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Criminal Law Between Public and Private Law

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To criminalize something (not someone, ordinarily) means to bring it within the scope of criminal law; in this sense, crime is a legal phenomenon, as is punishment. This means that an account of criminalization needs an account not of crime *simpliciter*, but of law in general, and of criminal law within it. In this paper, I approach this task equipped with two distinctions, one—between law and police—designed to illuminate the concept of law, and the other—between public and private law—meant to clarify that of criminal law.

Law is here understood as a mode of state governance that is usefully contrasted with police.[1] There are two ways to think about the state: as a normative concept or as a prudential one. As a normative concept, the state is the manifestation of the idea of right (*Recht*) in the political realm. It is that collection of individuals, institutions, animate and inanimate objects, practices, and so on that brings to life the idea, or if you like the ideal or promise, that all persons can be legitimately governed only as persons, which means they are fundamentally equal (as persons) and free (as persons). It would be nice if they were also brothers and sisters, but I do not think the idea of *fraternité* is essential to that of the state in quite the same way as are those of *liberté* and *égalité*, which might explain why the French Revolutionaries denied it the pride of first, or second, place on their shortlist of demands. This idea of the state is closely connected to the idea of democracy (or political self-government) and, more generally, to the fundamental concept of the political and moral thought of the enlightenment: autonomy (or self-government unmodified).

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[1] See generally MD Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

As a prudential concept, the state is the means by which the collectivity's welfare, well-being, commonweal(th), good, etc is advanced. Here the state does not differ qualitatively from any number of other collectivities, or groups, that are bound together, voluntarily or less so, by a common destiny or at least are treated, or treat themselves, as a unit of communal welfare, with each member's individual welfare being more or less closely related to the welfare of the entity as a whole. From this perspective, the state appears as a household governed by what we used to call 'police' and what we now call 'political economy', defined by Rousseau as the government of the state as a giant (or, in the case of Geneva, not so giant) household.

The normative state, in contrast, is qualitatively different: it is unique in its essential connection to the concept of right, or justice. Other institutions, even individuals, can affect, minimize, maximize others' or their own welfare, but only the normative state manifests the idea of right. There is a connection between this feature of the normative state and what is often misleadingly called the state's monopoly on violence—misleading because it gives the false impression both that the use of state violence is a matter of (improper, or at least suspicious, if not simply inefficient) market domination with the attendant power over consumers (here is the only connection between monopoly and state violence—power), and that this monopoly is somehow accidental, in the sense of non-essential, so that it could (at least theoretically) be broken up (distributing market power among other institutions or individuals) or transferred as a whole (onto another monopolist). The state's monopoly of violence, I think, is the state's exclusivity of (or exclusive right of) violence because 'violence' is only legitimate if it is used to manifest right, and the normative state is the manifestation of right. Only the state can do right, in other words, and therefore only the state is entitled to use violence to do right (or to undo wrong).

Corresponding to these normative and prudential concepts of the state—or perhaps these are two aspects of the same concept: I do not think this makes much difference—are two modes of governance: *law* (formal *Recht*) being the mode of governing the normative state, and *police* (or political economy, if you prefer) being that of governing the prudential state. Using more contemporary terminology, one might substitute 'regulation' or even 'administration' for police and get pretty much the same picture.[2] Either way, in one mode the state manifests (or should manifest) right (substantive *Recht*), in the other it pursues (or should pursue) welfare.

[2] See eg N Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in C Parker *et al* (eds), *Regulating Law* (Oxford: Oxford University Press, 2004) 144; MD Dubber, 'Regulatory and Legal Aspects of Penality' in A Sarat and M Umphfrey (eds), *Law as Punishment/Law as Regulation* (forthcoming).

Public law and private law are two species of law, rather than of police.[3] Initially, it is not obvious why one would need to give an account of the distinction between public law and private law; the concept of law as the mode of state governance *vis-à-vis* persons does not appear to call for it, and might in fact be hostile to it, depending on how it is fleshed out. Still, it is a distinction that is invoked and, more interestingly, attacked often enough to deserve our attention as we try to shed some light on criminal law's place within the realm of law. Its critics (most audibly among CLS historians and feminist scholars) may well be right that the distinction could be, and has been, abused for political/oppressive ends, something that arguably does not set it apart from other distinctions in legal rhetoric; whether it has theoretical purchase for our project is a separate question.

The concept 'civil law' is often used interchangeably with that of 'private law'. (Not helpfully, but relevantly, it is also often contrasted with that of 'criminal law'.) There are some good reasons for *not* treating the two terms as synonymous. For one, they have not always been treated that way. Justinian's Digest, often cited as the first recognition of the distinction between public and private law, distinguishes public law (*ius publicum*) from private law (*ius privatum*), but then proceeds to divide private law into natural law, *ius gentium*, and civil law.[4] Interestingly, the Digest (or at least Ulpian) appears to think of civil law as characteristically private in one sense: civil law is local law, Roman law, 'a law of our own', that is distinct from, though 'not altogether independent of natural law or *ius gentium*'. Here civil law is formally distinguished from the other types of private law by its scope, and I suppose its origin, rather than in any substantive sense.

For two, using civil law and private law as synonyms and, at the same time, as antonyms of criminal law, classifies criminal law as a species of public law, rather than of private law. This would make quick definitional, but uninteresting, work of our task of regarding criminal law from the perspectives of public and private law.

I The Public/Private Distinction in Roman Law

If we stick with Ulpian for another moment, he distinguishes public law, which concerns 'the government of the Roman empire' (*ad statum rei Romanae*)

[3] There is an analogous distinction in the realm of police: that between the macro-household (or political household, state) and the micro-household (or domestic, familial household). See J-J Rousseau, JR Masters (trans), 'Discourse on Political Economy' in *On the Social Contract, with Geneva Manuscript and Political Economy* (New York: St Martin's Press, 1978) 209, 209.

[4] Dig 1.1.1.2 (Ulpian); Inst 1.1.1.4.

from private law, which concerns 'the welfare of individuals' (*ad singulorum utilitatem*). Remarkably, this way of framing the distinction has remained essentially unchanged since then (if, for the Roman Empire we substitute the macro-household *du jour*, most recently the abstract 'state'). As remarkably, and perhaps not unrelatedly, this way of framing the distinction is not particularly illuminating, since it tells us nothing about what 'the government of the Roman Empire' (or of the state) might encompass and how it might differ from, and not involve, 'the welfare of individuals'.

