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Introduction: The Special Part and its Problems

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Philosophers and theorists of criminal law have often focused on the ‘general part’ of the criminal law (the part containing supposedly general doctrines, rules, and definitions) rather than its ‘special part’ (the part containing the definitions of particular offences). One could speculate about the reasons for this. Perhaps they saw it as being the primary task of philosophy, whether analytical or normative, to explicate general principles, or to identify general features of the criminal law—principles and features that could apply not just across a particular system of criminal law, but across all legal systems. That would certainly have led them to focus on the general rather than on the special part, and to illustrate their accounts, as they have tended to do, with examples of particular offences (such as murder and rape) that one would expect to find in every legal system. Or perhaps they thought that the definitions of particular offences were too parochial, too dependent on the contingencies of particular times and places, to be a fit subject for the kind of universality to which philosophy aspires.¹

Whatever its underlying reasons, such neglect of the special part has been unfortunate. Nothing in the criminal law is likely to be more universal than the recognition of certain core offences such as murder, rape, and theft. It is also difficult to imagine a general part that was not in some way analytically dependent on the special part. The point is not that the general part is not also foundational; even a system of criminal law that drew no explicit distinction between a ‘general’ and a ‘special’ part would have at least an implicit general part. Rather, the point is that if we theorize about the criminal law by focusing exclusively on the general part, or on only a few supposedly paradigmatic offences, we will lose sight of much of the

complexity and variety of criminal law that a more comprehensive account would capture.

Happily, the last decade has seen something of a renewal of philosophical interest in the special part and its distinctive problems; indeed, some of the most interesting recent work in the philosophy of criminal law has been on special part issues. This volume is intended to contribute to that renewal, and to demonstrate the philosophical indispensability of the special part to any adequate analytical or normative study of criminal law. In this Introduction, we will sketch some of the central issues that the special part raises, and connect them to the papers collected in this volume. Those issues are of two general kinds: one concerns the scope of the special part—what it should contain; the other concerns the way in which the offences that it contains should be defined and structured.

1. The Scope of the Special Part

The question of what the special part should contain raises two distinct sets of issues: the distinction between the special part and the general part, and the scope of the criminal law.

‘General Part’ v ‘Special Part’

There is no clear or agreed upon account of the distinction between the ‘general part’ and the ‘special part’, or of just which aspects of the criminal law properly belong to each part; nor do we think that much is to be gained by attempting to work out a precise, sharp distinction.

For a start, we can assume that the special part contains, at a minimum, the definitions of specific criminal offences. This, of course, leaves a host of questions about what else is contained in the special part, what the general part consists of, whether the special and general parts together exhaust the whole of the criminal law, and the extent to which the two parts are mutually exclusive.

Consider the doctrine of provocation. If one surveys a range of criminal codes, one sees that the doctrine almost invariably appears in what is

2 See J Horder, ‘The Classification of Crimes and the Special Part of the Criminal Law’, in this volume, § 2; also Lacey, n. 1 above; M S Moore, Placing Blame: A Theory of Criminal Law (Oxford: Oxford University Press, 1998), 30–5; J Gardner, ‘On the General Part of the Criminal Law’, in Duff, n. 1 above, 205; V Tadros, ‘The System of Criminal Law’ (2002) 22 Legal Studies 448. A further question worth noting concerns the distinction between the general part and the broader political morality to which arguments about what doctrines or rules the general part should contain will appeal: to put the matter very crudely, legal positivists will be inclined to draw fairly tight boundaries around what is to count as part of the (general part of the) criminal law, while anti-positivists will want to include, or to make essential reference to, some critical moral principles as part of the law.
designated as the ‘special part’, and specifically as part of the definitions relating to homicide. The typical formulation is as follows: a homicide that would otherwise be murder is mitigated to voluntary manslaughter if the defendant acted under provocation that caused him to lose self-control and ‘was enough to make a reasonable man do as he did’; or if he acted ‘under the influence of extreme mental or emotional disturbance for which there [was] reasonable explanation or excuse’. The question is whether the fact of such placement in criminal codes means that provocation is properly thought of as belonging to the special part.

While it is true that, in English and American criminal law, the doctrine of provocation applies only to homicide, there is a good argument that, as a conceptual matter, it should nevertheless be viewed as belonging to the general part. The fact is that there is nothing intrinsic to the doctrine of provocation that makes it applicable only to homicide: in principle, it could be applied to most, if not all, offences (even if it would require a vivid imagination to conjure up situations in which the commission of some offences could be ascribed to provocation). Under this approach, the fact that the doctrine is applied, in practice, only to homicide is not determinative of its place in the criminal law. What matters is whether the doctrine is in principle capable of general application. Thus, we might say that those criminal law principles that are theoretically capable of general application are part of the general part, and those that are not are part of the special part.

Conversely, there are some criminal law principles and concepts that are typically codified in the general part, but which might more properly be conceptualized as part of the special part. Think of attempt, which is usually defined in general terms: that is, the law defines it as an offence to attempt to commit any offence, and provides general definitions of the fault and conduct elements of attempts. Now if we should have such a law, it belongs to the general part in that it embodies the doctrine, not essentially tied to any specific offence, that it is criminal to attempt what it is criminal to do. But perhaps we should not have any such general law: perhaps we should instead decide separately for each specific offence whether, how far, and by what criteria criminal liability should extend beyond the commission of the substantive mischief with which the offence is concerned. In that case, the locus of the doctrine of attempt would shift from the general part to the special part.

