refer to as the modality of law or legalism, which give further content to ideas of civility. Criminal law has not always taken this form, and the ideal expressions are not always matched by legal practice, but it aspires to these ideas of civil order and these, I shall argue, have shaped the development of the law. The importance of the idea of securing civil order then for a normative theory of criminalization, is not that it has particular consequences for the content of the criminal law, but that it places normative questions about the scope of the criminal law within the institutional framework of modern society.

These general ideas about criminalization are then explored in relation to particular crimes or areas of criminal law, to analyse patterns of criminalization in these areas. I look at the development of particular areas of criminal law to see how particular objects of criminal law have been conceptualized and at how interferences with these objects have come to be treated as criminal. I look, for instance, at how the idea of property or the person has been formulated in criminal law as something that is worthy of protection, and then at the types of interference with property that have been regarded as sufficiently serious to fall within the scope of the criminal law. The aim here is to show, first, how the objects of the law change over time and that our ideas of wrong or of harm are in many cases contingent, or linked to the aims of the particular area at particular periods. Second, I shall show how the patterns of criminalization in particular areas have developed in a way that is relatively autonomous from the development of the criminal law more generally, with the law in each area pursuing slightly different aims or ends, and operating according to different logics or principles. There has, to be sure, been a move towards increasing homogeneity in recent times, but I want to argue that we should be wary about the assumption that this kind of homogeneity is the natural end of the law, or that the aims, objects, or principles of criminalization are identical across the criminal law.

The overall aim is to suggest that our understanding of the object of criminalization (and thus of the criminal law) is closely related to our understanding of the aims or ends of the criminal law or particular parts of it. We cannot properly make sense of the wrong or its place in the law without an understanding of the purpose of criminalization; and this purpose must be understood as being linked to the broader aims and institutional form of the criminal law as a body of rules which aims both at the securing of civil order and at the prevention and punishment of crime. It is only with the creation of this modern understanding

of criminal law as a (relatively) unified body of rules directed at this aim that the idea of criminalization emerges—and consequently that it becomes possible to consider the possibility of a theory of criminalization (or of the scope of the criminal law as something that is capable of being understood in terms of certain principles or concepts).

This is a book about criminalization, but it should now be apparent that it is also about a great deal more than criminalization. Or rather, it should be apparent that understanding criminalization entails nothing less than addressing the relationship between criminal law and civil order in modernity. This book, then, is about the making of the modern criminal law.

*

The book does not adopt the structure of other criminal law texts. While I have used the terminology of 'General' and 'Special' in Part II and III to distinguish between those parts of the law which relate to the development of the criminal law as a whole, and those which relate to bodies of rules governing specific areas, this should not be taken to imply any sort of logical or conceptual priority of the general over the special. In fact, I aim to show that the relationship between the two parts, as it is conceived in contemporary legal thought, is much more complex than is normally recognized and that thinking about general principles of liability can only really make sense if we recognize the different kinds of relationship that particular areas have with ideas of the criminal law as a whole. Thus, not only can there be no single principle of criminalization, but that a theory of criminalization should also attend to the institutional dimensions of the criminal law.

In Part I, I analyse contemporary discussions of criminalization and argue that these fail to take into account the aims and social functions of the criminal law. I argue that we can make good on this shortcoming if we understand criminal law as a particular type of social and legal institution directed at the general aim of securing civil order. Chapter 1 argues that criminalization must be understood as a legal question, and that this can best be understood in terms of an institutional theory of law. It uses MacCormick's institutional theory of law as a means of identifying the central features of the criminal law. The second chapter then discusses the idea of securing civil order as an aim of the criminal law. It looks specifically at themes of civil order, the civilizing process and conceptions of civility and civil society as key to the analysis of the emergence and development of the institution of criminal law.

Part II then goes on to develop this idea of securing civil order and to link it specifically to the modern understanding of the criminal law. This is then further developed by looking at certain key themes in the institutionalization of the criminal law—those of jurisdiction, codification, and responsibility. Chapter 3 is a long chapter which provides an overview of the development of the modern criminal law, looking in particular at the ways in which the scope and function of the criminal law have been understood in the modern period. This chapter looks at the changing scope of the different areas of social life that criminal law has been called on to regulate—how in different times and places these different areas have been understood as being central to the securing of social order. It is concerned

with the questions of how certain areas have become understood to be fit (or unfit) for regulation by the criminal law; how these have been regulated; and the impact of these changes on the criminal law. It is also concerned with the understanding of the role of the criminal law as a governmental project. What is it understood that criminal law can achieve? And finally, it looks at how order was itself conceived within the criminal law, setting out the kinds of conceptual structures or ideas that allowed criminal lawyers and theorists to think of the criminal law as a distinct or coherent body of rules.

