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Rights of the sovereign: criminal law as public law

Peter Ramsay*

I. Introduction

The criminal law has been claimed by public law scholars on the ground that it comprises 'rules governing … the relationship between the institutions of government and private citizens'.[1] The status of substantive criminal law as a type of public law nevertheless plays little role in doctrinal or university education in the criminal law. It is, however, a subject of increasing interest among criminal law theorists in the common law world.[2] In this contribution, I will present both a rigorous account of the relations between state and citizen that are governed by criminal law and, in the process, a specific public law concept of criminal law.

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1 D Feldman (ed), *English Public Law* (Oxford University Press 2009) xxviii. I have previously explored citizenship as the underlying political relation that explains the fundamental form and content of English criminal law (see P Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review* 29). Here I make a broader and conceptually more rigorous claim about sovereignty, although I think the earlier narrower claim about citizenship is compatible.

2 See Ramsay, *ibid*; A Brudner, *Punishment and Freedom* (Oxford University Press 2009); M Thorburn, 'Criminal Law as Public Law' in RA Duff and SP Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2010) 21; L Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016); RA Duff, *The Realm of Criminal Law* (Oxford University Press 2018); V Chiao, *Criminal Law in the Age of the Administrative State* (Oxford University Press 2019).

I build on Malcolm Thorburn's argument that 'the central focus of "true criminal law" is the very authority of the state itself as the sole lawmaker for the jurisdiction'[3] and that criminal punishment is a remedy for the usurpation of the state's claim to possess an 'exclusive right to rule'.[4] I develop Thorburn's insight in three ways. First, I show that we can derive such a concept from an analysis of the only workable definition of criminal law, that is, the formal definition elaborated by Glanville Williams.[5] Second, I integrate this analysis of the formal definition into one of the leading theoretical accounts of public law and, in so doing, both locate Thorburn's 'right to rule' in the state's political structure and specify precisely how criminal punishment serves as a remedy for damage to the state's authority. In *The Idea of Public Law,* Martin Loughlin defines public law as: 'the capacities and restraints that give expression to a particular arrangement of the sovereign authority of the state'.[6] The analysis of the formal definition offered here will show that the substantive criminal law sets out certain rights of the sovereign that are vindicated by punishment and amount to 'a particular arrangement of the sovereign authority of the state'. The criminal law is public law *by definition*. Third, I briefly explain how this 'political jurisprudence' of criminal law both accounts for the longstanding influence of legal moralism in criminal law theory and, at the same time, identifies an immanent standard of critique for the criminal law, one that arises from within the sovereign authority of the state itself rather than from external moral commitments.

The concept of the criminal law elaborated here identifies what the law is, and it does this independently of any theory of what the law ought to be. My claim is not that the criminal law *ought* to be a branch of public law on which the sovereign stakes the authority of the state. My claim is that the criminal law *is* that branch of public law.[7] To be more precise, I identify the legal-political concept of the actual criminal law, its essential or generic content that unifies the apparently diverse specific contents of the many different criminal offences. This conceptual analysis is prior to consideration of the specific content of these offences, or of how we should assess the law normatively. My approach is, therefore, oriented to a social-scientific explanation of the law rather than to a normatively attractive reconstruction of it.[8] As a result, what I offer is *not* a moral or political theory that I seek either to vindicate

3 M Thorburn, 'Punishment and Public Authority' in A du Bois-Pedain, M Ulväng and P Asp (eds), *Criminal Law and the Authority of the State* (Bloomsbury 2017) 21.

4 M Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70 *University of Toronto Law Journal* 44.

5 G Williams, 'The Definition of Crime' (1955) 8(1) *Current Legal Problems* 107.

6 M Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 88.

7 I do not investigate whether the criminal law is the only branch of public law in which rights of sovereignty are at stake or make any claim to that effect. However, it may be that the criminal law is the law by means of which the authority of all of the sovereign's rights is *ultimately* realised.

8 My approach therefore contrasts with the normative philosophical theorising about criminal law that characterises the public law conceptions of Brudner, Chiao, and Duff (see (n 2)). In different ways, they seek to explain how the criminal law could be 'rationally reconstructed' in order to vindicate a particular normative theory. (On rational reconstruction, see RA Duff, 'Criminal Law and the Constitution of Civil Order' (2020) 70(Supplement 1) *University of Toronto Law Journal* 4, 15.) Brudner nevertheless provides essential conceptual resources that I will rely on below, as does Thorburn.

through analysis of the law or to deploy as an external standard of criticism of the existing criminal law. My starting point is the defining features of the law itself, and I will argue that a standard of criticism of the state's penal practice can be found in the criminal law's own essential political content.[9]

After outlining the formal definition of the substantive law, the paper analyses each of the elements of that definition to show that it is a form taken by the political authority of the sovereign, and that the generic content of the substantive criminal law so defined consists of rights of the sovereign on which the sovereign stakes its authority. I locate this public law concept of criminal law in Loughlin's theory of 'political jurisprudence'. While I argue that this concept is of general application, I illustrate it primarily with English law. Finally, I clarify the claims and demonstrate the virtue of political jurisprudence in a field of legal theory that has been dominated by moral philosophy.

II. The formal definition

The great diversity of the particular obligations that the criminal law imposes makes it impossible to offer a definition of the substantive law in terms of its immediate and specific content.[10] In response to this problem, Williams defined the criminal law in the following terms:

> A crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal.[11]

This combination of proceeding *and* outcome is a distinguishing characteristic of all substantive criminal offences. The definition is formal because it tells us nothing directly about the content of the substantive law contained in the legal definitions of particular offences and defences. The substantive law is only that which in a court of law is governed by the specific criminal procedure and may have a specifically criminal outcome. This definition seems of little practical use – certainly not to a court deciding whether or not the criminal procedure should apply to a particular provision[12] – but that does not make it false. Nor does it make the formal definition circular, as some

9 Farmer (n 2) avoids all normative considerations. There is significant common ground between his historical account of criminal law as securing civil order and the analysis presented here. Farmer does not, however, seek to identify any essential quality in the law nor to investigate sovereignty's continuing significance in the present or its ideological aspect, as I do here.

10 For a review of the problem, see Williams, 'The Definition of Crime' (n 5); L Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5(1) *Social & Legal Studies* 57.

11 Williams (n 5) 130.

12 The English courts' decisions about when criminal procedure applies must be consistent with Article 6 ECHR. Following *Engel v Netherlands* (1976) 1 EHRR 647, a court will consider any formal designation in legislation, and the nature and scope of the conduct prohibited or required by the measure concerned, but the strongest factors tending a court to think that it is a criminal offence will be the applicability of a penalty and its severity.

have alleged.[13] Each of the most distinctive legal 'characteristics' which 'mark a proceeding or its outcome' as criminal has specific content that is distinct from the substantive elements of a criminal offence. And, as we shall see, the content of each element of the formal definition concerns a different aspect of the sovereign's political authority.

To explain this, I will begin with the criminal outcome because the power to punish criminal offending is a necessary condition of the sovereign's authority. Having identified a generic concept of criminal law I then briefly divert from the conceptual argument in order to specify the basic types of substantive law that arise. After that I turn to the two most distinctive aspects of the criminal procedure: first the burdening of the prosecutor with the presumption of innocence and second the control of the initiative by the sovereign's executive agents. While sovereignty might persist without these distinctive procedural elements, they are nevertheless clear markers of the intrinsic conceptual connection between the contemporary criminal law and the state's authority.

III. The criminal outcome

As James Fitzjames Stephen put it, criminal law is 'a collection of threats of injury to … liberty and property'.[14] The criminal outcome is liability to the execution of those threats of injury through punishment. Some basic facts about those threats and their execution strongly suggest that they concern wrongdoing against the state.

Since the criminal outcome is liability to punishment, the formal definition establishes that the substantive criminal law itself defines wrongdoings. Everything about those wrongs, and the penal response to them, is dominated by the state. The wrongs and the nature of the punishments are defined by the state's legislators, adjudicated by judicial agents of the state, and any punishment is carried out by persons answerable to the executive. For example, in England the threats are made by a parliament acting as the ultimate source of valid law, as the legislative sovereign.[15] The imposition of any penalty will be determined by the Crown's judicial representative in a sentencing proceeding following a finding of guilt.[16] Subsequently, the execution of any penalty will be carried out by officials answerable to ministers of the Crown.[17]

13 See, for example, Farmer (n 10).

14 JF Stephen, *A History of the Criminal Law of England*, vol II (Burt Franklin 1883) 107.

15 A few criminal offences still find their source in the common law rather than statute, but the legislative supremacy of the 'Crown in parliament' and the practical extent of the replacement of common law with statute in criminal matters means that any remaining common law offences subsist only with parliament's licence.

16 Every courtroom in England and Wales is adorned with the Royal Coat of Arms. 'Justice is said to emanate from Her Majesty. All jurisdiction is exercised in her name, and all judges derive their authority from her commission': M Loughlin, 'The State, the Crown and the Law' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press 1999).

17 If any private person were to execute a criminal punishment on another without the warrant of a court, even if it was after a finding of guilt in a trial with impeccable procedures and was the same punishment as the one that a judge would have imposed in the circumstances, that person would themselves be liable for a criminal offence.

