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The Concept of Criminal Law

Sandra Mayson
Assistant Professor of Law *University of Georgia School of Law*, susan.mason@uga.edu

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ORIGINAL PAPER

The Concept of Criminal Law

Sandra G. Mayson[1]

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Abstract
What distinguishes "criminal law" from all other law? This question should be central to both criminal law theory and criminal justice reform. Clarity about the distinctive feature(s) of criminal law is especially important in the current moment, as the nation awakens to the damage that the carceral state has wrought and reformers debate the value and the future of criminal law institutions. Foundational though it is, however, the question has received limited attention. There is no clear consensus among contemporary scholars or reformers about what makes the criminal law unique. This Essay argues that Antony Duff's The Realm of Criminal Law offers an answer—and that the answer is correct. Duff rightly diagnoses criminal law as unique by virtue of the fact that it censures particular acts in the polity's name. It is a mechanism of collective condemnation. The Essay advocates recognition of this concept of criminal law and draws out implications for both criminal law theory and criminal law reform.

Keywords Duff · Criminalization · Overcriminalization · Realm of criminal law · Symposium · Reform · Criminal justice reform · Criminal law theory · Conceptual analysis · Condemnation

1 Introduction

Prison abolition. Reparations. Human caging. These words have leapt from radical corners into mainstream discourse[1] and legal scholarship,[2] and it is about time. A century and a half after the South enacted vagrancy laws to re-enslave black

[1] *E.g.* Ta Nehisi-Coates, *The Case for Reparations*, The Atlantic (June 2014); P.R. Lockhart, *The 2020 Democratic Primary Debate over Reparations, Explained*, Vox.com (June 19, 2019); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, The N.Y. Times Magazine (Apr. 17, 2019); Michael Zuckerman, *Alec Karakatsanis'08 Puts 'Human Caging' and 'Wealth-Based Detention' in America on Trial*, Harvard Law Today (Aug. 23, 2017).

[2] *E.g.* Harvard Law Review, Vol. 132 Issue 6 (2019) (dedicated to prison abolition).

✉ Sandra G. Mayson
smayson@uga.edu

[1] University of Georgia School of Law, 225 Herty Drive, Athens, GA 30602, USA

men,[3] America is finally grappling with the racial legacy of our criminal justice system. This belated awakening is driving a schism in criminal justice reform circles. Efforts to reduce the reach of the criminal legal system have found broad support along the length of the political spectrum. Increasingly, though, reformers who identify as abolitionists reject incremental measures that seek to remedy the worst excesses of the system without disrupting its basic operations.[4] They understand the problem as one not of excess but of fundamental structure.[5] The scale of the system is only a symptom. True reform requires dramatic, totalizing change: Abolish prisons.[6] Abolish the police.[7] Abolish criminal law itself.[8] Reject textbook theories of justice and attend to the lived experience of those directly affected.[9]

Antony Duff's *The Realm of Criminal Law*[10] does not explicitly engage these debates. Although Duff's magisterial exposition addresses a social problem—overcriminalization—he diagnoses it as a problem of scale and, at a deeper level, of conceptual incoherence. The discussion does not highlight the distributional race and class concerns that animate so much contemporary debate. Even on its own terms, Duff's argument for a thin, formal "master principle" of criminalization seems like a vehicle for piecemeal reform at best.

Yet *The Realm* does bear on existential reform debates, because it addresses an overlooked first step in any coherent deliberation about the future of the criminal legal system: defining "criminal law." What is the nature of the thing we seek to reform? What—if anything—makes criminal law a distinctive kind of law? Duff undertakes this task because one cannot deliberate about what to criminalize without determining what the criminal law is *for*; and one cannot deliberate about what the criminal law is for without determining what it *is*. This initial, definitional task, though, is necessary to more than criminalization theory. It is necessary to debates about the value and future of criminal law itself. And notwithstanding the centrality of the question, there appears to be no clear consensus among either scholars or reformers about what differentiates criminal law from every other kind of law.

[3] *See generally* Douglas Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008).

[4] Penal abolitionism is a broad movement that encompasses diverse groups and strains of thought. *See generally* Michael J. Coyle and Judah Schept, *Penal Abolition Praxis,* 26 Critical Criminology 319 (2018). Due to space constraints, I use the terms "abolitionist" and "abolitionism" quite reductively throughout this Essay.

[5] *See, e.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L. J. 1419 (2016); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 Mich. L. Rev. 259, 262 (2018); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 Yale L.J. Forum 848, 852 (2019).

[6] *See, e.g.*, Angela Y. Davis, Are Prisons Obsolete? (2003).

[7] *See, e.g.*, Meghan G. McDowell and Luis A. Fernandez, *'Disband, Disempower, and Disarm': Amplifying the Theory and Practice of Police Abolition*, 26 Critical Criminology 373 (2018).

[8] *See, e.g., Abolitionist Principles and Campaign Strategies for Prosecutor Organizing,* Community Justice Exchange, https://www.communityjusticeexchange.org/abolitionist-principles.

[9] *See, e.g.*, Allegra M. McLeod, *Envisioning Abolition Democracy: Developments in the Law*, 132 Harv. L. Rev. 1613 (2019).

[10] R. A. Duff, The Realm of Criminal Law (2018) [hereinafter "Duff"].

This Essay contends that Duff gets the answer right.[11] The fact that makes criminal law a unique form of law is that it operates as a mechanism of collective condemnation. It is a body of law and legal practice that censures particular acts in the polity's name. This concept of criminal law makes sense of the bulk of existing criminal-law doctrine and institutions. To my mind, it is the only concept of criminal law that can. It is not a novel concept of criminal law, and it is consistent with nearly all theories of criminal law and punishment in current circulation. But nor is it universally recognized.

Achieving clarity about the nature of criminal law is important for theory and reform alike.[12] For purposes of theory, recognizing criminal law as a mechanism of collective condemnation helps to refine the questions up for debate, because the concept logically entails certain constraints on criminalization and punishment. For purposes of reform, recognizing criminal law as a mechanism of collective condemnation is essential to thinking about whether we want a criminal legal system at all, and what, in its best form, it should look like.