3 Homicide Act 1957, s. 3; Model Penal Code, s. 210.3(1)(b).
4 Or any offence of a suitably serious or non-trivial type: so English law criminalizes only attempts to commit indictable offences (Criminal Attempts Act 1981, s. 1(4)), while the Model Penal Code criminalizes only attempted crimes, not attempted violations (ss. 1.04, 5.01(1)).
5 See P R Glazebrook, ‘Should We Have a Law of Attempted Crimes?' (1969) 85 Law Quarterly Review 28; for some further complications, see Horder, this volume.
Some of these controversies about the proper scope and content of the 
general part (about how substantive, and how general and authoritative, it 
should be) will concern us later, since they obviously bear on the ways in 
which the special part can define specific offences: before that, however, we 
must discuss some issues that arise more directly from the special part.

The Criminalization Question—Underlying Principles

Before we can ask how specific offences should be defined, we must have 
some idea of what should count as an offence at all: what kinds of ‘conduct’6 
should be criminalized? Or to move back a step, what kinds of criterion, 
principle or value should guide decisions about criminalization? Slightly 
more precisely, what kinds of consideration should bear on what is logically 
the initial decision whether a certain kind of conduct is *in principle* 
criminalizable; and what kinds of consideration should then bear on the 
further decision that it would (or would not) be right to criminalize it all 
things considered.7

Two familiar principles, or slogans, have formed the focus of much 
discussion of the first (the ‘in principle’) question: the Harm Principle and 
Legal Moralism. The former takes harm and its prevention to be the primary 
concern of the criminal law; the latter takes wrongdoing or immorality, and 
its punishment or prevention, to be its primary concern.

So what should count as ‘harm’ for purposes of the criminal law? Is a 
Feinbergian analysis in terms of setbacks to interests adequate? Should we 
refine it so that harm requires some relatively lasting setback, or a setback to 
a subset of interests, such as ‘welfare’ interests?8 When, if ever, is the risk of 
harm, rather than actual harm, sufficient to justify criminal sanctions? What 
room is there for ideas of harm not only to individuals, but also to groups, 
communities, and the state?9 Is harm to self (as opposed to harm to others)

6 We use here the broader term ‘conduct’ rather than the narrower term ‘act’, since it 
unequivocally covers omissions or failures to control what one could control. But to talk of 
‘conduct’ still presupposes that as a matter of general doctrine or principle the law should not 
criminalize mere thoughts, or conditions or states of affairs that cannot be portrayed as (flowing from) 
conduct; see further D Husak, ‘Does Criminal Liability Require an Act?’, in Duff, n. 1 
above, 60.

7 See e.g. J Schonscheck, *On Criminalization: An Essay in the Philosophy of the Criminal 
Law* (Dordrecht: Kluwer, 1994), distinguishing three successive ‘filters’ through which 
decisions to criminalize should pass; A J Ashworth, *Principles of Criminal Law* (4th ed., 
Oxford: Oxford University Press, 2003), chs. 2–3, on the range of ‘principles and policies’ that 
should bear on decisions about criminalization.

8 See J Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), chs. 1–3; 
J Kleing, ‘Crime and the Concept of Harm’ (1978) 15 *American Philosophical Quarterly* 32; 

9 See M D Dubber, ‘Policing Possession: The War on Crime and the End of Criminal Law’ 
(2001) 91 *Journal of Criminal Law and Criminology* 829 (also *Victims in the War on Crime*
the kind of harm with which the criminal law is properly concerned? Are there cases in which the causing of something other than harm—such as ‘offence’—will justify criminal penalties?¹⁰

A second set of questions concerns the substance and scope of legal moralism. Under such an approach, what kinds of immorality, or wrongdoing, should be the concern of the criminal law? Should the criminal law be concerned with moral vice, or at least with ‘the grosser forms of vice’;¹¹ or only with moral wrongdoing, however that should be understood?¹² Must wrongs be wrongs against some person, or should the criminal law also be concerned with wrongs that are in some respect ‘free-floating’?¹³

A third question concerns the relationship between harms and wrongs. To what extent are the two concepts intertwined? At least many wrongs clearly consist at least in part of harms, but are there harms that consist at least in part of wrongs?¹⁴ There are certainly ‘pure’ harms, which involve no wrong (harms that flow purely from natural causes, for instance); but are there ‘pure’ wrongs, which involve no harm?

Criminalization Principles Applied

We also need to inquire into the force that such principles are to have. For example, should the principles be exclusive, holding that harm and only harm, or wrongdoing and only wrongdoing, provide adequate grounds for criminalization?¹⁵ Or should we instead see them as specifying grounds, but

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¹⁵ Mill’s Harm Principle, in its canonical formulation, is of this kind: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’ (J S Mill, On Liberty (London, 1859), ch. 1, para. 9). Moore suggests an analogous version of Legal Moralism: in order to serve its proper function of doing ‘retributive justice, criminal law must punish all and only those who are morally culpable in the
not necessarily the only possible grounds, for criminalization?\textsuperscript{16} Or should we see them simply as specifying necessary conditions of criminalization—an as declaring that we may not criminalize conduct that is not harmful, or that is not wrongful?\textsuperscript{17} Can we combine them, so that the law should criminalize if, or only if, both the harm criterion and the wrongfulness criterion are satisfied?\textsuperscript{18}