Crucially, liability to punishment is *in addition* to compensation to any individual victim of a crime. English sentencing law, for example, has long permitted judges to pursue one or more of five aims of sentencing:

(a) the punishment of offenders,
(b) the reduction of crime (including its reduction by deterrence),
(c) the reform and rehabilitation of offenders,
(d) the protection of the public, and
(e) the making of reparation by offenders to persons affected by their offences.[18]

Of these five sentencing aims, only the 'making of reparation' is directly concerned with compensating or making amends to any victim of a crime. A judge is not obliged to order a reparative sentence. Moreover, the civil law already provides for compensation to victims of many serious crimes through tort claims, while the criminal law contains many offences that lack any individual victim, or even a potential victim. Criminal liability may arise even though there is no risk of a particular individual's rights being violated or a particular individual's interests being set back. Offences of abstract endangerment are common, and these may be drawn so broadly as to encompass conduct that creates no risk of harm to another person.[19]

Taken together, these facts support Thorburn's contention that the criminal outcome provides a remedy for damage to the state's interests. He argues that the remedy is for the wrong of 'usurpation' done to the state by a criminal offence, and what the offender usurps is the state's 'exclusive right to rule'.[20] To show that the criminal outcome does indeed entail a remedy for the damage done to the state by such a usurpation, we need to know, first, what exactly this exclusive right to rule is, where it comes from and to which institutions it belongs; second, why criminal offending amounts to a usurpation of it; third, exactly what interest of the state is damaged by that usurpation; and, lastly, how the criminal outcome serves as a remedy for this damage.

To answer these questions fully we will first turn to the fundamentals of Loughlin's political jurisprudence, which provides a conceptual structure of the state, and locate the origin and nature of its exclusive right to rule within that structure.

State, sovereign, sovereignty

The concept of the state, together with its 'sovereign' and its 'sovereignty', provides what Loughlin calls a 'scheme of intelligibility' for the continuously contested realm

18 Put on a statutory footing in Sentencing Act 2020, s57.
19 See, for example, *Smedleys Ltd v Breed* [1974] AC 839.
20 See Thorburn (n 4).

of 'politico-legal relations'.[21] The *state* is a 'fictional' unity made up of the population of a territory and its government.[22] The state is a political and legal idea, or fiction, through which a multitude of different individuals, families, clans, localities, social classes, religious and cultural identity groups, with different interests and preferences, are imagined *as if* they were a singular corporate entity acting together.

This imagined unity of all within a territory is given legal and political reality when it is *represented* by the public offices that exercise the powers of a *sovereign*, forming a hierarchy of institutions that carry out the various tasks of government (legislative, executive and judicial).[23] As the representative of the fictional unity, the *sovereign* is the ultimate arbiter of the interests common to all – the public interest.[24] And sovereign is that entity that has the autonomous power, or *political right,* to make and enforce the laws that serve that public interest, and thereby unify the subjects into the public thing (the *res publica*) that is the state.[25] Here then is the source of Thorburn's 'right to rule': the sovereign's political capacity and status as the representative of the unity of all.

The sovereign as a public office is a *concept* that makes sense of the autonomy of the state, but in practice the powers of the sovereign are distributed across the diverse branches of government. In England and Wales, for example, the locus of these sovereign powers and the representation of the state lies in the public offices that comprise 'the Crown'. As a matter of constitutional law, the Crown is an ambiguous institution.[26] But for the purposes of criminal justice, it is clear that, as we noted above, the 'Crown in parliament' is legislatively sovereign,[27] while the imposition of penalties belongs to the Crown's judicial agents, and execution to the Crown's ministers.

Of course, what the 'public interest' consists of is often a controversial matter politically. Subjects with conflicting private interests may well have divergent assessments of their common interests. The sovereign's claim of political right to determine the public interest is therefore inherently *ideological,* where ideology is meant in the specific sense of a claim that the particular occupants of a public office or offices, who are themselves natural persons with *particular* interests, nevertheless represent the interests of *all* the subjects as if they were a singular people – a universal *public* interest – notwithstanding the plurality of private interests in the particular society. Such ideological claims

21 M Loughlin, *Advanced Introduction to Political Jurisprudence* (Elgar 2025) Chpt 3.

22 The following account is drawn from Loughlin, who in turn derives these concepts from Thomas Hobbes, see *The Idea of Public Law* (n 6) 58–61, 79–80.

23 *Ibid*, 58–61. For a detailed discussion, in the criminal law context, of the Hobbesian theory of political representation on which the state is founded, see also S Classmann, 'What We Do to Each Other: Criminal Law for Political Realists', PhD thesis, London School of Economics and Political Science (LSE Theses Online 2023) 23–33.

24 Cf: Brudner (n 2) 21.

25 This juridical concept is the counterpart to Max Weber's sociological definition of the state as a 'human community that (successfully) claims a monopoly of the legitimate use of physical force within a given territory', see M Weber, *Politics As a Vocation* (Oxford University Press 1946) 4.

26 And not to be confused with the person of the monarch. See Loughlin (n 16).

27 *R(Jackson) v The Attorney-General* [2005] UKHL 56 at [9].

depend on the elaboration of sophisticated worldviews that we will return to below.[28] These structures of thought can and often do fail in practice, sometimes catastrophically, when the subjects cease to be convinced of the sovereign's claims. However, to the extent that the occupants of the public offices successfully maintain their claim of political right within the territory of the state, because enough subjects recognise and accept that claim, then there will be *sovereignty*.

Sovereignty, as opposed to the sovereign, consists in the obligation of the subjects to obey the laws and decisions of the sovereign as the representative of their unity and common interest, an obligation that, as we shall see, may be realised by criminal punishment. Sovereignty is, therefore, a *relation* of authority in which, as the representative of the interests (claimed to be) common to all, the sovereign asserts an ultimate power to determine the norms that subjects shall live by that is recognised as *rightful* by the subjects.[29] Within its jurisdiction, the sovereign's claim of authority is *universal,* and that is the basis of Thorburn's formulation that the state's claimed 'right to rule' is an 'exclusive' one.

Note two critical distinctions. The first is that between legal and political sovereignty. From the legal point of view, the sovereign has the ultimate power to determine the legal norms within the jurisdiction.[30] But maintaining that legal sovereignty as a practical matter depends on the prior relation of political authority between sovereign institutions and subjects. While legal sovereignty is an either/or question, political authority is a matter of more or less. The second distinction is between 'authority' and 'power'. The sovereign's *power* is its capacity to do its will despite resistance, and that can be a matter of mere coercion. The sovereign's *authority* lies in the recognition by its subjects of its claim to exercise power rightfully, so that subjects willingly obey the sovereign.[31] Authority is a measure of the strength of the *political* relationship binding sovereign and subjects together, of their bonds of allegiance, as opposed to the state's mere *bureaucratic* power over its subjects.

28 See text (n 111) *et seq*.

29 Loughlin (n 6) 81–5. This account concords both with Thorburn's idea that the state's authority is 'robust' in the sense that the sovereign just has the 'right to rule', and with the contrast that he draws between this robust authority and Joseph Raz's legally influential instrumental account of authority (see Thorburn (n 3)). What Loughlin's political jurisprudence explains is the political source of the robustness of this right to rule in the sovereign's status as the representative of the unity of all.

30 H Heller, *Sovereignty: A Contribution to the Theory of Public and International Law*, D Dyzenhaus (ed) (Oxford University Press 2019) Chpt 5.

31 'The state possesses authority only to the extent that its power is acknowledged as rightful' (Loughlin (n 21) Chpt 2). Loughlin's formulation is a synthesis of modern political theory and Max Weber's sociology. The distinction between coercive power and authority is implicit in Hobbes's account of the way that the subjects authorise Leviathan's all-powerful sovereignty (see A Ristroph, 'Sovereignty and Subversion' (2015) 101 *Virginia Law Review* 1029, 1040). On this account, therefore, authority is power-generating (see Loughlin (n 6) 50–1). For an explanation of Weber's distinction between 'Macht' and 'Herrschaft' (in *Economy and Society*, G Roth and C Wittich (eds) (University of California Press 1978), 53), see Classmann (n 23) 35.

At the time of writing, most of those subject to the sovereign powers of the Crown in England and Wales are also citizens, with political rights, to whom government and parliament are ultimately accountable; and the substance of the state's political authority is democratic. The claims of England's sovereign institutions to represent the public interest have not failed in more than 300 years, although the political relationships between citizens and the institutions of government have weakened markedly in recent decades, a development sometimes referred to as 'post-democracy'.[32]

Political authority and the public interest are at the heart of the state's sovereignty. The maintenance of the sovereign's exclusive right to rule over matters of the public interest is the state's most fundamental interest. If we now consider the nature and aims of the criminal outcome, we will see how criminal offending damages this claim of universal political authority, and how state punishment serves to remedy that damage.

State punishment and criminal wrong

Criminal wrong

The criminal outcome normally involves a judge ordering agents of the executive to do to the offender what would itself be a paradigmatic criminal wrong in any other circumstances: acts such as imprisonment, fining or forced labour. Other outcomes such as disqualifications or restorative justice measures have no criminal equivalent, but these alternatives will, like the most common forms of punishment, involve some deliberate interference with the rights of the offender.[33]

When the state punishes, the sovereign is claiming that its agents have a right to do something that would, according to its own laws, amount to a legal wrong, but for the licence that the law grants the sovereign's agents when a subject has violated the substantive criminal law. Given that the sovereign claims to be the representative of the unity of *all* subjects, this apparent denial of the rights of some of those subjects must somehow be consistent with that prior claim. The imposition of the penal rights-denial must have some *political* justification. What is it about committing a criminal offence that permits the sovereign to itself commit what would otherwise be a criminal wrong against the offender, and yet nevertheless maintain its own claim to act rightfully as the representative of the unity of an 'all' that *includes* the offender?

32 See, for example, C Crouch, *Post-Democracy* (Polity 2004); P Mair, *Ruling the Void* (Verso 2013).

33 Other disposals, such as disqualifications and treatment orders are available, but form a very small proportion of criminal outcomes, approximately 3.5% of disposals (see Ministry of Justice, *Criminal Justice Statistics Quarterly, England and Wales, Year Ending June 2023*, 18 January 2024, 4). Restorative justice is also coerced in so far as participation is backed by the threat of an alternative sentence in the event of non-cooperation. Even a mere verbal admonishment delivered by a judge is coerced in so far as the offender is required to be present in order to hear it.