The Realm ultimately offers a compelling case for the criminal law. Only a mechanism of collective condemnation can enact a polity's shared moral code. Only a mechanism of collective condemnation can constitute a polity as a community of moral agents. Criminal law is not just useful to a liberal republic; it is vital. The challenge for reform is to forge a future in which our legal institution of collective censure promotes both accountability and forgiveness, condemns acts without condemning people, and works to mitigate inequality rather than to drive it.

2 Criminal Law as a Mechanism of Collective Condemnation

2.1 What Makes Criminal Law Unique?

The Realm of Criminal Law begins with this question. As Duff explains, "[a] normative theory of criminalization… must depend on an account of what the criminal law is for."[13] And "[a]n account of what the criminal law is for must depend on what the criminal law is: what are its distinguishing features as a particular kind of law?"[14]

There are several things this question is not about.

This is not a question about the inherent meaning of the words "criminal law," as Duff notes.[15] They have no inherent meaning. A linguistic community might ascribe

[11] Duff might deny that he answers the question at all. *See infra* Part 2.2.

[12] Perhaps this Essay should be titled "The Nature of Criminal Law" and dispense with the intermediary notion of a concept. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985) (describing and defending a realist theory of meaning); Michael S. Moore, *The Various Relations between Law and Morality in Contemporary Legal Philosophy*, 25 Ratio Juris 435, 438–440 (2012) (differentiating between effort to draw "analytically" versus "metaphysically" necessary connections between law and morality). Given space constraints and my own ambivalence, I leave the question open.

[13] Duff, *supra* note 10, at 11.

[14] *Id.*

[15] *Id.* at 50–51.

them a new meaning or eliminate the term altogether.[16] It is, rather, a question about the set of institutions and practices to which those words attach.

The question is also not about what makes criminal law a kind of law. Criminal law must have certain features by virtue of being law. What they are depends on what "law" is. Any concept of criminal law thus embeds a concept of law. The concept of law—or the nature of law, for realists about meaning[17]—is the subject of enduring and intricate debate, but for present purposes it suffices to note that contemporary positivists and non-positivists alike acknowledge certain features as central to a system of law: the existence of action-guiding norms that are publicly available, intelligible, generally applicable, prospective rather than retrospective, and enforced by a neutral authority through procedures that guard against error.[18] To qualify as criminal law, a given set of norms and institutions must first of all qualify as *law*.

Finally, the question of what makes criminal law unique is notably not about what is most central to criminal law, nor about which of its features do the most good or the most harm. Those questions are important. But they are not at issue here.

The question at issue here is what distinguishes criminal law from every other kind of law. This question is logically prior to questions about what justifies criminal law, what criminal law is for, and how to reform criminal law. To answer such questions—to even consider them—it is necessary to identify the object they address. When we talk about "criminal law," what are we talking about?

As Michael Moore has explained, this question embeds two layers. We need to know not only what kind of thing criminal law is, but also what "kind of kind."[19] Criminal law might be a nominal kind: a set of doctrines and institutions that have evolved in the particular shape they have purely by happenstance, to which we attach the label "criminal law" by mere convention. If criminal law is a nominal kind, the only kind of definition possible is a description of its current state. The concept of criminal law is coextensive with the reality of criminal law, and there are no normative criteria intrinsic to criminal law by which to judge its current operation. We can only judge the success of criminal law by reference to extrinsic normative criteria. The other possibility is that criminal law has a deeper identity: We designate a set of doctrines and institutions as this particular kind of law by virtue of certain structural or functional features. If that is so, a definition of "criminal law" requires identification of the relevant features.[20] The concept of criminal law is a statement of those features that are necessary and sufficient to constitute an instance of criminal law.[21] If criminal

[16] *Cf.* Vincent Chiao, *What is the Criminal Law For?*, 35 L. & Phil. 137, 159 (2016) (expressing skepticism about the importance of "received legal categories").

[17] *See supra* note 12.

[18] *See, e.g.*, Jeremy Waldron, *The Rule of Law*, *in* Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/rule-of-law (last visited Sept. 24, 2019).

[19] Michael S. Moore, Placing Blame: A Theory of the Criminal Law 19–23 (1997).

[20] *See* Duff, *supra* note 10, at 12. Moore further differentiates between "natural" and "functional" kinds. Moore, *supra*, at 19–23.

[21] *See* Duff, *supra* note 10, at 12 (noting that the identification of such features will inevitably be "selective, and normatively informed").

law has this kind of deeper identity, we can evaluate how successful a given criminal law system is *as criminal law*, as well as with reference to extrinsic normative criteria.

2.2 Duff's (Ambivalent) Answer

Duff himself does not purport to offer a concept of criminal law at all. He is both modest and cautious; he claims only to present his own particular conception of criminal law, one candidate among others.[22] Yet the text is ambivalent. In his first chapter, for instance, Duff outlines those features he "takes to be central" to criminal law but disavows any intent to be engaged in conceptual analysis.[23] Elsewhere he admits to conceptual analysis.[24]

Regardless, *The Realm* does offer a concept of criminal law.[25] Duff clearly believes that criminal law is more than a nominal kind. Criminal law has a distinct identity, he argues, and the fact that makes criminal law a distinctive kind of law is that it operates as a mechanism of collective condemnation. He writes, for instance, that the distinctive feature of criminal law is "the censure or condemnation that a conviction involves:"[26] a conviction "formally condemns [the accused's] conduct as a wrong, and formally censures her, as the agent of that conduct, as a wrongdoer."[27] Likewise, "to criminalize a type of conduct is to portray, and condemn, it as wrongful."[28] The distinctive feature of punishment—the thing that differentiates it from quarantine or tax penalties—is that "punishment is intended to communicate or to express censure."[29] It follows that "censurable wrongfulness is integral to criminal law in a way that it is not integral to a system of non-criminal regulation."[30]

Duff never says that what is necessary and sufficient to constitute an iteration of criminal law, as distinct from every other kind of law, is a set of doctrines and practices that together operate as a mechanism of collective condemnation. He writes instead that "*part* of what is distinctive about criminal law is that it portrays the conduct that it criminalizes as wrongful."[31] Later he asserts, with arguable inconsistency, that "the distinctive function of criminal law… is that it helps to sustain the

[22] *E.g.,* Duff, *supra* note 10, at 6 ("*Chapter 1* develops a conception of criminal law as a distinctive kind of legal institution…. This account is not meant to provide an analysis of 'the concept of criminal law'—of, for instance, the necessary and sufficient conditions for anything to count as a system of criminal law….").