The text does go on to say that public law is 'concerned with sacred rites, with priests, with public officers', which suggests a rather limited view of public law as a form of internal management (one might say, of matters concerning the micro-household), with the possible exception of the regulation of sacred rites, which one might view as being concerned with the interaction between members of the state's micro-household (state officials, 'bureaucrats') and other, less privileged, members of the macro-household, who might form the audience for, and consumers of, sacred rites, at least insofar as they are performed—or reported—in public. The definition of public law, then, like that of civil (private) law as Roman local law, is framed formally in terms of its addressees, or objects, rather than in terms of the substance of the rules governing their behaviour, or the nature of their interactions amongst each other, or with others, including the state itself.

In this light, Roman public law appears as the direct continuation and expansion of the original model of Roman governance, of the household by the householder, of the *familia* by the *pater familias*. Public law in this sense might be subject to various guidelines of prudence, and certainly to divine supervision if not control, but it was not subject to publicized rules and principles to be formulated, critiqued, revised, and interpreted in 'legal opinions' by jurists.

If we consider the distinction between law and police, Roman public law is better thought of as a species of police than of law. Put another way, Roman law is private law. Public law is not law properly speaking, but police, and as such subject to the sort of prudential considerations explored in Marcus Aurelius's *Meditations*, and later on in Machiavelli's *The Prince*.

The police, or shall we say domestic, character of public law reflects what is often speculated to be the origin of Roman state power in general, the power of the *pater familias* over his *familia*, which included human and non-human resources, and (among humans) spouse, children, servants, and slaves, and extended to the power over life and death within whatever limits custom and religion might impose. As the story goes, this familial governance was subjected to general rules with the growth of a Roman state, the accumulation and publication of the Twelve Tables marking an important early step in this

process (despite, and through, their codification of the father's *vitae necisque potestas*, the power of life and death). The familial mode of governance, however, never disappeared entirely, either in the micro-*familia* or in the new and ever growing macro-*familia* of the Roman state, which eventually was governed by the emperor as a *pater familias* would govern his *familia* (under the non-publicized prudential norms labelled 'public law'). Indeed, the emperor was seen as governing the entire state, and not merely his officials, as a *familia*, a development symbolized early on in Augustus's assumption of the title *pater patriae*.[5]

It is often said that the Romans (or rather Roman jurists) did not pay much attention to the distinction between public law and private law, showed little interest in public law, and—being the 'pragmatic and casuistic' lot they are said to have been—kept adjusting the distinction between public and private law to suit their needs from case to case, and certainly from emperor to emperor. This may or may not have been the case, at one point or another in Roman history; we will never know. The distinction between public and private law, at any rate, is widely, if not universally, considered to be of Roman origin and the gist of the distinction, in all its vagueness, continues to resonate today. It therefore is not exclusively of historical interest to note that Roman law in practice (and in theory, though Roman jurists also apparently paid little attention to criminal law) at one point classified much behaviour that today falls under the heading of criminal law as private law, with the exception—as is often noted somewhat cryptically—of 'very serious' offences, which appear to have encompassed offences against the state itself, most notably treason and its various relations. Robbery, assault, theft, and other property offences were considered, to use the *Institutes*' distinction, as matters regarding 'the welfare of individuals' rather than the 'government of the Roman state'.[6]

Although the Roman classificatory system has proved difficult to reconstruct (because it was not laid out clearly, where laid out clearly was not implemented

[5] See eg OF Robinson, *Criminal Law of Ancient Rome* (London: Duckworth, 1995) 9; see also RA Bauman, *The* Crimen Maiestatis *in the Roman Republic and Augustan Principate* (Johannesburg: Witwatersrand University Press, 1967) 238. The significance of this title is contested: see eg SI Oost, 'Review of Bauman' (1969) 64 *Classical Philology* 205, 206 fn 1 (citing Mommsen, and cautioning that '[o]ne should not be misled by the language of poetry or flattery,' which is true enough).

[6] For an interesting selection of cases and other resources on delictual liability, see BW Frier, *A Casebook on the Roman Law of Delict* (Atlanta, Ga: Scholars Press, 1989). Proceeding from a (narrow) definition of delict as a 'private wrong', ibid xiii (or, more precisely, as 'a misdeed that is prosecuted through a private lawsuit brought by the offended individual and punished by a money penalty that the defendant must pay to the plaintiff', ibid 1), Frier's collection includes cases of assault, murder, arson, robbery, adultery, and destruction of property.

and followed consistently, and, at any rate, evolved over time), historians appear to have settled generally on a distinction between private delicts (*delicta privata*) and public delicts (*delicta publica*), each triggering a different process and subject to different remedies or sanctions—compensation in the former case, and punishment in the latter, including fines, banishment, civil death, and death. This 'old Roman distinction', too, can claim contemporary significance, as 'revived' in Blackstone's still much-cited distinction between private and public wrongs.[7]

There may be something to the recognition of the delict as a general concept subject to further differentiation, though not necessarily along the public–private line.[8] We will return to this point a little later. For now, suffice it to say that German law (still?) distinguishes somewhat lazily between criminal delict (*Kriminaldelikt* or *Strafdelikt*) and civil delict (*Zivildelikt*). (*Zivildelikt* is often translated as tort, and *Deliktsrecht* as tort law.) Delict in general is unlawful culpable behavior, with the civil delict being compensable and the criminal delict being punishable. Very little effort, however, is expended to distinguish between civil and criminal delicts other than by the nature of the applicable remedy or sanction.

While it is difficult to reconstruct the distinction between *delicta publica* and *privata* (if not impossible, futile, since 'the' distinction may never have been drawn *ex ante* or in general, as opposed to in a particular case, and where it is not even clear who drew the distinction and when) it is worth noting that Mommsen, whose monumental study of Roman criminal law remains the standard treatment of the subject today, over a century after its publication, located the origin of Roman criminal law in the *patria potestas*, that is the practically (if not religiously) limitless disciplinary power of the *pater familias* over his household.[9] If we eliminate *delicta privata* from the realm of Roman criminal law as public law, and even in a slight sleight of hand call the remainder public criminal law or Roman criminal law properly speaking, then Roman criminal law concerns itself with acts that affect the government, or perhaps slightly more broadly, the operation and administration of the Roman state. If that state in turn is based on the macro-household model itself (as suggested above), then (public) Roman criminal law properly speaking concerns itself with offences against the state and, most notably, against the head of the state and the officials charged with executing his sovereign commands. In this view

[7] H Mannheim, *Comparative Criminology* (London: Routledge, 1965) 27.

[8] Cf T Mommsen, *Römisches Strafrecht* (Leipzig: Duncker and Humblot, 1899) 10–11 (distinguishing the older term *delictum* from *crimen*, which came to be used primarily, though not exclusively, to refer to private delicts).