On the face of it, there might appear to be a contradiction in the sovereign claiming to represent a person in the same moment as committing what the sovereign itself defines as a wrong against the person, or otherwise violating rights that it guarantees to that person. However, there is one circumstance in which penal action against a subject will be compatible with the sovereign's claim to be the representative of the unity of all: when the subject against whom the sovereign commits what would otherwise be a wrong has themselves already renounced the sovereign's authority over them by acting as if they were not obliged to obey the sovereign's laws. And this is the essence of criminal wrongdoing. As Thorburn describes it:

> Where someone takes it upon himself to act contrary to the demands of the state's laws because he is acting instead upon his own view of his rights and duties, powers, and liabilities, he is directly challenging the state's claim to have the exclusive right to make the law around here.[34]

When an offender *knowingly* acts in violation of the obligations imposed on her by the sovereign's law (and does so without a legally recognised justification), she *acts* as if those obligations, and their concomitant rights, do not exist so that she is entitled to act contrary to them.[35] It is the offender who has repudiated the universal authority of the state; it is not the state that has repudiated the offender.[36]

An offender's usurpation of the sovereign's 'exclusive right to rule', or its political right, is not a matter of that person's subjective opinions about, or motives with respect to, legal obligations or political authority; it is a matter of the objective, practical implications of what the offender actually does (or fails to do, where the sovereign has imposed liability for an omission). Having said that, for the offender's actions, or omissions in violation of the law, to amount to a practical denial of the existence of the law's obligations – and, therefore, a usurpation of the sovereign's rights – the defendant must

34 Thorburn (n 4) 57. Cf: Michael Pawlik's Hegelian account: 'criminal wrongdoing involves the perpetrator opposing the prevailing criminal norms and regulations, and showing, through his actions, that he gives this counter-norm precedence over the norm of the law … The expression of power on the part of the perpetrator, the compulsion exercised by him against an external will, is understood in this conception as the implementation of a normative program, a program that can reasonably be interpreted as nothing other than a rebellion against the authoritative norms that apply to the perpetrator. This normative self-elevation, or rather presumption, by the perpetrator is the source of the added significance of his action, which justifies finding him criminally responsible', M Pawlik, 'Norm Confirmation and Identity Balance: On the Legitimacy of Punishment' (2020) 7(1) *Critical Analysis of Law* 1, 16.

35 Cf: Brudner's liberal Hegelian account of criminal wrongdoing as a denial of the rights of formal agency, Brudner (n 2) Chapters 1 and 2.

36 To be clear, this is a conceptual claim that makes the state's penal practice intelligible. In practical political or moral terms, it is widely recognised that whole classes of subjects are poorly represented in the life of the state, so as to cast serious doubt on the justice of state punishment. Arguably, this may amount to the state repudiating the class of subjects to which an offender belongs in advance of the adjudication of any offending behaviour. (For a review of the problem, see N Lacey, 'Criminal Justice and Social (In)justice' in V Mantouvalou and J Wolff (eds), *Structural Injustice and the Law* (UCL Press 2024).) In practice, this may undermine the authority of the state (see text (n 116)).

know that they are acting (or omitting to act) in a way that in fact violates the law. It is this that explains the doctrinal significance of proof of subjective fault in criminal law.[37]

The damage to be remedied

Once criminal wrongdoing is understood as a violation of the sovereign's exclusive political right, of its universal authority to determine legal rights and obligations, the damage done to the state by any criminal wrongdoing is clarified. The sovereign claims a right to *universal* obedience within its jurisdiction, but the offender has usurped that right and acted as if the obligations imposed on her by the sovereign's law do not apply. In so doing, the offender denies the state's authority.[38] In violating the political right of the sovereign, the universality of the sovereign's claim of authority is necessarily damaged.[39] Some offences will do more damage than others, depending on the importance of the interest of the sovereign that is at stake;[40] but all criminal wrongdoing does at least some damage to the universal character of the authority claimed by the sovereign.[41]

Public wrong

This analysis of the criminal outcome shows that the generic content of criminal wrongs is usurpation of the sovereign's right to rule that damages the universal character of the sovereign's authority. For this reason, criminal wrongs are appropriately termed 'public

37 Of course, in many jurisdictions there are criminal offences without subjective fault requirements, and we will return to them, see text (n 62).

38 See Brudner (n 2) 47. The use of the words 'denied' and 'denial' is precise and should not be confused with the word 'defied' which denotes a motive of hostility or resistance to the sovereign that is not necessary for criminal liability. In the absence of some special justification, such as self-defence or the prevention of crime, the knowing violation of the sovereign's command, committed for whatever reason, always manifests a practical denial of the existence of the rights protected by law.

39 Alice Ristroph puts the point in explicitly Hobbesian terms: 'Violations [of the criminal law] mean that the sovereign will no longer act with complete authorization' (Ristroph (n 31) 1044; and see further, text (n 44)).

40 For example, denying the rights protected by the law of homicide by killing another person is a far more serious and damaging denial of the sovereign's authority than say causing another person minor injuries, because of the greater public interest in normatively excluding homicide than assaults. And an intentional denial of the sovereign's law is a more potent denial than a reckless one. For more on the specific offences, see text (n 56).

41 It does not follow that all usurpations must necessarily be criminalised. Some usurpations may be of a type and degree of triviality as to fall beneath a threshold requiring a penal remedy. An example would be a knowing violation of planning regulations where purely reparative action at the property owner's expense would be sufficient to remedy a minor infraction. Recourse to an immediate penal remedy in these cases could be regarded by the sovereign as categorically disproportionate normatively and unnecessary from a consequential point of view (see discussion of punishment as a remedy below). Nevertheless, enforcement action by the authorities always has ultimate recourse to the criminal law should such action be resisted.

wrongs' because they wrong the representative of the public interest.[42] It is the damage this wrong does to the sovereign's authority as the representative of the public interest that punishments must remedy.

The remedial aims of sentencing

Punishment can serve to remedy the damage done to the state by the offender's usurpation of the sovereign's authority because it renders the offender's conduct into 'just another factual precondition to the operation of the state's laws: those who violate the laws shall be subject to the punishments prescribed by law'.[43] However, punishment provides two different ways of remedying the damage to sovereignty, and these are to be found in the two contrasting categories of penal aims: (a) the retributive punishment of offenders for the wrongdoing they have committed; and (b) the pursuit of the beneficial consequences of reducing future offending by means of deterrence, incapacitation or rehabilitation.[44] Different jurisdictions combine or mandate these penal aims in different ways. As we saw above, sentencing law in England, in principle permits judges to pursue retributive punishment and/or crime reduction.[45]

42 W Blackstone, *Commentaries on the Laws of England*, Vol 4 (University of Chicago Press 1979). Blackstone's coinage has been revived in recent years by Antony Duff and Sandra Marshall, see SE Marshall and RA Duff, 'Criminalisation and sharing wrongs' (1998) *Canadian Journal of Law and Jurisprudence* 7; and RA Duff, *Answering for Crime* (Hart 2007) 50–3, 141–2, and RA Duff, *The Realm of Criminal Law* (n 2). Their influential normative account does not, however, fit the criminal law's actual position in the state. Duff argues that: 'When the law defines wounding, or criminal damage, or tax evasion, as criminal, citizens are not supposed to hear this as a prohibition issued to them (imposed on them) by a sovereign distinct from the citizenry: they are supposed to hear it as a declaration that this wrong (which they should be able to recognize as a wrong independently of the criminal law, in terms of shared values in which the law itself is grounded) is a public wrong that merits collective condemnation and a public, formal calling to account for any who commit it' (*Ibid*, 120). This construction denudes the sovereign power of its political content as the *representative* of the unity of all', and thereby eliminates the precondition of the 'citizens' actually being *citizens* of a *state* that could institutionalise any values those citizens might come to share. Duff and Marshall's 'shared values' stand in the place of the actual politico-legal structure of the state, and obscure the political relationship of representation through which wrongs come to be constructed as public wrongs; the very relationship that, as we shall see, provides the only route to achieve in practice something like a mild penal law of mutually supportive citizens that is their normative aspiration (see further (n 130)).

43 Thorburn (n 3) 22. Following Hobbes, Ristroph doubts that punishment can 'fully repair' the damage done 'to the law' by an offender's violation of it (Ristroph (n 39)). An offender has denied the sovereign's authority over them so that any act of punishment is now an exercise of mere power expressing the failure of the relation of authority between subject and sovereign. However, Hobbes may not have the last word here, see text (n 49), (n 51) and (n 129) *et seq*.

44 While reparation has also persisted as an aim of sentencing, and the application of restorative justice techniques has expanded in recent times, these have not replaced the distinctively penal aims in modern states. Moreover, restorative justice can be interpreted as a penal practice that contains both retributive and crime reduction aims.

45 See (n 18). In practice, English judges are subject to detailed sentencing guidelines which they should follow unless they are 'satisfied that it would be contrary to the interests of justice to do so' (Sentencing Act 2020, s59(1)). The basic structure of the guidelines requires judges to set out from an assessment of the harm done by and the culpability for the offence committed, and this primary focus on the past

We will look at each in turn. Given that these aims of punishment are usually discussed in the normative register of whether and how the criminal law or punishment can be morally or politically justified, it is essential to keep in mind that we are here discussing them in order to answer the different and prior question of what the substantive criminal law is, independently of whether or not the law or its prescribed penal outcomes can be justified.

The consequential remedies

The three consequential purposes of sentencing aim to use the penal response to reduce offending in the future. They provide a remedy to the sovereign for damage done to its authority by criminal usurpations in so far as they forcibly recruit offenders to the task of reducing the future incidence of usurpations of the sovereign's right to rule. In this way, the consequentialist penal rationales aim to strengthen the sovereign's authority practically.