[23] *E.g. id.* at 6, 13.

[24] *Id.* at 11 ("The analytical exercise [of determining what criminal law is] is an exercise in conceptual analysis."); 12–13 ("It will be a conceptual analysis insofar as I will be claiming that anything that we are to count as a system of criminal law must display at least some of the features that I will highlight….").

[25] Or at least a concept of criminal law in contemporary Western democracies. Duff avoids any suggestion that he—or anyone—could "tell us what counts as criminal law at all times and all places." *Id.* at 11.

[26] *Id.* at 18 (asserting that "a criminal conviction is essentially censorious").

[27] *Id.* at 34.

[28] *Id.* at 260.

[29] *Id.* at 19; *see also id.* at 37 ("[W]hat distinguishes punishments from taxes or 'penalties' is their typically reprobative nature.").

[30] *Id.* at 19.

[31] *Id.* at 20 (emphasis added).

polity's civil order."[32] It is almost in spite of himself that Duff offers up a concept of criminal law.

Yet the collective-condemnation concept of criminal law runs throughout *The Realm*. It anchors Duff's commitment to distinguishing public from private wrongs. It animates his discussion of what constitutes a polity. It both motivates and follows from his exploration of the ways that criminal legal systems do, can, and should call members of the polity to account for their public wrongs.

This collective-condemnation concept of criminal law is not a novel one.[33] Some sources, in fact, suggest that it is already a matter of consensus. Joshua Dressler's *Understanding Criminal Law*—best-selling hornbook, boon to first-year law students and their teachers alike—begins with the assertion that the thing that "essentially distinguishes the criminal law from its civil counterpart… is the societal condemnation and stigma that accompanies the conviction": A conviction is "an expression of the community's moral outrage, directed at the criminal actor, for her act."[34] As authority, Dressler cites Henry Hart's 1958 article, *The Aims of the Criminal Law*, which puts the matter succinctly: "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition."[35]

Most contemporary criminal law theorists appear to endorse the collective-condemnation concept of criminal law, whether explicitly or implicitly.[36] Surveying

[32] *Id.* at 232. This is a strange claim. Many other fields of law—not least constitutional law—help to sustain the polity's civil order. Duff presumably means that the criminal law helps to sustain the polity's civil order in a unique way.

[33] It echoes Durkheim's views, among others. *See* Emile Durkheim, *Crime and Punishment*, in Durkheim and the Law 69 (Steven Lukes and Andrew Scull eds. 1983) (opining that punishment functions "to maintain inviolate the cohesion of society by sustaining the common consciousness… to give voice to the unanimous aversion that the crime does not fail to evoke….").

[34] Joshua Dressler, Understanding Criminal Law 2 (7th ed. 2015).

[35] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & Contemp. Probs. 401, 404 (1958).

[36] *E.g.* Larry Alexander & Kimberly Kessler Ferzan, Crime and Culpability: A Theory of Criminal Law 18 (2009) ("The criminal law prevents harm by inculcating and reinforcing norms about how to treat others and operates in accordance with norms about deserved and appropriate punishment for the violation of those norms."); Andrew Ashworth & Lucia Zedner, Preventive Justice 14 (2014) (identifying "censure" as one of "key elements" of punishment, and implicitly as the only unique element); H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 11, 13, 17 (2d ed. 2008) (identifying a culpability requirement—"the restrictive principle of Distribution"—as the thing that distinguishes punishment from preventive restraint, and thus criminal from non-criminal law); Douglas Husak, Ignorance of Law: A Philosophical Inquiry 26 (2016) (defining punishment as a state response that "deliberately expresses condemnation or stigma and imposes a deprivation or hardship on the offender"); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 Harv. L. Rev. 1485, 1565 (2016) (arguing that criminal law is distinctive as "an instrument of normative reconstruction" that operates through "condemnatory punishment"); Moore, *supra* note 19, at 33 (arguing that criminal law is a functional kind, the distinctive function of which is to "attain retributive justice"); Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law 3 (2011) ("The right to punish offenders… is grounded in the duties that they incur as a result of their wrongdoing."); Gideon Yaffe, Attempts: In the Philosophy of Action and the Criminal Law 32 (2010) ("To punish for conduct is to express the judgment that the conduct is an appropriate object of disapproval and condemnation: this is censure."); Joel Feinberg, *The Expressive Function of Punishment*, 49 The Monist 397, 400 (1965) (identifying the expression of blame as the distinguishing feature of punishment); Andrew von Hirsch, *Censure and Proportionality*, *in* A Reader on Punishment 118 (R.A. Duff & David Garland eds., 1994)

scholarship on the criminal-civil divide in 1997, Carol Steiker summarized the field as concluding that the distinguishing feature of punishment is that it necessarily "expresses blame."[37] And Duff himself notes that "theorists often include some notion of censure in their analytical accounts of criminal punishment," because "a key difference between punishment and other kinds of burdensome imposition… is that punishment is intended to communicate or express censure."[38]

Nonetheless, it is not clear that a consensus on the distinctive feature(s) of criminal law exists! Duff does not seem to think so.[39] Many theorists, including Duff himself, are equivocal about whether its collective-condemnatory nature is *the* distinguishing feature of criminal law or just one of them.[40] Some theorists seem to reject the notion that criminal law has any meaningful distinguishing feature at all; they see it as a purely nominal kind.[41] Perhaps most unsettling for a new criminal-law teacher, her textbook never explicitly identifies or addresses the question of what distinguishes criminal from non-criminal law.[42] A recent edited volume, *Philosophical Foundations of Criminal Law*, raises the question of whether we should "hope to specify the necessary or defining features that any practice must display if it is to count as a system of criminal law,"[43] but does not answer it.

So the situation is an odd one. Some authorities treat the matter as settled: The defining feature of criminal law is the condemnation it expresses on behalf of the community. Others suggest, enigmatically, that the matter is far from settled. A vast quantity of contemporary theory ignores or elides the question.

This Essay advocates the following proposition: As Henry Hart wrote, as Duff (sometimes) asserts, the distinguishing feature of the criminal law—in conceptual terms—is that it operates as a mechanism of collective condemnation. A criminal conviction asserts blame in the community's name. Other bodies of law deter harm and wrongdoing, incapacitate the dangerous, rehabilitate the compromised, and inflict hard treatment. Some other legal mechanisms speak in the name of the people.