[9] Ibid 16–17; see especially 16 ('The householder's limitless power over household members is essentially identical to the state's power over community members').

of (public) Roman criminal law, the most serious offence is an offence against the emperor as macro-householder (*laesae majestatis*), the macro-version of the traditional micro-offence against the *pater familias* at home.[10]

These familial offences of denial of respect and insubordination traditionally elicited the most brutal punishments, with punishments for parricide often involving sewing perpetrators in a sack, accompanied by a dog and perhaps other animals, including an ape, and then dumping them into the sea or, if that proved impracticable, exposing them to wild beasts or, later on, burning them.[11] Despite the colourful punishments for parricide, which bear an interesting resemblance to the punishment for petit (and high) treason and regicide in English (and American colonial) and French law,[12] it is somewhat misleading to focus on the punishment for the elimination of the *pater familias*, since, by definition, their execution requires the existence of a punitive power beyond the *pater familias* himself.[13] More significant is the regular exercise of the father's disciplinary power over family members *before* the catastrophic event of his death. It is this punitive power that Mommsen posited as the origin of Roman criminal law; crimes, in this view, are offences against patriarchal sovereignty and their punishment a discretionary reassertion of that sovereignty designed to affirm the (quasi-)householder's superior power *vis-à-vis* the offender. (Gustav Radbruch later on generalized the point and traced criminal law in general back to patriarchal discipline over members

[10] There is apparently some dispute about the nature of the *majestas* at issue (*populi Romani* or *dignitas*), at least in the Republic and early Empire, and relatedly about the precise timing of the transition to a macro-state household. See eg Bauman (n 5 above) (arguing that, as late as Augustus, the relevant *majestas* was that of the Roman people, ie fundamentally republic, rather than quasi-patriarchal). There is little doubt that this development was well on its way out by the time of the *Institutes*, however, after some five centuries of imperial rule.

[11] Cicero makes much of the brutality, or rather the indignity, of the punishment for parricide in his oration in the case of Sextus Roscius: Cicero, 'The Defence of Sextus Roscius' in *Murder Trials* (Harmondsworth: Penguin, 1975) 27.

[12] See eg W Blackstone, *Commentaries on the Laws of England* vol 4 (Oxford: Clarendon Press, 1769) 75 (petit and high treason, which Blackstone treats as 'equivalent to the *crimen laesae majestatis* of the Romans'), 92 (high treason), 203–4 (petit treason); M Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1979) 3 (punishment of Damiens for regicide); AP Scott, *Criminal Law in Colonial Virginia* (Chicago: University of Chicago Press, 1930); R Semmes, *Crime and Punishment in Early Maryland* (Baltimore: Johns Hopkins Press, 1938); see generally Dubber, *The Police Power* (n 1 above) 26–31. For a fascinating account of a petit treason case from late colonial Massachusetts, see AC Goodell, *The Trial and Execution for Petit Treason of Mark and Phillis, Slaves of Capt. John Codman, Who Murdered Their Master at Charlestown, Mass., in 1755; for Which the Man Was Hanged and Gibbeted, and the Woman Was Burned to Death* (1883) (online at <http://www.archive.org/details/trialexecutionfo00good> and <http://www.gutenberg.org/etext/26446>).

[13] G Long, 'Leges Corneliae' in W Smith, *A Dictionary of Greek and Roman Antiquities* (London: J Murray, 1875) 686–687 (online at <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Leges_Corneliae.html>).

of the household.)[14] This punitive power was discretionary in every sense—with respect to the fact, the quantity, and the quality of its exercise. It was an internal family matter, and in this sense could be classified, in Rome, as a species of public law, rather than of private law.

Roman (public) criminal law then appears, as all Roman public law, as a precursor of police regulations, eventually derived from norms of police science discovered by police scientists and taught at police academies to budding bureaucrats. Police science eventually was pushed out by administrative law, taught at faculties of law, rather than at police academies (which gave rise to a 'new' university, notably in eighteenth century Germany), a subject so closely associated with the notion of public law as today to have become virtually indistinguishable from it in many countries, notably those without a long tradition of positive constitutional law (for example, the UK). Administrative law, however, arose from the attempt to place public and formal constraints on the exercise of police power through police—that is, regulatory—agencies. While the line from the Roman view of public law, such as it was, to administrative law is direct, it is important to recall that Roman public law was not concerned with public control of administrative action, but rather with the internal norms governing that action itself, that is, not with limits on governmental power, but with its exercise.[15]

II Public Police and Criminal Administration

From the—anachronistic—retrospective of the later distinction between police and law, then, Roman public law appears more policial (police-like) than legal. The police origins of administrative law are intriguing: while the emphasis in administrative law tends to be placed on the law-like aspect of administrative law (administrative *law*), its police-like aspect is easily forgotten (*administrative* law). Administrative law spends surprisingly little time studying its subject matter, administration, and instead focuses almost exclusively on a tiny fraction of this subject, which is subject to formal legal review. This creates the impression of a state under the deep and wide control of 'the

[14] G Radbruch, 'Der Ursprung des Strafrechts aus dem Stande der Unfreien' in *Elegantiae Iuris Criminalis*, 2nd edn (Basel: Verlag fur Recht und Gesellschaft, 1950) 1.

[15] A similar distinction played a central role during the formative period of administrative law in the United States, when the study of police power (as exercise) morphed into the discipline of administrative law (as limit, constitutional or not). See O Kraines, *The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law* (Tuscaloosa, Ala: University of Alabama Press, 1974); Comment, 'Ernst Freund: Pioneer of Administrative Law' (1962) 29 *University of Chicago Law Review* 755.

rule of law', which might misrepresent the actual operation of state government, the overwhelming bulk of which occurs beneath and beyond the limits of administrative law. Another way of putting this point is to say that administrative law favours process over substance; it is not generally concerned with analysing and testing the substantive scope of administrative power and instead attempts to subject that power to procedural rules at the margins.

The study and theory of modern criminal law resembles that of modern administrative law in many of these respects, though considerably more effort is expended on questions of substance in criminal law than in administrative law. Still, at least in so-called common law countries (that is, in countries whose legal system is (still) heavily influenced by the British colonial experience), procedural criminal law, and indeed procedural law in general, continues to be viewed as a more appropriate subject of doctrinal attention than is substantive criminal law. Within substantive criminal law, in turn, very little effort goes into exploring the scope of the state's power to criminalize, as opposed to the sorts of rules that should govern the application of this so-called special part of criminal law to particular acts and individuals (the general part, which, in this sense, can be viewed as applicatory, and therefore procedural). Then there is the tendency of modern criminal law to focus on exceptional and traditional crimes—most notably murder—rather than on the huge and ever-growing mass of so-called regulatory (or police) offences that include, importantly, offences generated (or at least defined) by administrative agencies, generally acting under only the vaguest of guidelines set by the legislature.