Another subject of inquiry concerns the way in which harmfulness or wrongfulness can ground criminalization. As both Mill and Feinberg present their harm principles, it is the prevention of harm (to others)\textsuperscript{19} that provides a good reason for criminalization, which on its face would allow the criminalization of conduct that does not itself cause harm, or perhaps even create a risk of harm, if this would help to prevent other kinds of harm-causing conduct, or to avert harm that might otherwise ensue. It is not hard to think of relevant examples: if one thinks that failures to prevent harm should not always or necessarily be said to cause the harms that ensue,\textsuperscript{20} then Good Samaritan statutes that criminalize failures to avert serious harm when one could do so easily and without significant cost or risk to oneself must be seen as criminalizing conduct that is not itself harmful, in order to prevent harm;\textsuperscript{21} and certain kinds of malum prohibitum offences seem to criminalize conduct that is not or need not be harmful itself, in order to prevent some kind of harm.\textsuperscript{22} Alternatively, we could read the Harm Principle as allowing the criminalization only of conduct that itself causes, or threatens to cause, harm. (A version of Legal Moralism might also figure here, as a constraint according to which we would criminalize only conduct that is wrongful in virtue of the fact that it causes or creates a risk of harm.)

doing of some morally wrongful action’ (n. 2 above, 35). It turns out later (in ch. 18) that a proper concern for liberty will on balance preclude the criminalization of many kinds of morally wrongful action, including at least most of those that liberals would not want to criminalize.

\textsuperscript{16} This is how Feinberg portrays his Harm Principle, ‘It is always a good reason in support of penal legislation that it would probably be effective in preventing. . . . harm to persons other than the actor’ (n. 8 above, 26); he later accepts a separate ‘Offense Principle’, according to which the prevention of ‘serious offense’ to others is always a good reason for criminalization, even though such offence does not constitute harm. Feinberg, n. 10 above.


\textsuperscript{18} See S P Green, ‘What’s Wrong with Bribery’, in this volume. This is how Feinberg develops his Harm Principle: the ‘harm’ that the criminal law can legitimately aim to prevent is wrongful harm; see Feinberg, n. 8 above, 31–6.

\textsuperscript{19} A further set of issues of course concerns harms to self; we cannot pursue these here.

\textsuperscript{20} One can believe this without holding, as Moore does (n. 12 above, at 267–78) that omissions are never causes.


\textsuperscript{22} See Dubber, in this volume, and R A Duff, ‘Criminalizing Endangerment’, in this volume.
This would be analogous to the way in which both Feinberg and Moore understand Legal Moralism: the principle is not that the prevention of wrongdoing constitutes a good reason to criminalize conduct; it is rather the wrongfulness of the conduct itself that gives us reason to criminalize it.\textsuperscript{23}

The answer to this question can make a crucial difference to the relevant principle’s scope. This is especially important in relation to the Harm Principle. At its narrowest, the Harm Principle would sanction the criminalization only of conduct that actually causes harm; but unless we count the risk of harm as itself a harm,\textsuperscript{24} that would preclude the criminalization of conduct that creates a danger of harm without actually causing any substantive harm—which is surely too strict a constraint.\textsuperscript{25} If we read the Harm Principle as sanctioning the criminalization of conduct that causes or might cause harm; and if we add, either as an aspect of the relevant notion of harm or as a separate constraint, that the conduct must be wrongful; then we allow for a more extensive criminal law—though how extensive it is will depend partly on what we build into the idea of ‘cause’. It is clear, in any event, that our existing laws criminalize kinds of conduct that are not in themselves likely to cause harm at least in any substantive or direct way.\textsuperscript{26}

Part of what is at stake here is the category of \textit{mala prohibita}. There are two things that make such offences potentially problematic. The first is that they involve no obvious wrong or vice other than the arguably trivial one of disobedience to law. The second is that they typically involve less serious harms than we are used to seeing in the criminal law, or at least harms that are more causally remote from the commission of the offence. The result, under either the Harm Principle or the Principle of Legal Moralism, is likely to be doubt about the extent to which the creation of such offences can be justified.\textsuperscript{27}

There is at least a danger that the Harm Principle will either be implausibly restrictive, if it sanctions the criminalization only of conduct that directly causes or threatens harm; or too vague (or too disturbingly

\textsuperscript{23} See the quotation from Moore in n. 15 above; Feinberg, n. 8 above. 27. Note, however, that at the end of the fourth volume of \textit{The Moral Limits of the Criminal Law}, Feinberg reverts to a ‘prevention’ mode of specification for Legal Moralism: ‘it is always a good reason in support of criminalization that it prevents… harmless immoralties’ (Feinberg, n. 13 above, 324) (emphasis omitted).


\textsuperscript{25} See Duff, in this volume.

\textsuperscript{26} See B E Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 \textit{Journal of Criminal Law and Criminology} 109; see also, in this volume, Dubber, on possession offences; and Duff, on endangerment offences.

\textsuperscript{27} Husak, in this volume, directly addresses this problem, in part through a critique of S P Green, ‘Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses’ (1997) 46 \textit{Emory Law Journal} 1533; and R A Duff, ‘Crime, Prohibition, and Punishment’ (2002) 19 \textit{Journal of Applied Philosophy} 97; see also Dubber, and Duff, in this volume.
broad) if it sanctions the criminalization of any conduct that might contribute to the occurrence of harm, or whose criminalization would help prevent harm. The question then is whether we can find either a more precise formulation of the principle (one, for instance, that says more about the kind, or the degree, or the proximity, of the harm that must be caused or risked), or suitable further principles that would control its application, to give it a plausible substantive role in decisions about criminalization.