Imprisonment, fining and forced labour are generally regarded as profoundly undesirable interferences in a person's freedom; so much so that, for reasons we will come to below, inflicting these on others is, as we noted above, universally held to be contrary to the public interest so that these practices are made the subject of criminal offences. When the sovereign inflicts them as a response to offending it can therefore do so with the aim of deterring the offender or others from carrying out future denials of the sovereign's authority. Imprisonment and other coercive interventions in an offender's life may also serve to incapacitate them, rendering them unable to commit offences. The sovereign can also seek to coerce offenders to participate in the effort to rehabilitate, so that they will avoid committing offences in future.

The fewer criminal denials of the sovereign's authority that take place, the greater will be the sovereign's authority in practice.[46] When punishment is imposed on an offender in order to achieve these ends then the offender's usurpation is nullified practically to the extent that the usurpation and weakening of the sovereign's authority becomes merely the trigger for the sovereign to use the offender as a means to *strengthen* its authority in future.[47]

Legal retribution as remedy

We are not concerned here with punishment as moral retribution but with a legally proportionate response to the damage done to the state. The question is not what the

wrong would appear to privilege retributive punishment in the sentencing process over the consequential aims. See A Ashworth and R Kelly, *Sentencing and Criminal Justice* (Bloomsbury 2021) 67.

46 This is a critical point to which we will return below, see text (n 129).

47 It will be immediately noted that there are many other, and possibly more effective, methods to reduce offending and strengthen the sovereign's authority than punishment.

offender deserves morally. The question is whether the offender is given a punishment that 'fits the crime'.

The consequential aims of punishment do not in themselves *require* any proportionality between the particular offence committed by the offender and the sentence imposed, since it may be that in a particular case a disproportionately severe or lenient sentence will be effective in preventing future criminal wrongdoing. However, once we understand that the damage done by the offence is damage to the sovereign's claim to a universal authority, then imposing a proportionality restraint on punishment can be seen to remedy that damage in a way that forcefully *realises* the sovereign's universal authority in a normative sense. This is achieved through two related aspects of proportional punishments.

The first aspect is that imposing an explicitly proportionate sentence serves to nullify any authority that the offender's criminal action might pretend to, thereby realising the sovereign's authority, notwithstanding the offender's usurpation of it. A legally retributive punishment does this by acting out a rights-violation on the offender that is proportionate to the damage done by the offender's violation of the sovereign's right to rule. Alan Brudner points out that the meaning of a legally retributive punishment is that only the sovereign's law has authority: 'by visiting the self-destructive consequence of the wrongdoer's principle upon him, punishment removes the appearance of its worldly validity and vindicates the worldly authority of Law'.[48] The offender's denial of the rights protected by the sovereign's criminal law only licences the sovereign to remove from the offender the protection conferred by those rights, and to impose on the offender an equivalent rights-denial. The proportionate criminal outcome imposed by the sovereign renders the original criminal usurpation of its authority as one of no lasting normative significance; it has been nullified as a denial of the sovereign's authority, leaving only the sovereign's law with authority – as that which ought to be complied with.[49] The criminal outcome *realises* the ultimate authority of the subject's obligations to the sovereign in respect of the conduct that the law prohibits or mandates. It makes that authority real by normatively nullifying the denial of authority.[50]

48 Brudner (n 2) 47.

49 Although a penal rights-violation does not have to consist in what would otherwise be a criminal wrong (eg, disqualifications), the fact that imprisonment, fining and forced labour are very frequently used as punishment is significant from the retributive point of view: penalties that share a common currency, as it were, with paradigmatic criminal wrongs have a particular potency as an instrument of normative nullification.

50 Hannah Arendt's claim that 'authority precludes the use of external means of coercion' (see 'What is Authority?', in *Between Past and Future: Six Essays in Political Thought* (Viking Press 1961) 93), should therefore be treated with caution. It is true, as we noted above (see text (n 38)), that where the criminal law is knowingly violated, authority has failed (and we will return to this, see text (n 129)). However, without the power to inflict the coercion involved in the punishment, the sovereign would lack the means to nullify the denial of its authority, and to realise that authority notwithstanding denials of it (cf: Classmann (n 23) 35). Moreover, where retributive penal coercion is proportionate then it is implicitly authorised by the offender as a subject represented by the sovereign and, therefore, not 'external' coercion (see text at (n 51)).

The second authority-realising aspect of the proportionality restraint on penal severity is that it ensures that the sovereign remedies the offender's denial of its authority in a way that is consistent with the sovereign being the representative of the unity of all the subjects, *including the offender*. Proportionality of punishment derives the severity of the penal response from the seriousness of the offence committed, and thereby from the offender's own volition. In this way, the sovereign's penal response enacts the principle laid down by the offender herself. The offender's intentional or reckless offence is a practical denial of the sovereign's claim that the conduct of subjects is limited by the obligations contained in the law. The sovereign's response in effect takes the offender at her word; or, to be precise, at her deed. In limiting its response to a proportionate denial of the offender's rights in the form of imprisonment, fining, forced labour or a disqualification, the sovereign's penal denial of the rights of the offending subject is implicitly authorised by the offender's own acts.[51] The sovereign does not, therefore, act outside the scope of its authority as the representative of all – *including the offender* – even as it suspends the offender's rights.[52]

For punishment to fulfil its authority-realising capacity through normative nullification it must be proportionate, or at least not disproportionate, to the offence committed.[53] A disproportionate sentence would either be excessive, in which case the punishment is merely an authoritarian violation of the offender's rights that will appear as unauthorised by the offender and tend to undermine the sovereign's claim to be representing a unity of all subjects, or alternatively too lenient so as to undermine the authority of the sovereign by not taking the damage to its authority seriously enough.

The retributive 'punishment of offenders' is an aspect of any criminal outcome, any rights-denial, imposed on offenders that falls within the limits of not being too lenient or too severe, even if retribution is not the stated aim. Its normative authority-realising capacity is independent of whether such a punishment has any practical crime-reduction effects. Proportionality is a notoriously indeterminate measure of punishment.[54] The idea of negative proportionality – that a punishment must not be disproportionate to the seriousness of the offence committed – does not make matters any more definite in the abstract. How do we know how much imprisonment or community service will fall within the limits of a proportional response to a particular offence? However, when proportionality is understood as a matter of remedying damage to the

51 Brudner (n 2) 45–6. The idea is ultimately derived from Immanuel Kant.

52 This authorisation of the sovereign's acts by the offending subject is not to be equated with the idea that the offender morally deserves the punishment. It may or may not also be true that a particular punishment is deserved, but the sovereign's fundamental interest in the retribution is realising its political authority. See further discussion below, text (n 119) *et seq*.

53 Brudner (n 2) 52–5.

54 See J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (OUP 1990) 178; N Lacey and H Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216, 225–7; A Ashworth, 'Prisons, Proportionality and Recent Penal History' (2017) 80(3) *Modern Law Review* 473.

sovereign's authority, these are highly contextual questions of statecraft, and proportionality presents fewer theoretical difficulties to a political jurisprudence of criminal law than it does to justificatory moral theory. We will return to that question and the potential conflict between the main penal rationales below.[55]

In summary, the criminal outcome provides a remedy for the damage to the sovereign's universal authority resulting from violations of the sovereign's rights.

IV. Basic types of criminal law

At this point it may help briefly to clarify the relation between the concept of the substantive criminal law being elaborated here and the specific legal content found in the many criminal offences. The public law concept of crime as a usurpation of the sovereign's rights tells us that the generic content of the criminal law consists of threats that the sovereign will remedy damage to its right to rule by penal means in the event that that right is usurped by a subject. But the state does not exist in order to punish; the state exists to institutionalise the unity of the people in a territory under a single government. The public law concept of criminal law does not directly tell us anything about the specific conduct over which the sovereign will assert its authority in order to achieve and maintain this unity. Nevertheless, the account of public law in which that concept of criminal law is situated also identifies the concept from which we can derive the basic categories of the law's 'special part'.

The sovereign exists to represent the *public interest,* and the idea of the public interest contains a logical distinction between two different broad types of interest that the sovereign may oblige the subject to serve by means of criminal law. The first is the public interest in maintaining the conditions of there being a unity of subjects that is capable of forming a public with an interest. The second is the other interests that this public, as constituted, may be understood to share. And the criminal law reflects this distinction within the public interest in two broad types of criminal wrong: 'truly criminal' offences and 'public welfare' offences.[56]

True crimes and public welfare offence

The truly criminal wrongs impose specific obligations that amount to necessary conditions of there being a state. Without the power to vindicate the authority of laws

55 See text following (n 122) *et seq*.

56 The distinction drawn below between true crime and public welfare offences maps on to Susan Dimock's characterisation of *mala in se* as wrongs that must be criminalised as a necessary condition of the social contract and *mala prohibita* as wrongs that are merely possible to criminalise within the terms of the social contract. But on my account the distinction requires no commitment to a social contract theory of the state (see S Dimock, 'The Malum Prohibitum – Malum in Se Distinction and the Wrongfulness Constraint on Criminalization' (2016) 55(1) *Dialogue* 9).

such as those against homicide, assaults, false imprisonment, theft, robbery, or criminal damage,[57] the 'fiction' that there is a unity of all constituted by a sovereign state will lack sufficient credibility.[58] The conduct that these offences criminalise is contrary to the public interest in a specific and fundamental respect: widespread impunity for that conduct would be incompatible with there being a public that could have an interest.[59] When these offences are committed knowingly, the existence of a fundamental condition of the state's exclusive right to rule is denied. The incapacity to enforce these offences is a characteristic of failed states. This is why these offences appear to be paradigmatic and present in virtually all criminal law systems.