More fundamentally, modern criminal law resembles administrative law in fact (rather than in study or theory) in that both bear traces of their origin in a conception of public law that, if only sketchily, can be seen in the Roman law of the *Institutes*. It is a view of criminal law that is state-centred—it is concerned with behaviour that affects the interests of the state, from the smooth operation of its administrative process to the existence of the macro-householder at its head.[16]

In this view of criminal law, the state is the ultimate victim of crime; the most serious—purest—crimes are offences against the state; all other offences

[16] 'Perhaps the parallel should not be forced too far, but it is impossible to escape the suggestion that the *potestas* of the master over the slaves and freedmen within his *dominium* was similar in kind to, though more limited in scope, to the *maiestas* of the prince over the subjects beneath his *regnum* or *imperium*': FS Lear, '*Crimen Laesae Maiestatis* in the *Lex Romana Wisigothorum*' (1929) 4 *Speculum* 73, 82–3. The author continues: 'This line of thought links up with parricide, which may originally have been punished as a violation of the *patria potestas* and so have constituted a rudimentary form of treason within the family-group in an age when the family-group fulfilled functions of a semi-public character'.

are watered-down versions of (splinters off)[17] the ultimate offence of interfering with the authority of the state, of acting beyond one's inferior status as a member of the state household. These inferior offences are indirect state offences insofar as they compromise the state's ability to govern, for instance, by depriving the state of a resource (human or otherwise)[18] or through disobedience of a state command. As already noted, the bulk of modern criminal law consists of regulatory offences that often bear a remote and, more importantly, generally unexamined relation to the welfare of the state household and are best understood as more or less explicit offences of disobedience that attach sanctions to the mere violation of a state command—many issued by regulatory agencies, rather than the legislature—without an inquiry into the actor's intention or, more relevant, the causing or even threatening of harm to another individual (though of course the mere violation of the command can be regarded as causing harm to the state's authority). The effective publication and dissemination of the incomprehensible, and constantly growing, array of criminal norms is impossible and, for that reason, considered unnecessary (which is perhaps surprising given the significance attached to the fact of disobedience); enforcement of criminal norms is essentially discretionary (which is no surprise given once again the sheer number of prohibitions and criminal regulations). In fact, the other ill-understood and ill-connected features of the rule of law (or, if you prefer, of the principle of *nulla poena sine lege*), including specificity, prospectivity, and legislativity, appear not as strict formal principles, but as flexible prudential guidelines, much like the norms of good human resource management one might find in a seminar for corporate executives or, once again, Marcus Aurelius's *Meditations.*[19]

III The Publicness of Criminal Law

If the publicness of criminal law is explored—and it is taken so much for granted that the question rarely arises—the fact that it is a species of public *law* is, oddly, rarely mentioned. Instead, the inquiry proceeds straight to the publicness of criminal law itself, as if the publicness of other areas of law were beside the point (and as if criminal law were somehow *sui generis*).

[17] See H Brunner, 'Abspaltungen der Friedlosigkeit' in *Forschungen zur Geschichte des deutschen und französischen Rechtes* (Stuttgart: JG Cotta, 1894) 444.

[18] For a discussion of homicide and maiming as (human) resource deprivation, see Dubber, *The Police Power* (n 1 above).

[19] See MD Dubber, '*Commonwealth v Keller:* The Irrelevance of the Legality Principle in American Criminal Law' in R Weisberg and D Coker (eds), *Criminal Law Stories* (New York: Foundation Press, forthcoming 2010).

At the same time, general inquiries into the publicness of public law, generally speaking, rarely discuss the publicness of criminal law. By and large they are exercises in (English) administrative law and, more specifically yet, inquiries into the availability, scope, desirability, and justifiability of official immunity in English law, which is thought to be the more or less necessary consequence of the recognition of a separate process (with separate courts, judges, and doctrines) for the resolution of disputes thought to qualify as instances of administrative law, a procedural and institutional feature traditionally associated with French law, and for that reason condemned as inconsistent with the liberty of Englishmen, as notably suggested by AV Dicey.[20]

One—popular—possibility is to give formal answers of various kinds. One might say, for instance, that public law includes any and all disputes (or, more generally, interactions) that involve the state on one side or another. So, for instance, much ink has been spilt in American constitutional law on the matter of state action, ie whether the behaviour in question can be attributed to a state actor. This is crucial because, and only insofar as, American constitutional guarantees cover only 'official' conduct, rather than 'civilian' conduct. Similar attribution questions also occupy the attention of English public (read 'administrative') lawyers, with similarly disheartening results. In both cases, the doctrine is so Byzantine and abstractly yet unsystematically complex that it is not uncommon to hold it up as a prime example of the result-oriented manipulation of formal legal distinctions (which in turn is often said to characterize legal doctrinal rhetoric in general), if not of the uselessness of the distinction between public and private law in the first place.[21]

Although it is rarely mentioned in this context, commonsensical views of the criminal law as public law fit into this general formal approach, except that in the case of criminal law the state appears as the subject of the dispute, rather than its object, as the prosecutor/plaintiff/complainant, rather than the defendant. Even if formal distinctions of this type were considered helpful in any way, the state's role as a 'party' in a criminal case is not as straightforward as it might seem at first, and certainly not as it is in a civil case where the state (or some subdivision or department thereof) appears as a defendant. American jurisdictions frame criminal cases as 'People v X', 'State v X', and 'Commonwealth v X', and English (and Canadian, etc) criminal cases bear the caption 'The Queen v X'. But—leaving aside the question of the connection between the state, the people, the commonwealth, and especially the

[20] See M Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003) 3 (British 'constitutional lawyers . . . have concluded that public law does not exist').

[21] See C Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241; MJ Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

monarch, and even disregarding the long-standing practice of 'private prosecutions' (not just in English criminal law)[22]—these formal titles themselves say nothing about the publicness of the dispute, though the designation of the first—prosecuting—party may of course point to a substantive view of the dispute (that might regard the state, the people, the commonwealth, or—again more interestingly—the monarch as the victim of the alleged offence).

The formal publicness reflected in the title of criminal cases instead reflects the procedural and institutional framework for its resolution: on the basis of one state official's investigation (the police officer), the case is brought by another state official (the prosecutor) before yet another (the judge) who—generally without, but very rarely with the assistance of another group whose officialness is difficult to pin down (the jury, lay judges in a mixed court)—disposes of the case and, in the event of a guilty verdict and sentence, passes it on to another state official (bailiff, prison warden, parole officer, etc). Certainly the reference to the state (or some more or less closely and obviously related thing) in the formal case title is not thought to be a prerequisite for the publicness of a dispute. German cases, for instance, refer simply to the 'Criminal Case Against X'; a reference to 'the People' appears only in the judgment disposing of the case ('in the name of the people'). This reference, however, appears not only in criminal cases (before criminal courts), but in civil cases (before civil courts) as well, once again highlighting the (non-essentially) procedural and institutional nature of the publicness of criminal law.[23]

Before we home in on views of the publicness, rather than the public lawness, of criminal law, it makes sense to consider briefly the distinction between public law and private in German jurisprudence, if only because it has received more sustained attention there than elsewhere. Interestingly, the 'interest theory' (*Interessentheorie*) of the distinction, derived directly from Ulpian's definition quoted above (public law 'regards the government of the Roman empire' and private law 'the welfare of individuals'), prevailed until the early twentieth century. It has since fallen into disfavour largely because it was thought unable to accommodate those aspects of modern public law (for example,

[22] A Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 OJLS 86, 107–8. On German private prosecutions (which in title are distinguishable from public prosecutions and in practice tend to be brought by large repeat victims of minor crimes, such as department stores in shoplifting cases), see MD Dubber, 'American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure' (1997) 49 *Stanford Law Review* 547, 572.