There is a similar problem of apparent over-breadth for Legal Moralism: is it plausible to suggest that we should, in principle, criminalize every kind of ‘morally wrongful action’, so that the criminal law can punish ‘all... those who are morally culpable in the doing of such actions’? Suppose that I break an important promise, or tell a serious lie, to a friend: in such a case, I would have breached a duty to keep promises, or to tell the truth, or to maintain my loyalties. My action would clearly wrong my friend, perhaps seriously. We can even assume that my action would cause my friend some serious harm (say, serious emotional injury). Nevertheless, even if the wrongs and the harms suffered by my friend were more serious than many of those that are regularly criminalized, we would still be unlikely to recommend criminalization.

The idea that crimes involve ‘public’ wrongs seems relevant here, if we can make substantive and plausible sense of it—not the idea that once a conduct has been criminalized, it becomes a ‘public’ wrong in that it can be dealt with by a public system of criminal justice, but the idea that what justifies criminalizing it is that it constitutes a ‘public’ rather than a merely ‘private’ wrong: my betrayal of my friend, seriously and harmfully wrong though it is, is still a private matter between me and her (and perhaps other friends of hers and mine). But we would need then to ask what ‘public’ means in this context. In particular, does a wrong count as ‘public’ only if and because it wrongs or harms ‘the public’, as distinct from identifiable individuals (in which case the worry is that the criminal wrongfulness of, e.g., a rapist’s action is detached from its moral wrongfulness as an attack on a particular victim)? Or should we rather say that a wrong counts as ‘public’ if it is of a kind that properly concerns ‘the public’, the community as a whole (in the case of criminal law, the relevant community is the polity), rather than just those directly affected by it (in which case it begins to look as if the ‘public’ character of the wrong is an implication, rather than a ground, of its criminalization)?

The idea of crime as a public wrong does at least serve to focus our attention on a central issue about criminalization: when, and why, we should look to the criminal law rather than, or in addition, to civil law or

28 Moore, n. 2 above, 35; but see n. 15 above.
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other non-criminal modes of regulation, to deal with conduct that does properly concern the law or the polity. Many matters, including some kinds of wrong and some kinds of harm, are of course properly left as purely private matters, to be sorted out informally by those directly involved; perhaps the first decision on the path to criminalization is then that a particular type of conduct is not in that sense a purely private matter. But we must then decide whether it is a matter for civil law (the key features of which are that the case is brought and controlled by a plaintiff, not by the polity, and that if the case goes against the defendant the outcome will be an award of damages, or a requirement to fulfil his commitments, rather than punishment as such); or for some non-criminal mode of regulation that might use 'penalties' to try to secure conformity to the regulations;\textsuperscript{30} or for the criminal law.

Criminal convictions condemn the convicted person. Criminal punishments are not merely neutral techniques of prevention or deterrence; they express condemnation or censure.\textsuperscript{31} We can plausibly argue, therefore, that the idea of wrongdoing, and the particular conception of 'public' involved in the idea of crime as a public wrong, must be central to a decision that criminalization is an appropriate way forward. To put it crudely and oversimply, civil law and non-criminal modes of regulation are primarily concerned with the prevention of harm and with compensation, as well as with spreading the costs of such harms and prevention, whereas criminal law is concerned with the definition and condemnation of wrongs. The truth in 'Legal Moralism' is thus that the wrongfulness of the conduct that is to be criminalized is crucial to the justification of its criminalization: but legal moralists go astray if they claim that we have reason to criminalize any and every kind of wrongdoing, since only 'public' wrongs are even in principle apt for criminalization. The task then is to make clearer sense of the idea of a public wrong, and to try to determine what else must be true of a public wrong if it is to be in principle apt for criminalization. Must it, for instance, either cause harm or be in some other suitable way related to the prospect of harm—and if so, what kinds of harm are relevant? In different ways, the


\textsuperscript{31} One can see condemnation or censure as in this way a defining feature of criminal law without taking the communication of that censure to be central to the justifying purpose of criminal law or punishment, as some theorists do (see, e.g., A von Hirsch, \textit{Censure and Sanctions}, Oxford: Oxford University Press, 1993; R A Duff, \textit{Punishment, Communication, and Community} (New York: Oxford University Press, 2001)); see also Feinberg, n. 30 above.
papers in this volume by Dubber, Duff, Green, Husak, and Simester and Sullivan all contribute to this question. Dubber, Duff, and Husak discuss relatively general issues about the scope of the criminal law in relation, for instance, to offences of possession and endangerment, and to the large category of ‘mala prohibita’. Green, and Simester and Sullivan, discuss the kinds of wrong that are involved in particular kinds of offence (bribery; theft and other property offences), in part to show why they are kinds of wrong that properly count as ‘public’, i.e. as in principle apt for criminalization.

We must turn now from questions about the scope of the special part to questions about the way in which its content, its specific offence definitions, should be structured.

2. Defining and Classifying Offences

There are two related general questions about the way in which the special part should define particular offences. One concerns the style or mode of offence definition, and of classification; the other concerns the extent to which substantive general principles (which figure as doctrines of the general part) can or should govern the definitions of particular offences.

Modes of Offence Definition I—The Descriptivist Approach

We can distinguish two quite different approaches to offence definition. While it is unlikely that a system of criminal law could embody either type in its ideal form, the contrast between them brings out some important questions about the proper aims of the criminal law, and about the tones or voice in which it should address the citizens.