With respect to these offences, legal systems typically require proof of subjective fault for liability,[60] because it is only the knowing violation of the law that amounts to a denial of the sovereign's authority and is incompatible with political unity as such. The particular foundational significance of these offences for the state and for public law is marked by the fact that the negligent or accidental execution of these wrongs is left to private law.[61]

By contrast to true crimes, public welfare offences define conduct that is prohibited or mandated because preventing it is in the public interest without that being a condition of the existence of the public interest. When public welfare offences are committed knowingly, it is not the existence of one of the legal conditions of sovereignty that is denied, but nevertheless the sovereign's right to rule by legislation in the public interest is usurped. Widespread impunity for such conduct might therefore also represent a threat to the sovereign's authority. To this extent, the public welfare offences are also implicated in the maintenance of the state's authority and share a quality of 'truly criminal' offences. However, typically, these offences can also be committed without proof of subjective fault.

57 The list is not intended to be exhaustive. For example, offences against the administration of justice or misconduct in public office are necessary ancillary offences and true crimes in this sense.

58 Note that it is the power to vindicate these laws by punishment that is the necessary condition of sovereignty. It does not follow that this power must always be used. How much it must be used to ensure the state's authority is a contingent question arising from a wider assessment of the strength of the state's authority in the round. See text (n 130).

59 Cf: Antony Duff's legal moralist equivalent, Duff (n 2) 300 and Dimock (n 56).

60 The English courts maintain a presumption of mens rea which is particularly strong where an offence is thought to be 'truly criminal' (*Sweet v Parsley* [1970] AC 133) which can only be overcome if strict liability is a 'necessary implication' of a statute (*Gammon (Hong Kong) Ltd. v A-G of Hong Kong* [1985] AC 1). The courts articulate this distinction in terms of moral stigma (see *Taylor* (n 63)). For the relationship between moral understandings of punishment and responsibility and the concept elaborated here, see text (n 118) *et seq*.

61 It is this distinctive characteristic of criminal law that Vincent Chiao's normative political theory of criminal law as a means of allocating social advantage (see (n 2)) is unable to explain. He treats the true crimes and the public welfare offences indifferently because his 'public law conception' has no account of the juridical nature of the state or of the position of the true crimes in the foundations of its authority (see P Ramsay 'Review of Vincent Chiao, *Criminal Law in the Age of the Administrative State*' (2022) 16 *Criminal Law and Philosophy*, 423).

Public welfare offences as quasi-crimes

When public welfare offences allow for negligence or strict liability, the sovereign proclaims a right that the subject does not do what is prohibited or does do what is mandated by the law. However, a merely negligent or accidental violation of the sovereign's right does not involve the offender in denying the right's existence or usurping the sovereign's authority. There is therefore no normative claim on the part of the offender that is in need of retributive nullification.[62] The sovereign's right to rule is not at stake. In common law jurisdictions these public welfare offences of negligence or strict liability remain part of the criminal law, and English judges refer to the conduct they define as 'quasi-criminal'.[63] The terminology is appropriate, since in many civilian jurisdictions these offences are categorically removed from the criminal law and treated as a separate category of administrative wrongs. These offences deploy a technique of criminal law (the threat of a penalty) without requiring proof of the element that is 'truly' criminal: that the sovereign's authority has been denied and usurped.[64] They are in effect a deterrent pricing mechanism operated by the state intended to reduce the incidence of certain harm-causing behaviours.[65]

V. Criminal procedure

Our analysis of the criminal outcome indicates that it provides a remedy for damage to the state's universal claim of authority arising out of a usurpation of the sovereign's right to rule. This conclusion is confirmed by analysis of two distinguishing features of the criminal procedure, although (for reasons I will come to later) these particular procedures, unlike the power to punish, are not a necessary condition of the sovereign's authority.[66]

Presumption of innocence

The most well-known feature of the modern criminal process is the presumption of innocence. In common law jurisdictions this is institutionalised in the higher standard of proof on the prosecutor than that placed on the complainant in a civil trial. This presumption of innocence is maintained by the sovereign's judicial representative in instructing the tribunal of fact on how to assess the evidence, and it will heavily

62 Brudner (n 2) 182.

63 *R v Taylor* [2016] UKSC 5 per Lord Sumption at [26].

64 The tendency to prefer discretionary enforcement of offences of strict liability in the regulatory public welfare offences creates a significant political tension in the criminal law where offending by the powerful in corporate roles is concerned, see A Norrie, *Crime, Reason and History* (Cambridge University Press 2014) 106–9.

65 Cf: Brudner (n 2) 177–78 and Thorburn (n 4) 58.

66 On the penal power as a necessary condition of sovereign authority, see text (n 59).

influence the prosecutor's decision as to whether there is sufficient evidence to justify proceeding with a prosecution. It is a decision rule that requires that the benefit of any reasonable doubt should go to the accused rather than to the prosecutor even when the prosecutor is an executive agent of the sovereign itself. The tribunal of fact should displace that presumption and convict only if it is 'sure' that it is right to do so.[67] This contrasts with civil proceedings where it is enough to be satisfied of the claimant's case on the balance of probabilities.

The burden and standard of proof do not apply to inquisitorial systems in the same way as they do in adversarial systems. However, such systems maintain rules preventing treatment of the accused as if he was guilty, the doctrine of *in dubio pro reo*, and the requirement that trial judges give written reasons for their judgement, reasons which can be appealed. In Germany, for example, trial judges must give the reasons why they were 'convinced' by the evidence.[68] Taken together, these doctrines function in similar ways to the adversarial burden of proof, and in principle they meet the requirements of Article 6(2) ECHR.

There is a deep and subtle reason why the criminal courts of a sovereign state maintain a presumption of innocence. The Canadian Supreme Court has gestured in its direction, albeit in moralised language:

> The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.[69]

When the legal system presumes that people are 'law-abiding members of the community', it not only articulates a 'faith in humankind'; it also presumes that the sovereign's criminal laws have been obeyed and, in so doing, institutionalises a belief in the universal authority of those laws. When, for example, the sovereign's judicial representative in a criminal trial instructs the tribunal of fact in the burden and standard of proof, the instruction is, by implication, that the starting point of its deliberations should be a presumption that the sovereign's commands enjoy universal authority. The norm of obedience to the sovereign's commands is not only a *prescriptive* one, but also formally *presumed* to be a *descriptive* one.[70] A fact finder must be 'sure' before they find that the sovereign's authority has been usurped by a subject. The strength of this presumption implicitly constructs violation of the sovereign's commands as the exception to the norm. The Canadian court's moral faith in humankind is mediated up by a political faith in the universal authority of the institutions that represent our political unity.[71]

67 *Crown Court Bench Book*, 16.

68 For a discussion, see Thomas Weigend, 'Assuming that the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8(2) *Criminal Law and Philosophy* 285, 290–3.

69 *R v Oakes* [1986] 1 SCR 103, at [29].

70 The thought is adapted from Dale Nance, who discusses the burden of proof in an ethical register, see DA Nance, 'Civility and the burden of proof' (1994) 17(3) *Harvard Journal of Law and Public Policy* 647, 652.

71 On this mediation of morality by political authority see Loughlin, text (n 108).

The alternative to a presumption of innocence is a legal system in which the authority of the law is not presumed by the state's legal process but has to be proved by those who are accused of usurping it. Sovereignty can seek to maintain itself on that basis,[72] but the sovereign's political authority is only strengthened by the institutionalised self-confidence embodied in the presumption of innocence.[73]

There is also a more immediate and practical connection between the presumption and the authority of the sovereign. The English courts have rarely sought to explain why the criminal law maintains the 'beyond reasonable doubt' standard of proof.[74] There is, nevertheless, limited legal authority for the proposition that the standard of proof is a question of 'natural justice'.[75] Certainly it can be seen to have the effect of applying the standards of natural justice.

The presumption of innocence tends to exclude bias since the heavy evidential burden forces the prosecutor to bring enough evidence to render the tribunal of fact sure that the accusations are well-founded, sure that the law was broken, and therefore sure that the conviction serves to protect the public interest rather than being an abuse of the sovereign's penal power in pursuit of a private or factional end. This is valuable to the sovereign in any criminal case, but especially where the prosecution is conducted by a public prosecutor, a natural person who nonetheless occupies a public office that wields a sovereign power.[76] The presumption of innocence serves to ensure (albeit imperfectly) that a particular conviction does serve the public interest in the enforcement of the law and is not being abused in the service of a private or factional interest. The tribunal of fact is not asked to revisit the public interest issue *directly*.[77] It is nevertheless asked to declare itself 'sure' that the prosecution and conviction are a use of the sovereign's coercive power that serves the public interest as the sovereign defines it, because the tribunal must declare itself sure that the rights of the sovereign have in fact been violated.

72 In England, the modern burden and standard of proof only developed across the course of the nineteenth and early twentieth century, see CK Allen, 'The Presumption of Innocence' in *Legal Duties and Other Essays in Jurisprudence* (Clarendon Press 1931); L Farmer, 'Innocence, the Burden of Proof and Fairness in the Criminal Trial: Revisiting Woolmington v DPP (1935)' in JD Jackson and SJ Summers (eds), *Obstacles to Fairness in Criminal Proceedings* (Hart Publishing 2018).

73 Moreover, this normative self-confidence creates a further practical tendency to strengthen the sovereign's authority: by assuming the normality of obedience and the exceptionality of disobedience, the sovereign is setting an expectation that is more likely to be met than it would be without the expectation. Again, see Nance in the ethical register (n 70).

74 Since the landmark decision in *Woolmington v DPP* [1935] AC 462 the application of that standard to the proof of every element of an offence has simply been held to be part of the common law on the (arguable) grounds that the contrary proposition was without sufficient judicial authority. In fact, *Woolmington* made a significant change in the law. See Farmer (n 72).