Footnote 36 (continued)
(asserting that difference between a tax and a punitive fine is that "the fine conveys disapproval or censure, whereas the tax does not").

[37] Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775, 799 (1997); 800–05 (describing evolution of scholarship on question of what defines "punishment").

[38] Duff, *supra* note 10, at 19.

[39] *Id.* at 21 ("I would be very happy if the claim that the criminal law is essentially concerned with wrongdoing was uncontroversial.").

[40] *E.g. id.* at 6–13, 28; James Edwards, *Theories of Criminal Law*, https://plato.stanford.edu/entries/criminal-law (describing features of criminal law that make it "distinctive" without discussing which are necessary or sufficient to constitute criminal law); Antony Duff, *Theories of Criminal Law*, 2013, https://plato.stanford.edu/archives/sum2018/entries/criminal-law ("It would be unproductive to ask whether all these are strictly necessary features of criminal law….").

[41] *See, e.g.*, Chiao, *supra* note 16, at 159 ("[T]he public law conception adopts an unapologetically revisionist attitude toward received legal categories generally, and the civil-criminal (or criminal-regulatory) distinction in particular."); *see also id.* at 158–159 (conceding that "the public law conception represents criminal justice institutions as functionally continuous with many other forms of coercive state power");

[42] Criminal Law and its Processes: Cases and Materials (Sanford H. Kadish, Stephen J. Schulhofer, & Rachel E. Barkow, eds., 10th ed. 2017).

[43] Philosophical Foundations of Criminal Law 5 (R.A. Duff & Stuart P. Green, eds., 2011).

It is arguable that certain other bodies of law operate as condemnatory mechanisms (punitive damages in tort, for instance).[44] But no other body of law is designed and perceived as a mechanism of condemnation that operates on the polity's behalf. It cannot be said of any other body of law that if it ceased to express condemnation of particular acts in the name of the polity, it would lose any unique identity.

2.3 Qualifications

Three qualifications are in order. First, as noted above, to say that criminal law is a mechanism of collective condemnation does not exhaust its necessary features. It must also have the necessary attributes of law.[45] Nor is it to say that the condemnatory aspect of criminal law is the only feature of the system that requires justification, or even the most important one. To the extent that a criminal-law system inflicts coercive deprivations of liberty, its coercive aspects likely stand in greatest need of justification.[46] The claim is simply that the distinguishing feature of criminal law is that it expresses collective condemnation.

A second set of qualifications relate to the terms of the concept itself. I have been ignoring a great deal of complexity in the interest of stripping the concept to its essence. But this core concept raises a further set of questions. What does it mean for a set of doctrines, institutions and practices to "operate as a mechanism of collective condemnation"? Need it so operate in every case? Surely not. Who need understand the condemnatory message, and what does such understanding entail? What does it mean for the criminal law to speak for the "collective"? What do we mean by "condemnation"? And so forth.

A third qualification is that although it may be clear that the collective-condemnation feature is necessary to constitute a system of criminal law (as distinct from a regulatory system of sanctions and detention, for instance), it is far less clear that this feature is sufficient. Might other features also be necessary? For instance: Is punishment beyond a conviction necessary, or could we imagine a system that only announced convictions that we would still recognize as criminal law? Must criminal law be dedicated to attaining retributive justice, and, if so, what does retributive

Footnote 41 (continued)

Vincent Chiao, *Two Conceptions of Criminal Law, in* The New Philosophy of Criminal Law 25 (Chad Flanders & Zachary Hoskins, eds., 2016) ("[F]rom a public law perspective, what is unique about the criminal law is simply the severity of its sanctions."). *But see* Chiao, *supra* note 16, at 137 ("It is in the nature of the kind of thing it is that punishment—and hence the criminal law—serves to expressively vindicate rights and condemn wrongs.").

[44] *Cf.* Dan Markel, *Retributive Damages: A Theory of Punitive Damages As Intermediate Sanction*, 94 Cornell L. Rev. 239 (2009) (advocating retributive framework to guide and rationalize punitive damages).

[45] *See supra* Part 2.1.

[46] *Accord* Chiao, *supra* note 41, at 25 ("[W]hat makes the use of such [criminal] sanctions so difficult to justify is not its [sic] condemnatory message per se but rather the degree of coercion with which those messages are conveyed."). *Cf.* Mitchell N. Berman, *Punishment and Justification*, 118 Ethics 258 (2008) (exploring what it means to say that punishment stands in need of justification).

justice require? Truth and reconciliation commissions censure wrongdoing on behalf of the polity. Are they criminal law institutions?[47] It may be that a concept of criminal law should entail more detail than "a set of laws and legal institutions that operate as a mechanism of collective condemnation," or it may be that no concept of criminal law can cleanly categorize everything. There may be paradigmatic instances of criminal law, clear instances of non-criminal law, and a gray borderland in between.

Still, it seems useful to offer this concept of criminal law at least in provisional terms. Acknowledging that the uniqueness of criminal law lies in its mode of collective condemnation offers a foundation for debates about its purpose, its justification, and its future.

2.4 A Concept Versus a Conception

A last objection to the concept of criminal law proposed here is that there is no need to assert a concept of criminal law at all. The modest theorist should content herself, as Duff does, with offering one possible "conception." The difference, put crudely, is that to assert a concept of criminal law is to assert an objective truth, whereas to assert a conception is to present one possible understanding of the phenomenon we call "criminal law" without claiming objective supremacy over others.[48]

Notwithstanding the value of modesty, there is also value in striving to identify the concept of criminal law. The first reason is that there is an objective truth of the matter.[49] There really are certain features that make the set of laws and institutions that we call "criminal law" different from all other bodies of law. Those features, which include the social meaning of conviction and punishment and the stringent procedures we consequently require to protect against error, are not the accidental traits of institutions that evolved by chance. They have an internal normative logic, which, as Duff so elegantly explains, both derives from and helps to constitute the value structure of a liberal republic.