One ideal type we can call descriptivism. The guiding thought here is that the criminal law, insofar as it is addressed to citizens, must aim to lay down clear ‘rules of conduct’ for them that will tell them precisely what they must or must not do, on pain of punishment if they break the rules. To achieve this combination of clarity and certainty in the rules of conduct,32 the rules should, as far as is possible, specify the proscribed or prescribed types of conduct in purely descriptive terms, to minimize the extent to which citizens have to call upon their own normative standards and understandings to interpret and apply the law. For we cannot assume that citizens will share enough in the way of values and normative understandings to ensure

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32 Clarity and certainty are two often touted advantages of a codified criminal law, and two obvious desiderata for the criminal law (the third being consistency); see, e.g., Law Commission No 143, Codification of the Criminal Law (London: HMSO, 1985), paras. 1.3–9. We still need to ask, however, what should constitute clarity and certainty—and whether there are other, possibly conflicting, desiderata.
consistency in their interpretations of the law, or certainty and clarity in the predictions that they will want to make about the conduct of others or about the responses of the courts; nor can we assume that they will have the kinds of moral commitment that would securely lead them to refrain from wrongdoing.

Something like this ideal was clearly held by many advocates of the Model Penal Code, and is implicit in Paul Robinson’s draft Code of Conduct. It rests on (or is made more plausible if we accept) both a distinction between ‘facts’ and ‘values’, and a certain kind of separation between law and morality.

As for facts and values, this ideal would at least be rendered more plausible if we could intelligibly aspire to a complete and purely descriptive specification of the content of moral norms: if, that is, any moral norm could in principle be analysed down into a purely descriptive specification of a type of conduct, and a normative operator (‘right’ or ‘wrong’, ‘ought’ or ‘ought not’) that is attached to that specification. We could then believe that the criminal law is grounded in, and seeks to apply to citizens’ conduct, moral norms, while also arguing that it should provide purely descriptive specifications of proscribed and prescribed conduct: for those specifications could aim to reproduce the content of the moral norms that the criminal law embodies.

As for law and morality, the suggestion is not that the criminal law is not or need not be grounded in morality, or should not respect at least a negative version of Legal Morality (i.e. a principle that only wrongful conduct should be criminalized); it is, rather, that the criminal law should eschew moral language and moral concepts in its offence definitions—in order to serve the aims of clarity and certainty. It should be a criminal law whose content is intelligible to, and whose rules are applicable by, those with

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34 P H Robinson, Structure and Function in Criminal Law (Oxford: Oxford University Press, 1997); his Draft Code of Criminal Conduct is at 211–20. We cannot here discuss the separation that Robinson and others urge between a Code of Conduct addressed to the citizens, to tell them what they must or must not do, and a Code of Adjudication that is addressed to the courts, telling them how to deal with breaches of the Code of Conduct: see M Dan-Cohen, ‘Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law’ (1984) 97 Harvard Law Review 625, on which see R Singer, ‘On Classism and Dissonance in the Criminal Law: A Reply to Professor Dan-Cohen’ (1986) 77 Journal of Criminal Law and Criminology 69. Although Robinson favours separating the two codes, he does not favour the kind of ‘acoustic separation’ that Dan-Cohen ties to such a separation.
36 For a sophisticated argument that a descriptive criminal law can still track judgements of moral blameworthiness, see A C Michaels, ‘“Rationales” of Criminal Law Then and Now: For a Judgemental Descriptivism’ (2000) 100 Columbia Law Review 54.
diverse or with no moral values of their own; and, we might add, it must be such as to give even an amoral person with neither moral concern nor moral understanding motivating reason to obey the law (namely, the fear of punishment).\textsuperscript{37}

Such an ideal type fits happily, if not inevitably, with a Feinbergian view of the structure of criminal wrongdoing. On Feinberg’s account of the Harm Principle and of the idea of harm as it figures in that principle, the idea of a ‘harmed condition’ is conceptually ‘fundamental’: we ‘can hope to analyze the idea of harm (harmed condition) without mentioning’ how such harm was caused.\textsuperscript{38} It follows that we can hope to identify the kinds of harm that properly concern the criminal law, qua harms, without reference to any notion of wrong or of wrongdoing, since such reference would involve ‘mentioning causally contributory actions’. Of course, to determine which harms should concern the law, we must bring in judgements of wrongfulness, since only those that are caused by wrongful actions should be criminal;\textsuperscript{39} but our initial identification of the harm, as a ‘harmed condition’, requires no such judgements. In defining crimes, we might thus take as our ideal paradigm a definition that specifies the harm (the harmed condition) in virtue of its causal contribution to which the conduct that is to be criminalized is wrongful, and then defines as criminal any conduct that makes a suitable causal contribution to the occurrence of that harm. Robinson’s Code of Conduct thus replaces the often complex sets of offences of homicide and wounding that we find in many legal systems with one simple clause: ‘You may not cause bodily injury or death to another person.’\textsuperscript{40}

We would of course need to add an account of what could justify causing such harm, which we could most simply do by providing a general account of justifications for all offences—as Robinson does in ss. 52–67 of the Code of Conduct. We might also want to criminalize attempts to cause such harm, or conduct that creates a serious risk of such harm, which we could again do by making general provision for such inchoate or secondary liability—as Robinson does in ss. 49–51 of his Code of Conduct.\textsuperscript{41} And we would need to add specifications of the fault required for liability, as well as of any

\textsuperscript{37} Cf. O W Holmes, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, at 459: ‘If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.’

\textsuperscript{38} Feinberg, n. 8 above, 31. \textsuperscript{39} See n. 17 above.