75 Lord Diplock suggests this rationale in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 671.

76 For more discussion of the sovereign powers of the public prosecutor and the relation of private and public prosecutors, see text (n 98) *et seq*.

77 Arguably, a jury has been left a power to ask itself the public interest question directly by means of jury 'nullification' or a 'perverse verdict', acquitting a defendant of a charge it believes to be factually well founded, should it believe that the public interest is not served by conviction.

The power to prosecute and convict someone of a criminal offence is the most coercive available to the sovereign in normal circumstances. To the extent that the power is abused to serve private interests, the state is dissolved as a political unity, and the claim of those who exercise the powers of the sovereign that subjects are obliged to obedience – their claim to authority – is undermined. Of course, this is another way of saying that the presumption of innocence protects the individual subject from arbitrary oppression by state officials. It reinforces the role of the courts as a check on executive power, assisting the former to hold the latter to account for its accusations. For this reason, the presumption of innocence is rightly thought of as a fundamental aspect of the political liberty of the subject.[78] That the presumption simultaneously serves to realise the sovereign's *authority* speaks to the fact that civil liberty is an incident of sovereignty.[79]

The enhancement of the authority of the offices exercising the sovereign's powers is not merely the result of the fact that the presumption radically limits the opportunity for the abuse of those coercive powers for private or factional purposes; it is also a consequence of the effect that this most famous of legal rules has in *reassuring* subjects that the sovereign's powers will not be abused. Sovereignty is a relation of authority. The confidence of the people in the integrity of the sovereign as a public office is a key aspect of the political relation that constitutes that authority.[80] To the extent that the criminal procedure is open to private or factional abuse, trust in the public offices of the sovereign will be reduced along with the felt obligation of the subjects to obey. The presumption of innocence is, therefore, one of those constraints on public power that, as Loughlin puts it, 'ensure that public power is wielded only for public purposes, bolster the confidence of the people in the integrity of government and […] greatly enhance […] the capacity of public power'.[81]

This then is the significance of the presumption for the sovereignty of the state. While in a civil trial it is enough for a tribunal of fact to be convinced on the balance of probabilities that a private claimant is correct in their claim that a defendant has not fulfilled her obligations, it is not enough in a criminal trial to believe that on the balance of probabilities the sovereign's powers are being used in the public interest. When a criminal court convicts the accused, it declares itself 'sure' that the sovereign's coercive powers are being used in the public interest, 'sure' that in its use of the sovereign's coercive power the office of the sovereign really is what it claims to be.

78 See H Lai, 'Liberalism and the Criminal Trial' (2010) *Singapore Journal of Legal Studies* 87.

79 F Neumann, 'The Concept of Political Freedom' in WE. Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press 1996) 213.

80 See also the South African Constitutional Court in *State v Coetzee* [1997] 2 LRC 593, 677; Y Lee, 'Deontology, Political Morality, and the State' (2011) 8(2) *Ohio State Journal of Criminal Law* 385, 397–401; R Kitai, 'Protecting the Guilty' (2003) 6(2) *Buffalo Criminal Law Review* 1163, 1164.

81 Loughlin (n 6) 85.

Once the heavy burden of proof is understood as a guarantee of the sovereign's claim to authority, the ostensible extremism of William Blackstone's famous ratio, which has proved hard to defend on moral philosophical grounds,[82] becomes much easier to explain. When the high standard of proof is seen as both a confident assertion of the state's authority and a reassurance to the public of the sovereign's integrity as the representative of the unity of all, then it beomes much clearer why it is not merely 'better', but extremely important for the maintenance of sovereignty in normal circumstances, 'that ten guilty persons escape, than that one innocent suffer'.[83]

Control of the initiative

The precise means by which prosecutions may be brought varies widely between jurisdictions.[84] There are some, such as Spain, in which the right of private prosecution is broad and the practice is common.[85] Nevertheless, in modern criminal justice systems, the process tends to be dominated by state officials, and states that give a high degree of control over prosecution to public prosecutors emphasise the centrality of the sovereign's interests in the enforcement of criminal law.[86]

The specific argument I will make here is that where, as in the English law, the sovereign's agents have ultimate control of the initiative but a residual right of private prosecution is retained, the criminal process very precisely articulates the criminal law as an instrument of the public interest and strengthens the criminal outcome as a remedy for damage to the sovereign's authority.[87] Broadly similar systems can also be found in numerous common law jurisdictions.[88]

82 On the difficulties of defending it, see J Reiman and E van den Haag, 'On the Common Saying that It is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con' (1990) 7(2) *Social Philosophy & Policy* 226, 230–4; D Epps, 'The Consequences of Error in Criminal Justice' (2015) 128(4) *Harvard Law Review* 1065, 1139.

83 W Blackstone, *Commentaries on the Laws of England*, book IV (1765; Sweet, Maxwell, Stevens & Norton 1844) 358.

84 For comparative reviews, see Y Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 190–211; CL Ferguson, 'Actualizing Justice: Private Prosecution Regimes for Modern Social Movements' (2023) 56(4) *Columbia Journal of Law & Social Problems* 557, 564–89.

85 See J Pérez Gil, 'Private Interests Seeking Punishment: Prosecution Brought by Private Individuals and Groups in Spain' (2003) 25(2) *Law & Policy* 151.

86 For a discussion of the very wide discretion enjoyed by US prosecutors as an exercise of the sovereign power, see A Sarat and C Clarke, 'Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law' (2008) 33(2) *Law & Social Inquiry* 387.

87 The criticisms levelled at Spain's system precisely include its tendency to relieve the state of its basic political obligations to the citizens and its facilitation of private and factional abuse of the criminal process (see *Ibid*, 162 and 163–4).

88 See Ferguson (n 84).

In England, not only are the large majority of criminal prosecutions undertaken by the Crown Prosecution Service or, in less serious cases, by a police officer,[89] but it is the Director of Public Prosecutions (DPP) who has ultimate control over *all* prosecutions. The Code for Crown Prosecutors makes clear that the prosecutor 'does not act for victims or their families' but in the public interest.[90] The Code determines that if 'there is sufficient evidence to provide a realistic prospect of conviction',[91] a prosecution 'will usually take place' unless 'there are public interest factors tending against prosecution which outweigh those tending in favour'.[92] While individual subjects have rights to mount private prosecutions,[93] those proceedings can be taken over and discontinued by the DPP on the ground that continuing would not be in the public interest.[94] Not only is a private prosecution therefore dependent on the licence of the Crown, but when a victim brings a private prosecution, 'the victim takes the initiative as the representative of society as a whole'.[95]

The executive branch's complete legal control of the initiative is confirmed by the fact that an individual victim of a crime has no right to prevent a prosecution. A victim's unwillingness to cooperate with a prosecution might make prosecution practically difficult, but neither the victim's preference nor any private agreement between a victim and offender will necessarily relieve the offender of criminal liability should the offence come to the notice of the public authorities. All this is in marked contrast to the civil procedure where control of the initiative lies entirely with the victim of a wrongdoing, who can choose whether or not to seek legal redress for a civil wrong without interference by agents of the sovereign power.

In England, it is the public interest that is decisive in the question of whether a remedy will be sought in criminal law. Moreover, the DPP's discretion to determine what lies in the public interest when terminating a private prosecution is broad. In judicial review the courts will only impugn a decision not to prosecute that 'could not be honestly and reasonably arrived at'.[96] And the stated reason for this broad discretion is that the DPP is answerable to the Attorney-General and this 'officer of the Crown is, in his turn, answerable to Parliament if it should appear that his or the Director's powers … have … been abused'.[97]

In other words, in determining which prosecutions should proceed and which should not, the public prosecutor exercises executive powers of the sovereign,[98] and

89 The former are answerable to the Director of Public Prosecutions (DPP); the latter swear an oath of allegiance to the Crown.

90 Code for Crown Prosecutors 4.14(c).

91 Code for Crown Prosecutors 4.6.

92 Code for Crown Prosecutors 4.10.

93 As do various organisations under statutory powers, eg, Department for Work and Pensions, Financial Conduct Authority, Royal Society for the Protection of Animals.

94 Prosecution of Offences Act 1985 s6(2).

95 P Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *The Philosophical Foundations of Tort Law* (Clarendon Press 1995) 40.

96 *Raymond v AG* [1982] QB 839 at 847, confirmed in *R (Gujra) v CPS* [2013] 1 All ER 612.

97 *Raymond*, *Ibid*, Sir Sebag Shaw.

98 Cf: Sarat and Clarke (n 86).

providing their use of that power is not manifestly unreasonable, they are answerable only to the sovereign for any decision to forego prosecution where there is sufficient evidence.[99] The substantive criminal law, therefore, consists of obligations which have remedies for breach that will be sought only where the sovereign is content that seeking them is in the public interest.

Where the sovereign's agents exercise this degree of control over the enforcement of the law, it confirms our analysis of the criminal outcome. The diverse wrongs catalogued in the substantive criminal law are a declaration of the rights of the sovereign against the subject, rights that the sovereign will enforce, unless for some reason to do so would not serve the public interest. Implicit in the sovereign's political right to determine the imperative norms to which the subjects will be subjected is the right to suspend or disapply those norms in the public interest.[100] Since they are the sovereign's rights, the sovereign retains the discretion about when to seek to enforce them. The rights that are protected by the criminal law's catalogue of 'public wrongs' should be thought of as rights of the public, rights that are enjoyed by *all* through the mediation of their sovereign representative.[101]

The exercise of the prosecutorial discretion is a matter of statecraft. It needs to be exercised with care if the state's authority is to be maintained. The raison d'etre of sovereignty is the pursuit of a *public* interest through the sovereign's acting as the representative of the unity of all the subjects notwithstanding their particular and diverse private interests. This unity will tend to disintegrate unless subjects are governed by law, that is, by general norms applicable on a non-arbitrary basis. To the extent that some subjects are exempted by the sovereign from the normal consequences of violating these norms, the purported public interest may be abused as a mere cover for private or factional interests, and the authority of the sovereign as the representative of the unity of all would be undermined. This possibility arises from the fact that, as we have already noted, the sovereign is comprised of public offices, but the powers of those offices are exercised at any particular time by natural individuals who might abuse the sovereign power in pursuit of their private and factional interests.[102] The discretion not to prosecute is an obvious way in which the prosecutorial power could be abused to aid a friend in business or a political ally.