Secondly, and more importantly for present purposes, a concept of criminal law is necessary to criminal law theory and policy alike. We can argue all day about the justification of punishment or criteria for criminalization, but if we are all operating with different conceptions of the criminal law, we are arguing past each other. Our conflicting views about criminalization may be equally sound given our divergent conceptions of what it is to criminalize. The abolitionist challenge to criminal law institutions highlights the need for foundational clarity. A shared concept of criminal law is essential to fruitful debate over whether we need criminal law and, if so, how to make it the best it can be.[50]

[47] Thanks to Victor Tadros for suggesting the example.

[48] *See generally, e.g.*, Maite Ezcurdia, *The Concept-Conception Distinction*, 9 Phil. Issues 187 (1998). *Cf.* Chiao, *supra* note 41 (describing "two conceptions of criminal law").

[49] In my subjective opinion.

[50] Again, there is a question as to whether we need a "concept" of criminal law or should just proceed on a direct-reference theory of meaning, as Michael Moore does. *See supra* note 12.

3 The Concept of Criminal Law as a Foundation for Theory

Recognizing criminal law as a mechanism of collective condemnation promotes clarity in theoretical debate, because the concept logically entails certain constraints on criminalization and punishment. They include four central features of Duff's criminalization framework. First, given that the criminal law condemns, things designated as crimes must warrant condemnation.[51] Criminal laws must thus adhere to some kind of wrongfulness constraint, or "negative legal moralism": "*[I]f* we are to maintain such a system, it should criminalize only censurably wrongful conduct."[52] Second, things designated crimes must warrant condemnation by the collective. This requires some notion of a "public wrong." The relevant collective is the community in whose name the law speaks, and to whom it speaks—"the polity whose law it is".[53] Third, the censure actually inflicted in an individual case must be warranted; this entails a retributivist limit on punishment.[54] And fourth, criminal law, by its nature, is a communicative and declaratory enterprise that helps to constitute a polity's civil order, as well as relationships between members of the polity and between individuals and the collective.[55]

To recognize these four corollaries does not foreclose debate about their content. It does not begin to resolve what a coherent negative legal moralism or negative retributivism entails, what we should understand to constitute a "public wrong," or the precise contours of the criminal law's communicative and constitutive functions. But it does establish a clear conceptual infrastructure to frame those debates.

The collective-condemnation concept of criminal law leaves other deep questions open.

It leaves open, for instance, the question of whether punishment is necessary to the condemnatory mechanism. As Duff suggests, the answer might depend on how we define "punishment."[56] If a public judgment of guilt is itself punishment, then punishment is indeed necessary to criminal law. If not, it is unclear whether punishment is necessary. Duff presents a compelling case that it is the collective judgment of responsibility rather than the sanction imposed that represents the core mechanism of the criminal law.[57]

[51] I assert this in simple terms although it is surely not so simple. "Must" could refer to either a practical or normative requirement. As a practical matter, a system of collective condemnation primarily directed at blameless acts would face resistance. As a normative matter, a system that primarily condemned blameless acts would be incoherent and dishonest. I am assuming that "coherence" and "honesty" are normative criteria for any system of law.

[52] Duff, *supra* note 10, at 21.

[53] *Id*. at 117.

[54] Or at least on the "censure" element of punishment, if its constitutive elements of "censure" and "sanction" can be severed. *See* Yaffe, *supra* note 36, at 32.

[55] As well as *The Realm*, *see generally* R.A. Duff, Punishment, Communication, and Community (2001).

[56] Duff, *supra* note 10, at 223–225.

[57] *Accord, e.g.* Dressler, *supra* note 34, at 2 ("'The essence of punishment… lies in the criminal conviction itself,' rather than in the specific hardship imposed as a result of the conviction."); *see also* Lindsay Farmer, *Making the Modern Criminal Law: A Response*, 10 Jurisprudence 110, 113 (2019) ("The argument for seeing the aims of criminal law and punishment as distinct should primarily be understood as a conceptual distinction aimed at opening up space for broader reflection on the aims of the criminal law.").

The collective-condemnation concept of criminal law also leaves open the question of what the criminal law is *for*. It establishes that criminal law is a distinctive kind of mechanism. But such a mechanism might be put to many uses.

By way of analogy, consider a hammer. A hammer is "a hand tool consisting of a solid head set crosswise on a handle and used for pounding."[58] Its distinctive mode of operation is to pound. The purpose of a hammer, though, can be stated more broadly. Hammers are used to drive nails into wood, build houses, break things apart, and shape metal. A single hammer can have many purposes. The purpose of any particular hammer depends on its context and the intentions of the person who wields it.

The criminal law's mechanism of collective condemnation might likewise be directed toward any number of goals. The central purpose of criminal law could be to help to constitute and sustain a polity's civil order, as Duff sometimes suggests.[59] Or it could be, as Michael Moore contends, to "attain retributive justice."[60] It could be harm prevention—or "securing civil order"[61]—via deterrence,[62] the inculcation of pro-social norms or attitudes,[63] incapacitation, treatment or training of the crime-prone, or some combination. As Duff notes, furthermore, there seems little reason to assume that the criminal law must be limited to a single purpose.[64] It could have multiple purposes.[65] Different areas of criminal law might even have different objectives.[66] The aims of the criminal law might remain in perpetual flux. They might depend on the nature and the aims of the polity whose law it is.[67]

This is not to say that the collective-condemnation concept of criminal law imposes *no* constraint on its purposes. The criminal law's distinctive mode of operation—censuring in the name of the polity—must be at least a part of its purpose.[68] Arguably, this is the criminal law's "intrinsic" purpose (or function) whereas the further goals we might use the censuring mechanism to pursue are "instrumental" purposes (or functions).[69] Relatedly, the fact that censure and punishment must be limited by desert means that the criminal law is not always an effective means of

[58] Merriam-Webster's Collegiate Dictionary 563 (11th ed. 2005).

[59] *E.g.* Duff, *supra* note 10, at 230.

[60] Moore, *supra* note 19, at 32.

[61] Farmer, *supra* note 57, at 111.

[62] *See, e.g.*, Hart, *supra* note 35.

[63] *See, e.g.*, Alexander & Ferzan, *supra* note 36, at 18; Chiao, *supra* note 16, at 138 ("The criminal law supports the possibility of the rule of law—a collective life under stable public institutions—by providing crucial support to shared attitudes of reciprocity.").

[64] Duff, *supra* note 10, at 265; *accord* Chiao, *supra* note 16, at 138 ("In condemning wrongs and vindicating rights, the criminal law arguably fulfills a wide variety of functions.").