\textsuperscript{40} Robinson, n. 34 above, 213 (s. 3 of the Code of Conduct); see also the English draft Offences Against the Person Bill, ss. 1–2 (Reforming the Offences Against the Person Act 1861 (London: Home Office, 1998).

\textsuperscript{41} Note, however, that s. 51 retreats from a pure descriptivism, by prohibiting the creation of ‘a substantial and unjustified risk of causing a result made criminal by this Code’ (emphasis added).
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excuses that can be claimed—though for Robinson these are matters for the courts, and thus for the Code of Adjudication rather than for the Code of Conduct.

we should note the tones in which, on this account, the criminal law addresses citizens. It speaks to them in the language of prescriptions and prohibitions, of what they 'may' or 'may not' do (or, in the case of omission crimes, what they 'must' do); it defines behavioural rules that they are to obey. Nothing within the law expressly indicates why they should obey it, and given its descriptive character it would present itself in the same tones whether what it prohibited was conduct that was also, extra-legally, morally wrong, or conduct that was extra- or pre-legally neutral. If we ask why we should obey its prohibitions or prescriptions (bearing in mind that to obey a prohibition is to do more than act in a way that conforms to it; it involves acting because that is how I am ordered to act), the answer will then need to refer either to the law's authority or to its power: obey because it is the law, or obey because otherwise you will be punished. Under the kind of descriptive ideal sketched here, the law, we could say, speaks to citizens in the voice of the sovereign other: sovereign, in that it claims the power or authority to exact obedience from them; other, in that it does not appeal to values or goals that they supposedly share with each other or with the sovereign, but only of what it requires them to do.

modes of offence definition II—the moralistic approach

the other ideal type of offence definition looks not for descriptive purity, but for moral adequacy. It aims not merely to make clear what conduct is prohibited or permitted, but to declare to citizens what count as public wrongs that require a public condemnatory response; not to detach the criminal law's offence definitions from the moral norms that must underpin them, but precisely to give those moral norms, insofar as they should be given force by the criminal law as public norms, adequate expression in the law. Advocates of this type of offence definition do of course take such desiderata as clarity, certainty, and consistency seriously: but they will insist that what must be made clear is the wrong that underpins each offence, and that what can count as clarity, certainty, and consistency in such moral matters is not the same as what counts as clarity, certainty, and consistency in factual matters.

on this view, we should not try to separate 'fact' from 'value', or the criminal law from morality, in the ways that the descriptivist view tries to do. Advocates of such a view are likely to deny that we can separate fact from value in that way: not that no separation is possible—we could of course produce purely descriptive specifications of situations, and of conduct at least insofar as it consists in bodily movements and their causal effects (it would be harder, if not impossible, to describe recognizable
actions); but that we cannot analyse moral norms out into a purely descriptive specification of conduct, to which the operator ‘right’ or ‘wrong’ can then be added, since no such descriptive specification could capture the content of the norm. Rather, the articulation of moral norms requires an extensive set of ‘thick’ ethical concepts—concepts that ‘seem to express a union of fact and value’, 42 since they describe the world, including human actions, in terms of substantive and specific ethical values. Criminal law also, on this view, needs a stock of ‘thick’ concepts, which will at least be closely related, if not identical, to thick extra-legal ethical concepts: for that is how it can characterize criminal wrongs as wrongs. On this view, we should therefore look for an ethically rich criminal law, which speaks to the citizens not of descriptively specified types of conduct that they must or must not engage in, but of wrongs that they must not commit—or more precisely, insofar as the wrongs of which it speaks are already recognizable pre-legally as wrongs, of wrongs that they will be called to answer and to be punished for if they do commit them.

From this point of view it is not necessarily a defect in the special part if, for instance, it uses the concept of dishonesty in defining theft and cognate offences; 43 or if it defines one kind of murder as homicide that ‘is committed recklessly under circumstances manifesting extreme indifference to the value of human life’. 44 Indeed, reliance on such ethical concepts would be regarded as a strength. The criminal law should define a category of public wrongs in terms that enable the citizens to recognize them as wrongs, which means that it must define them in richly normative terms that are at least closely connected to those that structure the citizens’ pre- or extra-legal moral thought.

Such an approach must of course presuppose that there exists a sufficiently rich, widely shared and understood set of norms and values outside the law on which it can draw, and by reference to which citizens can interpret and apply the law; and that presupposition has come under familiar kinds of attack from various quarters. 45 From this point of view,

42 B Williams, Ethics and the Limits of Philosophy (London: Fontana, 1985), 129; see ch. 8 more generally on thick ethical concepts and their significance.
45 For very different kinds of attack along these lines, see, e.g., A MacIntyre, After Virtue (2nd ed., London: Duckworth, 1985); A W Norrie, Crime, Reason and History
however, the absence of a sufficient set of shared values (a sharing that need involve neither universality nor identity, and that may consist in shared procedural norms as well as or in partial place of shared substantive norms of conduct) marks the absence of the possibility of a legitimate or just system of criminal law—as something distinct from the exercise of bare power.

This conception of offence definition can be most plausibly interpreted as embodying a quite different conception of the relationship between the law and the citizens, and of the tones in which the law should address us. The law now claims to speak as our law, as the common law of the polity that embodies our values as citizens; not in the voice of the sovereign other, but in what claims to be our collective voice declaring our own values to ourselves.  