In this context, the right of private prosecution provides 'a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of … authorities to

99 This is not to say that the prosecutorial discretion is beyond review on other grounds, but even then courts will be reluctant to interfere (for an example of just how reluctant, see *R (Cornerhouse Research and another) v Director of the Serious Fraud Office* [2009] 1 AC 756), except perhaps where a decision is based on a legal error (see *R(F) v DPP* [2013] EWHC 945).

100 See Heller (n 30).

101 See also (n 42).

102 Indeed, in the form of the offence of misconduct in public office, the rights of the sovereign against the subjects found in the English criminal law include rights against the natural individuals who occupy the public offices that exercise the sovereign power, see generally J Horder, *Criminal Misconduct in Office* (Oxford University Press 2018).

prosecute offenders'.[103] Although private prosecutions remain ultimately subject to the sovereign's discretion to determine where the public interest lies, such a prosecution represents an opportunity publicly to challenge official inaction and put pressure on the public prosecutor to give reasons why prosecuting is not in the public interest. The subject's right to mount a very public and practical challenge to executive discretion in the form of a private prosecution serves as a bulwark for the sovereign's integrity as a representative of the public interest, of the purported interest of the unity of all, and, therefore, of its political authority, of the felt obligation to obey on the part of the subjects.

VI. The virtues of political jurisprudence

The concept of criminal law

The elements of the formal definition of the criminal law together tell us that the generic content of the substantive law consists of legal rights of the sovereign against the subject, rights whose violation amounts to a usurpation of the sovereign's exclusive political right to rule in the public interest and determines liability to a remedy that nullifies the damage done to the sovereign's claim of universal authority within its jurisdiction. The criminal law is a branch of public law because it is among 'the capacities and restraints that give expression to a particular arrangement of the sovereign authority of the state'.[104] It defines the circumstances in which the state's authority is at stake and that permit the use of its penal 'capacity' to realise that authority in the face of usurpations of it, subject to 'restraints' including general part doctrines like the mens rea requirement, retributive proportionality in punishment and the presumption of innocence in procedure.

It might be thought that all law involves the state's authority since the scope and the application of any law is ultimately a matter for the state's judicial officials. But this would be to misunderstand what is specific to public law. If a judge finds that a subject has breached a contract or committed a tort that too will be a ruling that the subject has acted unlawfully, and the judge may at that point assert the sovereign's authority by making some remedial order. However, the law that has been broken contains capacities and restraints that pertain to the relations between subjects as private individuals in civil society, not to their conduct as participants in the unity of all that is the state and, therefore, to their relations with the sovereign power that represents that unity. Any wrongs concerned are private wrongs not public wrongs. In consequence, and unlike the criminal law, the right to bring a legal action in private law is entirely at the will of a subject who claims to have been wronged or harmed, and the outcome is normally intended to compensate the subject for damage to their private interests,

103 *Gouriet v Attorney-General* [1978] AC 435, 499 per Lord Diplock.
104 Loughlin (n 6).

not to achieve some wider benefit to the state or to communicate the persisting authority of the law.[105] The sovereign's political interest in its authority is not directly at stake in the private law as it is in criminal law, and violations of private law do not necessarily damage that authority (unless the conduct concerned also comprises a criminal offence).[106]

The public law concept of criminal law elaborated here shows it to be an aspect of the constitution of the state's political authority.[107] It identifies the essence of the criminal law as something that arises from the fundamental political characteristics of the state itself. Loughlin characterises the 'political jurisprudence' of public law in the following terms:

> Political jurisprudence takes its orientation from the fact that people are organized into territorially bounded units within which authoritative governing arrangements have been established. This is a distinctive way of being and acting in the world, the world of the political. The political should not be confused with politics. Politics is a set of practices that has evolved to manage conflicts that arise between individuals or groups. The political, by contrast, refers to a decisive and more basic phenomenon, that the primary form of the political unit – the state – is embedded in structures of authority and obedience whose power is such that they shape their members' sense of justice and injustice, right and wrong, freedom and servitude, good and evil.[108]

This may be an unfamiliar perspective in criminal law theory a field where moral philosophy has provided the main source of ideas about the 'sense of justice and injustice', of 'good and evil', ideas that have tended to be considered as existing prior to and independently of the state's particular structures of authority. The criminal law is then reconstructed in the light of the moral theory. Given that readers are likely to be more familiar with the moral philosophical understanding of criminal law, a political jurisprudence of criminal law, and its public law concept, is likely to be misunderstood.

In what follows I therefore seek to clarify the nature of its claims. I will briefly specify the difference between the perspective of political jurisprudence and that of moral philosophy. In the process I will deal with a couple of possible objections to the argument made here and elaborate some of the virtues of political jurisprudence for understanding the criminal law: in particular, its political resolution of two key problems that arise in the moral philosophy of punishment and its identification of

105 In English tort law punitive damages are available only in very limited circumstances (see *Rookes v Barnard* [1964] AC 1129).

106 The authority of the sovereign power will only be at stake in private law proceedings if a remedy has been ordered and a party that has acted unlawfully refuses to comply with the court's order. The affinity between this civil contempt of court and criminal wrongdoing is marked in England by the availability of fines and incarceration as outcomes of civil contempt proceedings (Civil Procedure Rules [81.9]) and the application of the criminal standard of proof (Civil Procedure Rules, [81.4]).

107 Lorenzo Zucca describes criminal law as part of the 'material constitution' in the sense that it is 'essential for a well-functioning constitutional system', even if it is not part of the formal constitution (see, L Zucca, 'The Constitution of Criminal Law' (2020) 70(1) *University of Toronto Law Journal* 38). It is another question whether criminal law could be thought of as an aspect of the formal constitution itself. Brudner proposes that the 'general part' of criminal law could and should be (n 2) 327–8.

108 M Loughlin, *Political Jurisprudence* (Oxford University Press 2017) 1.

an immanent normative standard of criticism of the penal law, one that arises from within its own concept rather than being imposed by external moral commitments.

History and ideology in criminal law

One possible objection to this account of criminal law is historical. The criminal procedure in England, for example, relied for a long time on private prosecution and lacked what we now recognise as the burden and standard of proof on the prosecution. Crucially, it operated on this basis for a long period of time after we can speak of it being a sovereign state. The two procedural elements that I have emphasised here only developed in England over the course of the nineteenth and twentieth centuries.[109] This alerts us to the historical and relative character of political authority. While there are some minimum requirements that must be present before we can speak of sovereignty, political authority is something that a state can nevertheless have more or less of.

One of the minimum requirements of sovereignty is that when the sovereign power determines that something needs to be prohibited or mandated in the public interest, it can nullify denials of its authority by those who would usurp it. Impunity for such usurpation would rob the sovereign of a fundamental characteristic of its being sovereign. The sovereign's penal *power* is therefore not merely a marker of the criminal law's generic content as the sovereign's rights, but a *sine qua non* of the sovereign's political authority, an existential condition of sovereignty. By contrast, while the contemporary procedural elements of the formal definition are markers of the criminal law's role in strengthening the state's authority, sovereignty could in some historical conditions persist while relying on private prosecution or a lower standard of proof.

The intrinsically historical perspective of political jurisprudence contrasts with both moral philosophy and normatively sceptical accounts of criminal law. Political authority depends on subjects having sufficient belief in the rightful character of the sovereign's power, but this recognition among the sovereign's subjects of the sovereign's right to command can vary hugely in its quality. At different times, that recognition might involve a relation of passionate loyalty, tepid endorsement or sullen acquiescence. Political authority depends on some agreed set of beliefs which give the sovereign's commands their *rightful* character,[110] so that enough subjects will be obedient to them enough of the time because they believe they are obliged to obey, and we can, therefore, speak of there being a political unity.

These beliefs take the form of political ideologies, where 'ideology' is understood in a specific, technical sense. Ideologies are particular explanations of social life that may tend primarily to serve one particular set of interests in society, but do so by successfully

109 On the presumption, see Allen and Farmer (n 72); on public prosecution see Ma (n 84); P Cox and others, *Victims and Criminal Justice* (Oxford University Press 2023) Chpt 4.

110 This sense of rightful is social-scientific rather than philosophical. It arises where the power can be rationalised in terms of beliefs shared by sovereign and subjects alike. See D Beetham, *The Legitimation of Power* (Bloomsbury 2013) Chpt 1.

representing those particular interests as the interests of all.[111] It is this practical character, the capacity to provide a state with a plausible claim to universal political authority, that turns a mere social or philosophical theory into an ideology. To succeed politically such an ideological claim, even where it involves a decidedly partial interpretation of social life, has to be sufficiently credible to inspire widespread acceptance among those over whom the state exercises its power, and so allow public officials to maintain their claim to political right on the grounds that they represent the public interest.