This is followed by three chapters which go back over some of the same ground to trace the development of specific dimensions of the institutionalization of modern criminal law: jurisdiction, codification and responsibility. Each chapter begins with a theoretical discussion of each of these terms as an institution before going into a more historical account. Chapter 4 looks at *jurisdiction*. Jurisdiction can be understood as a question of the proper scope of the application of the criminal law, encompassing a range of questions: from the spatial extent or ambit of the criminal law, to the persons to whom the law applies, and the kinds of conduct which are subject to criminal laws. In these terms it is easy to see that it is fundamentally related to questions of criminalization, and that questions of how the jurisdiction of the criminal law is conceived and organized must be central to our understanding of these issues. Chapter 5 looks at *codification*, in the sense of understanding how particular knowledge of criminal law and its proper scope was codified in the creation and organization of a specialized body of rules accessible to criminal lawyers. This chapter looks at different forms of literature, from treatises to textbooks to legislative codes, and at the changes in the form and content of these works over the modern period. The final chapter in this part, Chapter 6, looks at *responsibility*. If there has been one concept which has been central to the conceptual ordering and self-understanding of the criminal law in the modern period it has been that of responsibility. However, rather than seeking to define a normative concept of responsibility, this chapter traces the emergence of different conceptions of responsibility and the function that these play in co-ordinating and legitimating the criminal law.

In Part III, I move from the general, or the idea of the criminal law as a whole, to look at the law relating to certain distinct areas—namely property (Chapter 7), the person (Chapter 8), and sex (Chapter 9). These are areas of law that would now, on most accounts, be understood as belonging to the 'special part' of the law, and as accordingly somehow subordinate to, or governed by principles of the general part. They are also areas which are thought to contain core wrongs based on stable liberal values and so are often seen as marginal to questions of criminalization. Criminalization is about challenging and justifying 'peripheral' crimes which do not fit the paradigm of criminal wrongs. In part the aim here is to challenge this kind of thinking, to show that there are no core values, and that patterns of criminalization in these areas demonstrate that the law develops in response to specific social needs. I also aim to give equal weight to these areas: to understand their development, to identify the interests that they seek to protect, and the ends of this protection not just as illustration of general principles of

criminal law or criminalization but as developing in distinct ways. I accordingly look at how the object of each of these areas is understood or has been constructed in the criminal law, at the kinds of infractions that are to be protected against, and the forms of liability associated with them. The aim is, in part, to demonstrate that each of these areas has its own pattern and logic of development and also, crucially, that they are not each based on a single understanding of a 'core' interest or wrong but that the understanding of wrongdoing has been shaped by the changing aims of the law in each area. This, however, also opens up a larger question of the relation between each of these areas and understandings of civil order. In abstract terms this can be framed as questions of the relations between persons and things, persons and others, persons and the self (particularly sexual identity), and consequently persons and civil order. There is also an important historical dimension to this: if security of property was originally understood as the foundation of modern civil order, we can see that civil order has broadened out to include the security of the person, and the regulation of conduct and civility. Moreover, I argue that in each of these areas it is possible to see how the content of property, person, sexual conduct, and identity has changed in ways which have an impact on our understanding of the proper scope of the criminal law. The aim is thus both to contribute to our understanding of the particular areas, but also to enable us to understand more clearly the relationship between general and special in the modern criminal law. This does not pretend to be a comprehensive account of all the features of the modern criminal law or to cover every doctrinal or institutional development that might be addressed. These areas have been chosen both because of their centrality to modern accounts of the criminal law and because the development of criminalization in this area can contribute substantially to our understanding of civil order. The aim, while still ambitious, is rather to set out a framework of analysis, and the themes are suggested as a way of capturing the main developments.

Finally, in the conclusion, I return to the question of the consequences of this argument for theories of criminalization. Without wishing to pre-empt the argument at this stage, in the conclusion I seek to draw out the normative implications of the institutional account of the criminal law that I have developed here, and conclude with some reflections, less on the question of what a normative theory of criminalization would look like, than on what is at stake in the enterprise of constructing a normative theory of criminalization.

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One final introductory comment is necessary. Although the overall argument makes claims about the development of the modern criminal law, the focus throughout the book is primarily on the development of criminal law in England. However, the focus on English law should not be taken as any kind of assumption, implicit or otherwise, as to the superiority of English criminal law—and as a Scot writing in a Scotland which retains its distinctive system of criminal law in the shadow of English law, I am acutely aware of the sensitivities in this area. However there are good reasons, both historical and practical, for focusing on English criminal law in order to make this more general argument. In historical