[23] Andrew Ashworth makes a similar point when he concludes, after an exceptionally insightful discussion of various accounts of the '"public element" in crimes', that it is 'the existence of a machinery of enforcement (police, prosecutors, courts, prisons, etc.) which marks out the difference between criminal and civil liability': Ashworth (ibid) 89. Recall also that French law, on procedural grounds, classifies criminal law as *private* law.

constitutional law) that (also) protect private interests rather than concern the operation of the state. The currently preferred account of the distinction, 'modified subject theory' (*modifizierte Subjektstheorie*) generally resembles the commonsensical view just outlined, with some further specification: a conflict, or relationship, falls under public law if the state (or one of its subdivisions) appears as a party in its capacity as sovereign, rather than as one juristic person among others.[24] This theory is thought to be more useful, though this increase in usefulness may well come at the price of emptiness—public law applies to the state when it acts as state.

More interestingly, this 'modified' theory is regarded as a compromise between 'subject theory' (*Subjektstheorie*) and the most intriguing theory of the lot, 'subordination theory' or 'subjection theory' (*Subordinationstheorie, Subjektionstheorie*). Subordination theory distinguishes public law from private law by looking to the power relationship between the parties to a dispute (or relationship); public law governs relationships among unequals, private law those among equals. This theory has been roundly dismissed not only as impracticable (since power relations may be difficult to decipher and public law—under some other, non-explicit, classification—also includes some relationships among equals), but also, and more interestingly, because it is incompatible with the very idea of a modern democratic state based on the principle of equality. (Note that modified subject theory likewise recognizes the uniqueness of state sovereignty, but does not rely on it exclusively to distinguish public from private law.)

The classification of criminal law as public law in German jurisprudence is less interesting than the various attempts to distinguish public law from private law. Suffice it to say that the consensus in German jurisprudence appears to be that criminal law 'technically' is a species of public law no matter which version of the public/private law distinction one prefers. At the same time, however, criminal law is treated, and taught, separately from public law because criminal law is said to have preceded public law, historically speaking.[25] Whether this makes any sense naturally depends on one's definition of criminal law and public law and on one's view of legal history, which might lead one to recognize the existence of criminal law as private law in, say, Roman law. But to say

[24] Compare a similar distinction in the American law of torts, which permits the state to sue in tort only in its capacity as property owner, not in its governmental capacity: W Prosser, *Handbook of the Law of Torts*, 4th edn (St Paul, Minn: West Publishing, 1971) ch 1 §2.

[25] One current manifestation of the distinction between the disciplines of public law and penal law is the dispute about the constitutional significance of supposedly pre-constitutional principles of criminal law, notably the *Rechtsgutstheorie*. See, most recently, BVerfG 2 BvR 392/07 (26 February 2008) (affirming constitutionality of criminal incest prohibition as applied to adult siblings).

that criminal law was not always public law would of course challenge the unexamined consensus that criminal law is a species of public law.

Subordination theory, or rather its critique from the standpoint of subject theory, raises the question whether public law is possible (or, if possible, desirable) in a modern liberal state.[26] Much of the English debate about the distinction between private and public law revolves around the related question whether public law is consistent with the English Constitution, which is thought to guarantee an ever-changing (and presumably ever-expanding), unwritten slate of proto-Enlightenment equal rights of Englishmen. Here the very existence of public law is taken to reflect a deeply hierarchical and centralized (read 'French') system of government that accords special protections (immunities) to state officials jealously protected by pseudo-judicial administrative tribunals staffed by other state bureaucrats who have little regard for the rights of non-officials who dare challenge the expert discretion of their fellow bureaucrats. (In some ways, the English theoretical literature on the nature of public law—as opposed to the uninspiring doctrine—can be seen as still operating, and expressing discomfort, with Ulpian's approach to public law as pertaining to the administration of the state without any reference to public accountability or, for that matter, public norms.)

The very question of the possibility of English public law appears oddly insular, even if modern commentary has aimed to move beyond Dicey's ill-informed, and by now outdated, musings about French administrative law. For one, the institutional focus of the debate remains, as does the association between the questions of public law and of official immunity. Moreover, the comparative discussion, such as it is, retains Dicey's narrow focus on French administrative law and, more specifically, the institutional structure of French administrative adjudication. Broadening the comparative view to include other systems with an established public law tradition, such as Germany, might lead one to question the link between public law and state impunity. German law, for instance, recognizes, in theory if not in practice, serious criminal liability for officials who deviate from basic norms of state conduct. The German Criminal Code, for instance, has long included serious offences of official misconduct in a criminal case,[27] such as 'bending the law' in favour of one party

[26] While some argue that all law is (must be) private, others argue that all law is (must be) public. Cf A Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391. A variation on the latter claim, that all law is (must be) *also* public, is also quite common and is often taken to support the general claim that the distinction between public and private (in general, and not only in law) is fatuous or, more specifically, borne of an attempt to shield 'private' (property) rights from 'public' control: see eg Horwitz (n 20 above).

[27] Since its original version of 1871, which in turn was derived from the Prussian Criminal Code of 1851. Felonies for official misconduct already appear in Frederic I's Prussian Allgemeines Landrecht of 1794. See H Lüpkes, *Die Verbrechen der Diener des Staats im Allgemeinen Landrecht*

or another (*Rechtsbeugung*, punishable by up to five years' imprisonment)[28] and obstruction of punishment, including the failure to comply with the principle of legality (*Legalitätsprinzip)*, or the principle of compulsory prosecution, which requires the investigation (by the police) and the prosecution (by the prosecutor) of all colourable criminal matters (punishable by up to five years' imprisonment).[29]

Still, the English literature on the possibility of public law as a distinct category (largely institutionally and personally, rather than substantively) reflects a broader tension between the idea of public law and the modern idea of law in general. The challenge of public law, in this context, is to find its place in a system of government under the rule of law that places the autonomous person at the centre, as governor and as governed. The Enlightenment's radical political notion of equality challenges any species of law—public law, private law, criminal law—that presumes a fundamental inequality of governed and governor, of state and individual. The challenge of modern law, then, is to legitimate the exercise of coercive power by one person (acting under the authority of the state) against another, with the power to punish as the most blatant example. Criminal law, in this light, appears as the sharp edge of public law, raising the legitimacy question of public law in its most acute form.