To follow this approach through would involve attending not just to the range of harms caused by various forms of criminal conduct, but also to the wrongs that they involve. It would require us to analyse and classify existing crimes in terms that, and seek modes of definition that, as far as is possible and consistent with other norms of legislation, capture the relevant wrongs. One crucial issue will be how far the law should seek to discriminate different wrongs, since whatever force there is to the principle of fair labelling, and to the demand that matters relevant to sentencing should be proved at the trial, there must clearly be limits to how fine-grained our offence definitions should be.

A number of recent works in criminal law theory exemplify versions of this approach, as do several of the papers in this volume. For example, Victor Tadros, in his piece, argues that, although some of the harms associated with domestic abuse may be similar to the harms associated with other assault-type crimes, a fuller account would recognize the distinctive, even unique, effects such abuse has on its victims’ sense of self-worth. Antony Duff rests a crucial distinction between attacks and endangerments on a distinction between the kinds of wrongs that such acts, respectively,


46 See further Duff, n. 31 above, 56–68. Dubber’s critical discussion of the ‘Police Power Model’ of law, in this volume, is also clearly relevant here.

47 See Ashworth, n. 7 above, 89–92.

entail—that attacks involve being guided by wrong reasons, whereas endangerments involve not being guided by right reasons. Jeremy Horder draws a similar distinction between crimes in which the offender is ‘active’, and those in which the offender is ‘passive’, in relation to the relevant harm, and uses it to reconceptualize the unclear and controversial distinction between crimes of ‘specific’ and crimes of ‘general’ intent. Andrew Simester and Bob Sullivan discuss both the wrong of theft (and why it should be a matter for the criminal rather than the civil law), and the distinctive wrongs involved in other types of property offence. Stuart Green offers an analysis of the distinctive wrongs involved in offences of bribery, in terms of the idea of a duty of loyalty that is breached.

Another issue concerns the question whether new or newly significant forms of criminal activity should be dealt with through already existing legal prohibitions, or whether instead new offences should be created to deal with the problem. For Tadros again, speaking in the context of domestic abuse, there is an important symbolic role that creation of a new offence might play, one which marks out the failure of an earlier legal regime to recognize such behaviour as significantly wrong. On the other hand, by bypassing already existing offences to deal with new problems, we risk losing out on the range of associations that such offences will have previously engendered.

A final issue concerns so-called *mala prohibita*, which seem to involve the creation of purely legal wrongs rather than the definition of pre-existing moral wrongs: how can these be explained and justified on this approach? Douglas Husak’s paper directly tackles this question; he argues that if we accept the ‘wrongfulness constraint’, that only morally wrongful conduct should be criminal, it becomes extremely difficult to justify the creation of *mala prohibita*.

Classifying Crimes

Whatever mode of offence definition we use, we must deal with two classificatory issues. First, as we saw in the previous two sections, we are engaging in a form of classification when we decide what kinds of conduct shall constitute a given offence.49 Secondly, we engage in another sort of classification when we decide how various groups of offences should be categorized. For example, we might want to know whether a particular offence is a felony or misdemeanour, an offence against the person or one against property, or an inchoate offence or a consummated one. Such matters of classification can have important consequences in relation to

49 The task here is to identify the ‘elements’ that go to constitute one or another offence. For example, we must decide whether ‘murder’ should include only intentional killings or also accidental deaths caused during the commission of certain enumerated felonies or in the course of highly dangerous, ‘implied malice’ kinds of behaviour. The question of felony murder is addressed by Finkelstein, in this volume.
sentencing, in connection with evidentiary or jurisdictional rulings, in determining the applicability of certain defences, and elsewhere.  

Traditionally, our codes have classified crimes in terms of the harms they cause or the kinds of victims they affect, as in the case of Model Penal Code classifications such as ‘offences involving danger to the person’, ‘offences against the family’, and so forth. But we can also imagine circumstances in which we might consider the possibility of classifying offences in terms of, say, the kinds of wrongfulness they entail (e.g. grouping together offences that require some form of deception), or the kinds of mens rea they require or do not require (e.g. grouping together all of the strict liability offences). Alternatively, we might also wish to distinguish offences within each group by reference either to the precise sub-category of harm involved (so within the group of offences involving bodily injury we will distinguish homicide from wounding, and perhaps serious from less serious types of wounding), or to the causal contribution the conduct makes to the occurrence of the relevant harm (so we will distinguish actually and directly causing harm from creating an unconsummated risk of it, and from other modes of facilitation or encouragement).

General Principles and Particular Wrongs

On some conceptions of the general part, it should contain doctrines, rules, and principles that quite tightly constrain the special part’s offence definitions. This is particularly true of what Gardner labels as the ‘supervisory’ and the ‘definitional’ general part. The supervisory general part ‘contains guiding principles for the creation, interpretation, and application of new criminal laws’, while the definitional general part ‘specifie[s] how crimes (and defences to crime) are to be defined, [it] provide[s] the detailed linguistic and conceptual apparatus of the law.’ A key question about both aspects of the general part concerns their scope: how rich, and how general, should they be?

Consider, for instance, just a few examples drawn from two familiar actual or proposed criminal codes, the Model Penal Code and the English Law Commission’s Draft Code, which display a relatively ambitious conception of the general part’s scope and authority. The Model Penal Code includes a qualified version of the act requirement (which we can express, in

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50 In this volume, for example, Huisjen explores the consequences of categorizing statutory rape as a strict liability crime; and Simester and Sullivan address the significance of the category of ‘property’ offences. See also S P Green, ‘Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part’ (2000) 4 Buffalo Criminal Law Review 301; S P Green, ‘Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi’ (2000) 90 Journal of Criminal Law & Criminology 1087.