[65] *Accord* Duff, *supra* note 10, at 202–203 (canvassing other scholars' arguments about the "primary purpose" of criminal law and offering his own).

[66] *See* Farmer, *supra* note 57, at 112.

[67] Duff, *supra* note 10, at 152 (recognizing this).

[68] Thanks to Alec Walen for pushing this point.

[69] This is Michael Moore's suggested vocabulary from the symposium.

pursuing goals like harm prevention.[70] The tension between its distinctive mode of moral censure and utilitarian goals like harm prevention leads some theorists to conclude that the criminal law cannot coherently pursue both retributive and utilitarian objectives.[71] Others think that, tension notwithstanding, multiple purposes are possible.[72] The relevant point here is that the collective-condemnation concept of criminal law does not resolve the debate.

Nor does the collective-condemnation concept of criminal law resolve when punishment is justified, beyond the constraint of negative desert. It does not determine whether (or when) desert is a sufficient condition for punishment as well as a necessary one. It does not determine the content of desert or of deserved punishment. It neither affirms nor precludes a "duty view of punishment."[73] And it does not resolve the relevance of utilitarian concerns to the determination of what punishment is just. Lastly, to say that criminal law is a mechanism of collective condemnation does not resolve precisely what procedures it must, or should, entail.

I see no reason to believe that there should be unitary answers to the questions of what criminal law (or punishment) is for, what justifies punishment (or criminal laws), or what procedures are sufficient or optimal to operate a system of criminal law. It seems both possible and necessary for criminal-law theorists to recognize that what makes criminal law unique is the fact that it operates as a mechanism of collective condemnation, and thus to adopt a shared concept of criminal law. By contrast, perhaps it is neither necessary nor possible to reach consensus on the questions that this concept of criminal law leaves open.[74]

4 The Concept of Criminal Law as a Foundation for Reform

Recognizing criminal law as a mechanism of collective condemnation also helps to refine the question of whether we want a criminal law at all. The question becomes: Do we want a mechanism of collective condemnation? If so, what role should it play in a diverse and fractured republic like the contemporary United States?

There are reasons to doubt the value of collective condemnation. For purposes of analytical clarity, let us set out the stance of a hypothetical abolitionist who would reject criminal law altogether. The abolitionist notes that, from a utilitarian

[70] *See, e.g.*, Darin Clearwater, *'If the Cloak Doesn't Fit, You Must Acquit': Retributivist Models of Preventive Detention and the Problem of Coextensiveness*, 11 Crim. L. & Phil. 49 (2017); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. 301, 317–333 (2015); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429, 1444 (2001).

[71] *See, e.g.*, Moore, *supra* note 19, at 83–187.

[72] *See, e.g.*, Duff, *supra* note 10, at 265; Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 San Diego L. Rev. 1173 (2011).

[73] *See generally* Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law (2011).

[74] In terminology invoked by Antony Duff and Stuart Green, perhaps criminal law theory should be both "simple" and "neat" with respect to the question of what makes criminal law a distinctive kind of law, but both "complex" and "messy" with respect to questions about its purpose(s), justification(s), and procedures. Duff & Green, *Introduction*, in *supra* note 43, at 8–10.

perspective, there is no reason to believe that a collective-condemnation mechanism is an especially effective means of preventing harm, relative to alternatives. Given its costs, she argues, we should simply excise it from the state's arsenal of crime-control measures. We can focus instead on more cost-effective strategies to remedy the conditions that give rise to harmful behavior in the first place, and on practices of therapeutic and restorative justice that ameliorate harm when it happens.[75] If the state must resort to some kind of coercion to prevent harmful acts, it should at least forego moral judgment.[76]

The abolitionist might cite several grounds for preferring non-judgmental coercion. One is the metaphysical view that rejects moral responsibility entirely.[77] A second is the more pragmatic notion that, whatever its value in theory, a mechanism of collective condemnation will inflict too much injustice in practice. One variant of this argument might be that in the contemporary United States, we lack the kind of collective that can sustain a functional criminal law; any effort to operate a criminal legal system will merely impose the will of the powerful on the powerless.[78] Another variant might be that, in a society marked by structural inequality, criminal law enforcement will tend to disproportionately burden already-marginalized groups.[79] That burden has a pernicious character. High rates of prosecution and conviction not only inflict tangible harm, disrupting lives and splintering families. Because convictions express condemnation, a disparate conviction rate among a marginalized group also conveys condemnation of the group as a whole. Mass conviction means mass condemnation.[80] Worst of all, because each conviction is theoretically deserved, the aggregate condemnation can appear deserved as well. Of course it is not. The notion

[75] *Cf.* Chiao, *supra* note 16, at 160 (raising the question of whether we need coercive institutions); McLeod, *supra* note 9 (urging a shift toward restorative and therapeutic practices as a response to harm).

[76] Chiao, *supra* note 16, at 145–147, 159–161 (questioning "whether we should continue to prefer a guilt-conditioned scheme of coercive rule-enforcement to less destructive means of promoting pro-social cooperative attitudes").

[77] Determinism poses a deep challenge to any form of moral judgment. If we are fully determined creatures, choice is an illusion and both praise and blame are groundless. The metaphysical objection finds support in each new field of inquiry to take the baton in the progress of human knowledge, most recently neuroscience and statistics. *See, e.g.*, Stephen J. Morse, *Brain Overclaim Redux,* 31 Law & Ineq. 509 (2013). The merits of this view are beyond the scope of this Essay.

[78] Our history of racial oppression and wealth inequality has produced a situation in which many of the communities most affected by crime and criminal law enforcement—poor communities of color—feel little connection to the institutional apparatus of the criminal law. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2072 (2017) ("Most discussions of African American distrust of the police only skirt the edges of a deeper well of estrangement between poor communities of color and the law—and, in turn, society."). *But see* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 Colum. L. Rev. 249 (2019) (exploring means to promote "an inclusive system of criminal adjudication responsive to the multidimensional demands of the popular will," including historically excluded groups).

[79] That might be because crime is partly a function of disadvantage, because law enforcement tends to target the powerless regardless of crime rates, or both. *See, e.g.*, Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218, 2251–2259 (2019).