At bottom, then, the question of the definition of public law (and its distinction from private law) is the question of legitimate state power under the rule of law. To the extent that any exercise of state power over an individual implies (and requires) a relationship of subordination, in the sense of the final unavoidability of experiencing that power on one's person even in the absence of actual consent, then rejecting the very notion of public law as inconsistent with the modern idea of law goes too far. The question is not the existence of power (with its attendant hierarchy of subject and object), but its legitimacy. Similarly, in the case of criminal law—whether characterized as public law or private law—the Enlightenment's person-based concept of law does not, by itself, dispose of the state's power to punish, but (merely?) poses a difficult and entirely new challenge to its legitimacy in terms of right, rather than merely of (household) welfare.

für die preußischen Staaten von 1794 und ihre Entwicklung zu den Vergehen und Verbrechen im Amte im Strafgesetzbuch für die preußischen Staaten (Frankfurt: Peter Lang, 2004).

[28] StGB §339.

[29] StGB §§258, 258a. On the potential criminal liability under German law of police officers who engage in conduct that might amount to the defence of entrapment in Anglo-American law, see JE Ross, 'Tradeoffs in Undercover Investigations: A Comparative Perspective' (2002) 69 *University of Chicago Law Review* 1501.

IV Crimes as Public Wrongs

It is one thing to consider the publicness of criminal law in abstraction from other areas of law, or of any broader category of public law. It is another to ignore the lawness of criminal law altogether and proceed straight to an inquiry into the publicness of *crime*, or the publicness of the criminal 'wrongs,' which presumably are distinct from the privateness of non-criminal (civil?) wrongs (where it remains unclear whether any or all other areas of law concern themselves with wrongs at all). The alegality of this inquiry (and the attendant tendency to ignore the political aspect of punishment as a state practice), which treats the lawness of criminal law as at best an incidental, or perhaps formal, characteristic precludes reference to foundational concepts such as 'the rule of law' or the *Rechtsstaatsprinzip* or any account of law, for that matter. This inquiry will generate a more or less coherent account of 'crime' and 'punishment' in an alegal realm occupied by wrongs, public and private, criminal and civil, that cannot hope to capture criminal law as a historical or current practice, institution, concept, or ideal.

It is often said that criminal law protects 'public interests'. It is not usually made clear just what these public interests are, nor what makes them public, but we can, with fairly little effort, assemble a list of these interests: for instance, the Model Penal Code recognizes the following categories of offence that make reference to what may be considered 'public interests': offences against the existence or stability of the state, offences against public administration, offences against public order and decency.

These categories use 'public' in (at least) two different senses. The first two are offences against 'the public' in the sense of the state and its instrumentalities. These might fit best with the traditional Roman conception of what makes a *delictum publicum*. The third category, however, appears to include offences against 'the public' standing alone, and apart from the state. There are difficulties with defining 'the public' in this category with sufficient specificity: the legitimacy of punishing offences against an ill-defined communal concept (or, if you prefer, collective interests), rather than against the persons that may or may not constitute it is also questionable. But these concerns are beside the point in this context. It is enough to note that the Model Penal Code also recognizes 'individual' (or private) interests as worthy of penal protection: as a criminal code, it concerns itself, in language that has been cited repeatedly in US criminal law and elsewhere, with 'conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests'.[30]

[30] §1.02(1)(a).

The categories of offence that refer to private interests include offences involving danger to the person and offences against property, with offences against the family occupying an uncertain intermediate position (depending on one's view of the family, as a collection of persons or as a smaller political community within 'the public'). Again, offences against property might well be seen as protecting public interests ('the property system')[31] as well as (or in the case of the Model Penal Code even ahead of) private interests; the point is not the classification of an interest as public or private, but the recognition of offences that interfere with individual interests, rather than public ones.

The publicness of criminal law, then, cannot derive from the fact that it is concerned with the protection of 'public interests' since at least some offences are thought to interfere with 'individual interests' instead. Alternatively, and more ambitiously, it is often said that *all* crimes affect 'public interests', or rather 'the public interest' (or, simply, '(the) public welfare'). Public interest offences such as the ones listed in the Model Penal Code, then, are not the only public offences; they are *only* public offences, ie offences against the public, but not also against individuals. It is not always clear what it means to say that every crime (by definition?) offends the public; it cannot mean that all crimes harm, dull, disturb, or otherwise interfere with public sensibilities since most crimes require neither commission in public (or even in the presence of a single person other than the perpetrator and the victim, or the single perpetrator in one-person, 'victimless', crimes), nor, for that matter, subsequent publication or even detection, which might harm public sensibilities after the fact.

Alternatively, the essence of crime is often said to lie in its interference with, or threat to, not merely 'the public' but more specifically 'the public peace'. Initially, this way of putting things does not look any more promising, since the public peace, in the sense of the public's peace, is no more necessarily disturbed by (any or all) crime than is any other characteristic or interest of the public, such as, say, its sensibilities or its health, or wealth, or welfare. But its peace is not simply one characteristic of the public among others. After all, there is no offence of 'disturbance of the (public's) welfare' or 'disturbance of the (public's) sensibilities', while disturbance (or breach) of the (public) peace has been a staple of penal law for centuries.

The public peace is the modern manifestation of the traditional concept of the king's peace, which in turn is the centralized version of the householder's peace. Every householder had his peace, as Maitland and Pollock point out, from the most modest serf to the king. Breach of the householder's peace (or *mund*) challenged the householder's authority to maintain this peace, ie to guarantee the welfare of his or her household (human and otherwise).

[31] Model Penal Code 220.1–2.30.5 cmt at 157 (larceny as 'threat to the property system').