51 See, e.g., Model Penal Code, Part II.

52 Gardner, n. 2 above, 208.
its most general form, by the slogan *mens non facit reum nisi actus sit reus*): ‘A person is not guilty of an offence unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable’. The English Draft Code is more cautious:

For the purposes of an offence which consists wholly or in part of an omission, state of affairs or occurrence, references in this Act to an ‘act’ shall, where the context permits, be read as including references to the omission, state of affairs or occurrence by reason of which a person may be guilty of the offence.

The English clause is, as the Law Commission makes clear, ‘an interpretation clause’: it does not constrain the substantive content of the law or the possible bases of liability, but simply requires users of the Code to interpret ‘act’ in these broad, not to say all-embracing, terms. By contrast, the Model Penal Code provision does seem to constrain the possible content of the law, the possible bases of liability, by requiring liability to be based on a ‘voluntary act’ or ‘omission’. Such a provision is of course controversial, both as to its meaning and as to its plausibility: it is not clear whether the Act should count as an ‘act’, or whether such a requirement can be plausibly interpreted in a way that renders it non-vacuous. The question it raises for our purposes is whether the special part’s definitions of specific offences should be constrained by a general requirement, or even a strong presumption, that every offence should be defined to include a ‘voluntary act’ or ‘omission’. Markus Dubber’s paper in this volume clearly bears on this question, since the expansion of ‘possession’ offences, and the expansive meaning given to the idea of ‘possession’, put great pressure on any substantial act requirement; and insofar as we find that expansion worrying, we can see one significant merit to an extensive general part whose substantive or ‘supervisory’ doctrines constrain the special part.

The ‘act requirement’ is primarily a supervisory doctrine, though it also has a definitional element insofar as the general part tries to define what should count as a ‘voluntary act’. By contrast, the definitions of fault elements that both our sample codes provide are, initially, no more than definitional rules; but they can easily become substantive supervisory doctrines.


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53 Model Penal Code s. 2.01(1).
55 Law Commission, n. 54 above, vol. 2, para. 7.7.
57 See Model Penal Code, s. 2.01(2).
58 An earlier Draft Code had defined an additional four terms—‘purposely’, ‘heedlessly’, ‘negligently’, and ‘carelessly’ (Law Commission No. 143, n. 32 above, Draft Criminal Code,
Such definitions already exert a modest constraint on the special part insofar as they require these terms to carry the specified meanings whenever they are used: legislators or common law interpreters cannot give ‘intentionally’ or ‘recklessly’ a different meaning in the context of different offences. (This might reflect a misguided belief that non-ambiguous terms must always admit of such general definitions, misguided because it ignores the Wittgensteinian idea of family resemblances; or a concern that to allow courts or legislators to give different contents to the terms in different contexts would be confusing.) They exert a more significant constraint if it is also declared that one of these types of fault is a universally or presumptively necessary condition of liability, so that each offence must be defined (explicitly or implicitly) as requiring at least that kind and degree of fault; and they exert even more significant constraints if it is also declared or assumed that the fault element of each offence must be specified in terms of these concepts as thus defined.

Provisions of this kind raise a further set of questions about the special part, and about the extent to which its offence definitions should conform to the kind of general structure that the more ambitious doctrines discussed in the previous paragraph require. We might at least strongly suspect that the ‘descriptivist’ approach to offence definition sketched earlier in this section would favour a limited set of (descriptively defined) fault concepts, in terms of which the fault element of each offence would be specified; while the wrong-based approach would reject such constraints, and allow room for a richer set of thick fault concepts, many of which might be peculiar to particular offences.

The papers in this volume that most directly bear on these questions are Jeremy Horder’s, Kyron Huigens’s, and Claire Finkelstein’s. Horder argues that while a strictly ‘subjectivist’ approach to the criminal law would require even voluntary intoxication to be in principle relevant as evidence in support of a denial of mens rea for any offence that requires intention, knowledge or recklessness, attention to the distinction that he draws between crimes of activity and crimes of passivity in relation to the relevant harm enables us to make better sense of the doctrine that voluntary intoxication cannot support a denial of mens rea for offences of ‘general’ or ‘basic’ intent. Huigens goes even further in this direction, arguing that a defendant accused of rape can be said to be at ‘fault’ in the way that the criminal law requires even

s. 22). In the end, however, the Commission found that ‘none of them has proved to be required for the definitions of offences proposed for inclusion in the Code’ at that stage (Law Commission No 177, n. 54 above, vol. 2, para. 8.7).

59 See Model Penal Code s. 2.02, requiring at least negligence as the minimal culpability for any offence, and recklessness when the offence definition does not specify a culpability requirement (s. 2.05 makes some very limited provision for absolute liability); English Draft Code s. 22, specifying recklessness as the minimally required fault element for all offences (and as to each element of the offence), but with the all-purpose get-out clause ‘unless otherwise provided’.
if he neither knows nor suspects that the victim does not consent, given the existence of independent rape law ‘elements’ (as he terms them) such as minority, non-consent, threat, force, and victim incapacity. Finally, Finkelstein addresses the seeming illogic and ad hoc-ness of the traditional merger rule of the felony-murder doctrine, under which liability is barred where the predicate felony is not independent of the homicide. The key to making sense of such a rule is to think of the predicate felony as constituting a wrongdoing separate and distinct from the wrongdoing associated with the killing itself—a situation that occurs where, she says, following the principles of action theory, the act in virtue of which the defendant satisfies the elements of the putative predicate felony cannot properly be redescribed in terms of the resulting death.