[80] In the aggregate, the disparate impact of our current system has functionally produced official condemnation of poor communities of color. *See generally* Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2010).

that historically marginalized communities deserve the fruits of their exclusion is, to put it mildly, perverse. The hypothetical abolitionist might argue that the injustice of this disparate condemnation outweighs any benefit the criminal law could provide.

Yet there are also reasons to cherish and protect the criminal law. *The Realm* lays some of them out, for Duff sees a mechanism of collective condemnation as vital to a liberal republic. Duff does not stake his claim on utilitarian grounds. Perhaps alternative approaches to crime control *are* more effective at that task! Duff's view, rather, is that criminal law is indispensable because it is uniquely capable of constituting a polity as a community of moral agents.[81]

The first prong in the Duffian case is that the criminal law plays a unique role in constituting the civil order by virtue of the particular acts that it condemns. The process of criminalization is recursive. The polity's civil order shapes its decisions about what to criminalize; its criminal code, in turn, helps to shape its civil order.[82] This kind of recursivity is inherent to all democratic law-making. But the moral valence of a criminal code makes it a more immediate reflection of—and input to—the moral life of the polity than, say, the polity's highway regulations. Only a criminal code can set out a polity's consensus that certain acts are so destructive of the social fabric that they warrant condemnation in the polity's name. The particular acts a polity chooses to condemn are both reflection and source of its moral identity.[83]

Second, the criminal law has a unique capacity to help constitute and sustain a civil order by virtue of its very existence, which expresses certain commitments on the polity's part. It expresses a commitment to treating members of the polity as responsible agents.[84] Only a body of law that recognizes and reacts to moral choices as such can affirm individual moral agency.[85] Other mechanisms of harm prevention are indifferent to the moral quality of harmful wrongdoing. They treat human beings who inflict harm as so many destructive bacteria.[86] Relatedly, the criminal law expresses a polity's commitment to enabling a relationship of moral accountability between individuals and the polity as a whole.[87] As Duff has long argued, criminal law is relational.[88] It affirms the polity's concern for both the victim of a

[81] As noted above, this stance has much in common with Durkheim and, more recently, Joshua Kleinfeld. *See* Durkheim, *supra* note 33; Kleinfeld, *supra* note 36.

[82] Duff, *supra* note 10, at 144, 203, 332.

[83] *Accord* Durkheim, *supra* note 33.

[84] Duff, *supra* note 10, at 201–211.

[85] Herbert Morris, *Persons and Punishment*, 52 The Monist 475 (1968); *cf.* Marcus Kirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 Law & Hist. Rev. 113 (1998).

[86] *See, e.g.*, Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1589 (1994) (noting that "the criminal law might treat persons as part of the biophysical flotsam and jetsam of the universe and respond solely on the basis of the type and degree of dangerousness people threaten, without regard to moral responsibility"); Mayson, *supra* note 70, at 322–323 (exploring the distinction between law that affirms individual agency and predictive restraint that is "indifferent to agency altogether").

[87] Duff, *supra* note 13, at 211, 213, 215, 274.

[88] *E.g. id.* at 39 ("[I]f we are to make normative sense of a system of criminal punishment, we must understand it in more fully relational terms….").

public wrong and for the wrongdoer as constituents of the political community. It partly *constitutes* the relationship between individuals and the polity. The criminal law has these capacities in virtue of the kind of thing it is—a mechanism of collective condemnation—regardless of what we understand to be its ultimate purpose(s).

Alternative methods of coercion pose their own dangers. Even the abolitionist should admit that the state will sometimes have to resort to coercion to prevent the most harmful acts. It would indeed be preferable if we could eliminate harm solely by attending to the underlying causes of harmful behavior. But short of human perfection, there will be murders and rapes and assaults and thefts. Improved social welfare will not cure us of violence and deceit. The options for coercive prevention are a "guilt-conditioned scheme" or one not conditioned by guilt.[89] The latter—a system that aspired to prevent and redress harm without condemning any act as wrongful—would be regulatory rather than punitive. It would not condemn. It would not punish. And it would operate without the constraint of desert.

The replacement of criminal law by a regulatory prevention regime is a terrifying prospect. As C.S. Lewis once observed: "[W]hen we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a 'case.'"[90] Experts decide when the disease is cured, when the threat is disabled. Even in the best of circumstances, such regimes veer toward tyranny.[91] This is why H.L.A. Hart describes the deterrent, desert-restricted scheme of criminal law as the "method of social control which maximizes individual freedom within the coercive framework of law".[92]

So these are the parameters of the debate. On the one hand, a formal mechanism of collective condemnation can inflict untold harm on marginalized groups in the service of existing power structures, as history proves. So long as the system mostly condemns acts that are in part a function of social marginalization, as street crime is, it will disparately condemn already-disadvantaged groups. On the other hand, the criminal law is uniquely capable of expressing the moral commitments of the polity, and of affirming the agency of its subjects and their shared membership in a moral and political community. It is arguable that this function is critical to a liberal republic. A regulatory regime of coercive prevention would have an equally disparate impact on marginalized groups but would manage bodies without regard for desert.

My own view is that forsaking a mechanism of collective condemnation is not the answer to the injustice wrought by our criminal legal system. Should we not

[89] Chiao, *supra* note 76.

[90] C.S. Lewis, *The Humanitarian Theory of Punishment*, Res Judicatae 225 (1954) (originally printed in 20th Century: An Australian Quarterly Review (1949)).

[91] *Id.* at 228–229; *cf.* Toyosaburo Korematsu v. United States, 323 U.S. 214 (1944), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding preventive Japanese internment against constitutional challenge).

[92] Hart, *supra* note 35, at 23.

condemn acts of exploitation and violence, officially and collectively?[93] Clarifying the concept of criminal law, furthermore, highlights the fact that many facets of the current system that motivate reform are not features of the criminal law *per se*. They are perversions of it. Our statutes are rife with "crimes" that cannot plausibly be described as consensus public wrongs.[94] Criminal process is divorced from the polity; criminal law institutions do not speak in the polity's name.[95] Rather than affirm the shared membership of people who commit crimes in the moral and political community that censures them, the criminal process operates to exclude them.[96] The answer to these problems is to repair our system for proscribing and condemning socially destructive acts, not to jettison the system altogether.