To maintain, or reassert, that authority, householders might respond to the breach by any means necessary, using their essentially unlimited discretionary authority against members of their household and, in other cases, according to a more or less formal, and eventually centralized, set of intercommunal customs covering the interaction among householders (such as the wergild system).[32] ('Lordless' men, that is individuals not under the peace of another householder, who breached a householder's peace were subject to any discipline the victim-householder might see fit to impose.)[33]

The public peace, then, is not strictly speaking *the public's* peace. It is the peace of the sovereign who governs the public, much as the household peace (*Hausfrieden*, still the basis of a German crime, *Hausfriedensbruch*, breach of the *Haus* peace, as distinct from *Landfriedensbruch*, breach of the *Land* peace)[34] was not the household's or its members', alone or taken together, but the householder's. This point has become obscured in post-Revolutionary American criminal law, which replaced the concept of the king's peace with that of the public peace, as part of the general transfer of sovereignty from the English king to 'the people'. In England, as in Commonwealth countries, the criminal law's connection to the protection of the king's (or queen's) peace remains closer to the surface in the form of indictments, which allege an offence 'against the peace of our Lady the Queen [Lord the King], her [his] crown and dignity', as well as in the title of criminal cases, which are generally framed as the Queen [King] v X.[35]

If we now return to the distinction between police and law cited at the outset of this chapter, the view of crimes as violations of the public peace ultimately regards crimes as police offences. 'Police' was the early modern term for the ancient concept of 'peace' (or welfare, well-being, (common)wealth);[36] a police offence, ie an offence against the police, then, simply is an offence against the peace, as protected by the householder-sovereign and, later on in liberal democracies, by the abstract non-personal construct of the sovereign state.

[32] See generally Dubber, *The Police Power* (n 1 above) 9–10. [33] Ibid 15, 52.

[34] StGB §§ 123–125a. Then there's also the offence of disturbing the public peace (*Störung des öffentlichen Friedens*), §126. All three peace offences are classified as offences against public order (*Straftaten gegen die öffentliche Ordnung*).

[35] In the United States, see eg US Constitution Art I §6 (members of both Houses of Congress immune from arrest except in cases of 'Treason, Felony, and Breach of the Peace'); Texas Code of Criminal Procedure §45.019(a)(7) (every criminal complaint 'must conclude with the words "Against the peace and dignity of the State"').

[36] Cf the continuing characterization of 'police officers' as 'peace officers,' even at a time when the concept of police in common usage has been radically reduced from its once all-encompassing scope. Cf *City of Chicago v Morales* 527 US 41 (1999), 107 (Thomas J, dissenting) ('In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace').

Under this, the police model of penal power, the victim of crime, is the state. The paradigmatic crime is an offence against the sovereignty of the state and its officials. The sovereign state literally takes offence at the violation of its commands backed up by the threat of penal sanction. Each sovereign is free, but not required, to reaffirm its authority for any violation of 'its' norms. As the dual sovereignty exception to the double jeopardy prohibition in US constitutional law makes clear, the victim of the 'offence' is not the individual who might have suffered harm but the sovereign state; if a single act harms a single person but violates two sovereigns' penal norms, each sovereign is free, but not required, to exercise its penal power against the offender.[37] At the same time, as the ultimate victim of crime, the sovereign is also free to refrain from penally disciplining someone who has harmed another person; the public peace is, once again, not the public's, but the state's.[38]

Insofar as it merely restates, in somewhat antiquated form, the police model of penality, the view of crime as an offence against the public peace amounts to a comprehensive view of crime, rather than a description of some crimes. Moreover, it captures the publicness of crime as such, not just in some instances.

The problem is that it does so at the expense of draining crime of any private aspect—since the police model is entirely public—and, more importantly, of draining criminal law of its lawness. An account of crime as an offence against the public peace is not an account of criminal law; it is an account of criminal police.

The problem with the police model, and its account of the public element of crimes, is not descriptive, but legitimatory. The police model, in this respect, resembles the now disfavoured German subordination theory of the distinction between public and private law and faces similar objections. The critique of subordination theory overshot its aim insofar as it rejected any notion of unequal power relationships in a modern liberal state. The critique might more fairly be directed at the police model of penal power in particular, and of state governance in general, since it goes beyond capturing a necessary aspect of inequality in the threat and exercise of state power: the radical distinction between governor (householder) and governed (household) is not

[37] See MD Dubber, 'Toward a Constitutional Law of Crime and Punishment' (2004) 55 *Hastings Law Journal* 509 (discussing *Heath v Alabama* 474 US 82 (1985) (laying out dual sovereign exception to constitutional prohibition of putting a person twice in jeopardy 'for the same offence')).

[38] On limitless official discretion (to prosecute, as well as not to prosecute) in the US penal process, and the absence of a principle of compulsory prosecution (*Legalitätsprinzip*), see MD Dubber, 'The New Police Science and the Police Power Model of the Criminal Process' in MD Dubber and M Valverde (eds), *The New Police Science: Police Power in Domestic and International Governance* (Stanford, Cal: Stanford University Press, 2006).

incidental, but essential to police governance. Historically, the idea of modern law, and law governance (ie government under the rule of law) arose in explicit contradistinction to the idea of police; the equality of governor and governed was posited and pursued against the inequality of governor and governed in a police regime.

If we leave aside the general question of the legitimacy of police governance in a modern liberal state, which since the very inception of the distinction between police and law in the Enlightenment has been laden with basic conceptions of, and prejudices about, the nature and limits of state power, a more specific, and perhaps more manageable, question remains: What might constitute the public element of crime—the publicness of criminal law, the public law aspect of state penality—in a modern democracy? Put another way, it is worth considering whether recognizing crime as public commits one to a general endorsement of police governance, or whether another, non-policial (or at least apolicial) account of the publicness of criminal law is possible. Such an account, in turn, would inform an account of the scope of the state's penal power or, in other words, of the limits of legitimate criminalization.

The police model regards criminal law (or, rather, criminal police) as a public matter because the paradigmatic victim of crime is the public, or rather the state, which as macro-householder has unlimited ultimate discretionary authority to protect the public's 'police' (that is, welfare). Instead, one might think of the 'public interest in crime' in a different way, not as the 'public's interest' in its welfare—(re)defined, monitored, and protected by the state-householder—nor as various more specific 'public interests' protected by criminal law norms defining various means of interfering with these interests, and then threatening this interference with criminal punishment, but as the 'public interest in' crime as an interpersonal event. In this account, the paradigmatic victim of crime would not be the public (that is, the state, the sovereign, the king, the householder, etc) but the person. The paradigmatic perpetrator would not be the violator, or disturber, or offender, of the 'public' peace—a status that, historically, was not limited to humans but included animals (not infrequently pigs), plants (notably trees), and inanimate objects (swords)—but the person. Crime, then, would be an interpersonal event between one person (labelled 'offender' or 'perpetrator') and another (labelled 'victim'). The public's (state's) interest would not be in preserving its own welfare, peace, etc, but in protecting the personhood of both 'victim' and 'offender', which is threatened by crime and (the threat, imposition, and execution of) punishment, respectively.