5 Looking Ahead: Whither Criminal Law Theory?

My hope is that criminal law theorists and criminal law reformers will join forces to envision a better future for criminal law and strive to bring that future into being. That will require reformers to grapple more deeply with theoretical questions about the nature, capacities, and value of criminal law; and it will require theorists to engage directly with the realities that motivate reform.[97] We need both reformers and theorists in order to figure out what role a mechanism of collective condemnation *should* play in a liberal republic. That question is inseparable from the question of how the state should provide security. What part, if any, should the threat and execution of collective moral judgments play in that endeavor?[98] To the extent that a mechanism of collective condemnation has value that is independent of its preventive effects—by enabling retributive justice, promoting social solidarity, or constituting a polity as a community of moral agents—how great is that value relative to

[93] *Cf.* Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends* Buff. L.Rev. (forthcoming), https://ssrn.com/abstract=3404276 (commenting on views of self-identified progressives who advocate for and against punitivism selectively).

[94] *See generally* Douglas Husak, Overcriminalization: The Limits of the Criminal Law (2008).

[95] *See generally* Stephanos Bibas, The Machinery of Criminal Justice (2012); Simonson, *supra* note 78.

[96] *See, e.g.*, James B. Jacobs, The Eternal Criminal Record (2015); Mayson, *supra* note 70.

[97] *Cf.* Robert Weisberg, *Barrock Lecture: Reality-Challenged Philosophies of Punishment*, 95 Marq. L. Rev. 1203, 1208 (2012) (arguing "that both deontological and utilitarian philosophies of punishment will founder in irrelevance unless they accept some intellectual responsibility for engaging the stubborn facts of a system of imprisonment they often justify or enable").

[98] Outside the rarefied air of criminal law theory conferences, it is often assumed that (1) criminal law must be our primary method of crime control and (2) crime control is the primary purpose of criminal law. Both assumptions are dubious, to say the least. For an argument that grassroots police-reform movements have helped to raise first-order questions about how the state should provide security, see Jocelyn Simonson, *Police Reform Through a Power Lens* (work in progress; manuscript on file with author). Assuming that criminal law will continue to play some role in the state's crime control efforts, there are of course further questions about how criminal law institutions can most effectively promote public safety. *See generally* Rachel Elise Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration (2019) (urging more reliance on expert institutions to develop rational, evidence-based crime control policy).

other goods that the state might use its limited resources to pursue? And how must the criminal law change to realize its distinctive value?[99]

There is a school of abolitionist thought that acknowledges the value of an idealized criminal law but denies that it is possible, in practice, to transform the system we have into the system we want. This too is a question worthy of theorists' attention: Is there a viable path for transformation? To answer that question, we need to know what conditions are necessary and sufficient to make the condemnatory mechanism of criminal law meaningfully "collective". In Duff's terms, we need to identify the criteria for a moral and political community, and for the criminal law to speak in the polity's name.[100] We might also consider how to weigh the value of moral accountability on an individual scale against the harm of undeserved group condemnation.[101] And we might think more carefully about what normative criteria govern criminalization and punishment in the aggregate. Can we have a criminal law that does not direct its censure and coercion primarily against disadvantaged groups—if, for instance, we shift criminalization and enforcement away from quality-of-life crimes and toward securities fraud? What are the criteria for the shape of the criminal law as a whole, beyond those for individual offenses?[102] Given the recursivity of the criminal law, perhaps we have a duty to make criminalization decisions in order to *re*-constitute the civil order in ways that redress past racial harm and create a more just social order, whether through criminalization "on the books" or criminalization "in action".[103] Perhaps there is a world in which the criminal law can help to remedy the structural inequality that it has played so central a part in creating.

[99] Duff offers one compelling vision. For another vision of criminal process that maintains an emphasis on collective moral judgment within a framework of accountability and healing, *see generally* Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair (2019); *see also* Donald Braman, *Punishment and Accountability: Understanding and Reforming Sanctions in America*, 53 UCLA L.Rev. 1143 (2006) (investigating a "popular preference for 'accountability-reinforcing sanctions'" and exploring the role of accountability in punishment).

[100] Duff himself, of course, has given this question considerable attention. In addition to *The Realm, see generally* Duff, *supra* note 55; *see also* Simonson, *supra* note 78.

[101] This conflict is one manifestation of the metaphysical tension at the heart of criminal law. We believe in individual agency but also recognize that human action is highly determined. Convictions reflect blame for crimes committed; yet disparate conviction rates among disadvantaged groups demonstrate that convictions flow, in significant part, from undeserved circumstances. *Cf.* Weisberg, *supra* note 98, at 1240 ("Is it possible to defend an ethos of individual responsibility when it is instantiated in a practice that has led to the mass production of ruined lives?"); Jeffrie G. Murphy, *Marxism and Retribution*, *in* Punishment: A Philosophy and Public Affairs Reader 3 (A. John Simmons et al. eds., 1995).

[102] Some theorists have started down this path. *See* Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, 11 Crim. L. & Phil. 431, 450 (2017) (arguing for the necessity of "[a] normative theory of criminal justice that takes seriously the aggregate costs and benefits of those institutions, as well as how those costs and benefits are distributed across a population."); *see also* Chiao, *supra* note 16, at 154; Hamish Stewart, *The Wrong of Mass Punishment*, 12 Crim. L. & Phil. 45, 46 (2018) (arguing that "a policy of relentless prosecution and punishment is unjust in a free society" and characterizing this as "a retributive argument against mass punishment").

[103] Duff, *supra* note 13, at 40–50.

6 Conclusion

To a novice professor and scholar of the criminal law, it is bewildering that there exists no consensus—or at least no consensus as to whether there is a consensus—about what renders the criminal law unique. Among the many contributions of *The Realm of Criminal Law* is this: It offers a clear concept of criminal law. It asserts, albeit with ambivalence, that what makes the criminal law a unique kind of law is the fact that it operates as a mechanism of collective condemnation.

Can we agree that Duff is right about this? Recognizing the uniquely condemnatory character of criminal law allows for cleaner theory. We can acknowledge logical corollaries of the concept of criminal law, including some form of negative legal moralism, some notion of a public wrong, a retributive limit on punishment, and the fact that criminal law is relational. Maybe we can accept pluralism with respect to the potential aims and justifications of criminal laws and sanctions. Most importantly, we can better confront the question of whether criminal law is necessary or valuable, and how we might strive for the most just criminal law possible in an unjust world.

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