From the perspective of law, regarding criminal law as law, the public would *take an interest in* crime, rather than crime directly violating the public's

interest.[39] This recognition of the public (or superindividual) aspect of an interindividual matter is a crucial feature of a system of law that is easily overlooked. At bottom, this recognition is not a question of 'the state', or even 'the public', somehow taking an interest in the affairs of individuals, but is itself an interpersonal event. The key to understanding the nature of this interest, its source, its operation, and its continuous recreation (also) lies with the concept of *personhood*. One person (or group of persons), acting in an official capacity as authorized by the state, must recognize the fellow personhood of the parties to the conflict. By identifying herself with each party as persons (rather than on the basis of some other, more substantive, similarity—age, sex, ethnic origin, citizenship, favourite color), the person sitting in judgment *empathizes* with the object of her judgment and for that, and only that, reason, 'takes an interest in' the affairs of the persons involved in the dispute.[40] The jury captures this process of interpersonal empathy (interest taking through identification), but is neither necessary, nor sufficient, for the legitimacy of the legal process as a whole, as all state officials must 'take an interest in' the objects of their judgements in this way in order to legitimate the power wielded by the state.

Crime thus affects the public indirectly, with criminal law transforming a private matter (among persons) into a public one (that involves the state). Put another way, and drawing on our discussion of Roman law, crime is the public aspect of the interpersonal delict—*delictum publicum*. (Tort is its private aspect—*delictum privatum*.) Under this model, the delict becomes a public matter, not because it interferes with the operation of the state as a separate, superior, entity of government, but because the state's function precisely is to manifest and protect the personhood of its constituents, even and especially when they commit a delict against one another.

V Criminalizing Delicts

To further develop this account with an eye towards generating more specific principles of legitimate criminalization, one might begin by recalling that the key to the public interest in crime, and therefore the ground for the state's taking an interest in an interpersonal delict, lies in the *personhood* of

[39] Cf G Lamond, 'What is a Crime?' (2007) 27 OJLS 609, 629 (crimes are 'public wrongs not because they are wrongs *to* the public, but because they are wrongs that the public is responsible for punishing'); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007) 141–2 (public wrong not a 'wrong that injures the public' but one that 'properly concerns the public').

[40] Cf MD Dubber, *The Sense of Justice: Empathy in Law and Punishment* (New York: New York University Press, 2006).

the perpetrator and the victim of the delict. A delict is a state matter—as crime—if it puts into question the *victim's* personhood. At the same time, the response to a delict that is public in this sense is also a state matter—as (state) punishment—so that the *perpetrator's* personhood is not violated in the name of (re)affirming the victim's, but rather itself affirmed. (In this sense, the state has a 'monopoly' on punishment and the offender *qua* person has a right to be punished.)[41] A delict, then, is a public matter—a crime, *delictum publicum*—insofar as it requires state intervention to manifest and protect the personhood of its constituents (victims and perpetrators alike). It is a private matter—a tort, or *delictum privatum*—insofar as it does not.

This is one way of making sense of, and filling in, the vague notion that crimes are 'serious' violations of another's interest or, for that matter, that crimes which are not sufficiently 'serious' (so-called '*de minimis* infractions')[42] do not warrant state intervention.[43] Seriousness (in general, and among crimes) would be measured in terms of the perpetrator's behaviour's effect on, or relation to, the victim's personhood; personhood, in turn, would be defined in terms of the capacity for autonomy: The greater the challenge to the victim's personhood, that is, his capacity for autonomy, the more serious the delict. Seriousness, then, would range from, at one extreme, the complete destruction of another's physical and mental faculties essential for the capacity for autonomy, through homicide or very serious assaults, to the threatened temporary interference with the exercise of that capacity, through remote threats of assault or physical restraint (at the other).

All law, including criminal law and tort law, is concerned with persons, understood as beings with the capacity for autonomy. All delicts are interpersonal events—as are all contractual transactions, which manifest both parties' capacity for autonomy, the exercise of which in the form of a 'promise' is reflected, and respected, through the imposition of liability in the event of a unilateral breach. (Property law, by contrast, is concerned with persons' control of, and exercise of their capacity for autonomy through, non-personal things, as objects only.)[44] Through criminal law (in its various aspects—from the definition of penal norms (in substantive criminal law), via the imposition of these norms in particular cases (criminal procedure, from investigation to trial), to the execution of threatened sanctions for their violation (execution law, prison law)), the state manifests and safeguards, *ex ante, ex post*, and in the

[41] See MD Dubber, 'The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought' (1998) 16 *Law and History Review* 113; H Morris, 'Persons and Punishment' (1968) 53 *Monist* 475.

[42] See eg Model Penal Code §2.12 (judicial dismissal).

[43] See eg StPO §153 ('no public interest in the prosecution').

[44] See eg A Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley, Cal: University of California Press, 1995).

moment, the personhood of both victims and offenders (so offenders have a right to be punished, as victims have a right to *have* offenders punished, rather than to punish offenders themselves).

The state's role in tort law (and contract and property law) is less (pro)active and more facilitative; by providing a mechanism for the resolution of conflicts, it assists persons in the direct assertion of their personhood through the pursuit of a private cause of action itself, rather than (re)asserting it through a public prosecution on their behalf (where, again, the state also represents the *offender's* personhood through empathic identification, an ideal and a process institutionalized by the jury). In criminal law, the process is (part of) the punishment; in tort law, the process is (part of) the compensation.

Tort compensation restores the victim, or rather the plaintiff, to his or her pre-delict state. Criminal punishment reasserts the victim's personhood in the face of its denial through the offender's criminal act. Punishment puts the offender 'in his place': not, as some have suggested, by visiting upon him the humiliation he inflicted on the victim, but by confirming that he is no better, nor worse, than the victim, that they are equals as persons.[45] In this sense, crime is concerned not only with the victim's personhood, but also with the offender's. In the end, punishment reasserts the equal personhood of victim and offender (and judge) alike.

If one thinks of crimes and torts as public and private interpersonal delicts, respectively, the question of the complementarity of criminal law and tort law arises. From the perspective of law, tort law appears as the preferable response to the commission of a delict, since the act of 'prosecuting' of a tort suit by the victim/plaintiff reflects her personhood and the imposition of tort liability does not threaten the tortfeasor/defendant's personhood in the same way as would the imposition of criminal liability, and the infliction of criminal punishment. Criminal law, then, would be reserved for cases that threaten, and deny, the victim's personhood, rather than simply diminishing his resources for the exercise of his capacity for autonomy. In this account, the so-called *ultima ratio* principle would be linked to law's essential concern with persons as defined by the capacity for autonomy. The criminal law, as posing the greatest threat to the personhood of its objects (offenders), should be limited to 'serious' cases in which it is necessary to (re)assert the personhood of victims, not only in the abstract (as reflected in the scope of the substantive criminal law) but also in the particular case, so as not to violate the victim's autonomy in the name of manifesting it.

[45] Cf GP Fletcher, 'Domination in Wrongdoing' (1996) 76 *Boston University Law Review* 347, 353–4.