The conversion of economic interests and social power into sovereign authority is mediated by an appeal to some account of universally shared or *public* interests. The contest and compromise of these ideologies is the stuff of modern politics and, through that engagement, it is possible to construct an idea of the state as a unity of all its subjects that possesses a public interest.[112] These competing ideological conceptions inform the history of the state's sovereignty as it has evolved from early modern absolutism through liberal constitutional authority to representative democracy (or 'liberal democracy') and, more recently, to its current neoliberal or 'post-democratic' condition.[113] As the ideological basis of the state's claim to authority has shifted, so the ruling conception of the persons who constitute 'the public' and what that public's interest therefore consists of has changed. In the process of this political development, the sovereign asserts new rights, reformulates older rights and jettisons redundant ones.[114] By identifying the category of sovereignty as conceptually critical to the criminal law, political jurisprudence allows us to situate the development of the law and its norms in their specific social and historical context in a systematic way that goes beyond recording the contingent reactions of influential jurists or political figures to contingent events in law's environment, as found in more normatively sceptical accounts.[115]

Sovereignty is a work in progress (or regress). The institutional forms of the state can embody a stronger or weaker authority.[116] Statecraft is a practical matter carried

111 I Meszaros, *The Power of Ideology* (Harvester Wheatsheaf 1989) 10–12.

112 Classmann's 'realist' account of criminal law articulates the underlying problem of maintaining the state's authority that ideology helps to solve, but without recognising ideology's mediating role: 'The "proper" representation of the state as a "single entity" … hinges on the suitability of governmental measures … to forge an "appearance" of unity … in spite of the differences and disagreements … that prevent the "multitude" from moving as a collectivity' (see (n 23) 31).

113 The idea of an evolution of political authority is adapted from Alan Brudner (see his *The Owl and the Rooster* (Cambridge University Press 2017) Chpt 6). Brudner does not extend the idea to democratic or post-democratic sovereignty, but for discussion see P Ramsay, 'The Sovereign's Presumption of Authority (Also Known as the Presumption of Innocence)' *Law, Society and Economy Working Paper* 15/2020, and P Ramsay, 'A Democratic Theory of Imprisonment' in I Loader and A Dzur (eds), *Democratic Theory and Mass Incarceration* (Oxford University Press 2016).

114 To take only the simplest examples, the expansion of the public welfare offences in England occurred as the ruling idea of the public interest adapted to the democratisation of the state (see Ramsay (n 1)).

115 This is the decisive difference between a political jurisprudence of criminal law and Farmer's historical account (see Farmer (n 2) and P Ramsay, 'Civilisation Through Criminalisation: Understanding Liberalism's Dystopian Tendency' (2019) (10)1 *Jurisprudence* 91).

116 For a discussion of weakening in a general public law context, see M Loughlin, 'The Erosion of Sovereignty' (2016) 45(2) *Netherlands Journal of Legal Philosophy* 57.

out by natural persons with political ideas and material interests. Actual sovereigns maintain their authority on a more rough-and-ready basis than will satisfy a moral philosopher, and the officials who wield sovereign powers may also undermine the authority of their office in the very endeavour of asserting it.[117] The mediation of sovereignty by political ideology also helps us to understand the preponderant influence of moral philosophy over the field of criminal law theory notwithstanding its shortcomings as an explanation of the actual criminal law.

Moral philosophy and ideology in criminal law

Another objection to the concept of criminal law elaborated here might be that it claims to offer an explanation of the criminal law and yet its terms make little appearance in the language through which the penal law proceeds. In England, the 'public interest' will sometimes be mentioned in criminal appeals, but the state's sovereignty and political authority make no real appearance in criminal law doctrine. Meanwhile, a term like 'fairness', which has made no appearance here, will be found all over the criminal law in the English-speaking world. English judges follow sentencing guidelines that are framed explicitly in terms of 'harm' and 'culpability', the terms relied on by moral philosophical theories of criminal law; and sentencing in high-profile cases is often accompanied by highly moralised language. Moreover, there are many elements of the substantive criminal law that require a tribunal of fact to make assessments of a defendant's conduct in a way that will depend on its own moral standards.[118] Is the claim of political jurisprudence that the criminal justice system is deluded about its own practice?

None of these facts about the moralised terms in which criminal justice is conducted and rationalised undermines the political concept of criminal law elaborated here. The thinking of those within the criminal justice is not delusional; it is ideological. As we have just observed, sovereign authority depends upon successful ideological claims about the rationale of state power, claims based on beliefs that are shared by rulers and subjects alike; and moral retributivism and crime-prevention consequentialism are just such ideological claims. They offer arguably liberal explanations of criminal justice in so far as retributivism aims to respect the individual as a moral agent, by punishing only to the extent that will communicate the appropriate amount of moral blame,[119] and consequentialism to ensure that the state's coercion is oriented to

117 Unenforceable laws are an obvious example. I have elsewhere argued that the state's sovereignty has also been undermined by the recent expansion of pre-emptive offences, see P Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012), esp Chp 10; P Ramsay, 'Pashukanis and Public Protection' in M Dubber (ed), *Foundational Texts in Criminal Law* (Oxford University Press 2013).

118 See generally, A Norrie (n 64).

119 A von Hirsch, *Deserved Criminal Sentences* (Bloomsbury 2017). Liberalism being a very broad church not all liberals accept that. For very different liberal critiques of the moral philosophy of punishment, see Brudner (n 2), and Chiao (n 2).

the public welfare. By representing the aims of punishment in these philosophical terms, that are indeed widely shared, the element of sovereign authority that is intrinsic to the law is taken for granted, and obscured.

In so far as judges act on the basis of deterrence or moral retribution, they are relying upon and reproducing this ideological structure. They are occupants of a public office exercising the sovereign's penal power to punish in order to prevent crime or to give offenders what they believe offenders deserve. And, for as long as liberalism remains a significant influence on the ideological rationalisation of the state's power, both these ways of thinking can be consistent with the exercise of the state's authority.

We have already seen that the reduction of crimes pursued by moral consequentialism entails a reduction of the violations of the sovereign's rights. The pursuit of the public welfare is a matter of the public interest that the sovereign has staked its authority on through criminalisation. On the other hand, if judges impose proportional retributive sentences that they imagine are *morally* deserved, these too can serve the realisation of the political authority of the state to the extent that (a) moral retributivism is a belief shared in general terms between the people and the judiciary, and (b) sentencing practice adequately reflects popular beliefs concerning offence seriousness. In these circumstances, giving offenders what judges perceive to be their just deserts will appear rightful and serve to realise the sovereign's authority *in its own ideological terms.*

Similarly, the state's authority can find expression through a criminal law that sometimes relies on a jury evaluating a defendant's conduct in terms of the moral standards of the day, for example, by asking if a defendant's conduct was 'reasonable' or 'honest'. For a liberal democracy, as England and Wales claims to be, moral desert *can* therefore serve as a rough-and-ready ideological realisation of the sovereign's authority.

The point is not that moral philosophy is entirely false as an explanation,[120] but that it is partial. Legal moralism fails to explain numerous aspects of the criminal law that are open to the perspective of political jurisprudence. Crucially, it cannot provide a complete theory of criminalisation because it struggles to answer the question of why only some moral wrongs and some harm-causing behaviours become criminal wrongs, while others do not. This is not a question that moral philosophy can answer because it is a political question, a historically relative matter of what the legislative sovereign regards at any particular time as being in the public interest.[121]

Another well-known problem that bedevils the moral philosophy of punishment is the contradictory relation between the two types of justificatory penal theory. Political jurisprudence, however, identifies the real social basis of this contradiction and explains

120 Indeed, following Brudner and Hegel, I have here adapted a famous insight of Immanuel Kant's moral philosophy to make the argument that retributive punishment can nullify any claims to authority that might otherwise adhere to crimes.

121 'The details of a comprehensive theory of criminalization require nothing less than a theory of the state', D Husak, *Overcriminalization* (Oxford University Press 2008) 120.

why in practice it proves manageable. The problem is that the consequentialist aims of punishment *in themselves* determine a penal response that is limited not by the seriousness of the offence already committed but by what is necessary to prevent offending in the future. Such punishment therefore lacks the intrinsic element of proportionality to offence seriousness that we identified arising from retributivism. A sentence that is thought necessary for deterrent, incapacitatory or rehabilitative purposes may not satisfy retributive criteria of proportionality, and vice versa.

The tension between the two arises from the underlying fact that they are remedies for damage to the state's authority. The sovereign's claim is that it represents the unity of all; a claim to represent both the interests of the *unity* of all – the supposed public interest – and the unity of an *all* that is in fact comprised of a multitude of individuals without whose putative authorisation the state has no claim to be an actual unity. If the state has the universal authority arising from this claim to represent the unity of all, then it is an authority that arises from each as well, so that each is obliged to obey, and the state can realise its claim to be a unity of *all*. It is this political tension between the claims of the unity, on the one hand, and of the many individuals who comprise the unity, on the other, that finds expression in the legal-philosophical tension between the consequential and retributive aims of punishment. The consequential rationale pursues the public interest in there being less of the conduct that the sovereign has criminalised; the retributive aim of punishment seeks to limit punishment by the sovereign to an interference with rights that has been implicitly licensed by the offender herself, and thereby to respect the particular offender as one of those individuals who make up the unity that the sovereign represents.[122]

The conflict between the two rationales is a practical problem for the sovereign's authority. A sovereign that consistently imposed disproportionate punishments would be failing to represent offenders as among the unity of all and, to the extent that this was experienced as injustice, it would be an expression of the weak condition of the state's political authority. A sovereign's authority will be strengthened by a system that ensures that the pursuit of practical nullification is limited by the requirements of normative nullification, of universal representation, and therefore by the need not to be disproportionate. Whether or not such a system of 'limiting retributivism' is morally justified, or whether it is essentially retributive or consequentialist overall, are not issues for political jurisprudence. The only question is whether the penal system provides adequate reinforcement for the sovereign's political authority in the face of usurpation: that is, a practical question of statecraft.

122 This political tension is fundamental to the modern state because it is an expression of the underlying reason for the state's existence. The sovereign state arises as the means to govern a civil society comprised of mutually dependent individuals who, as such, have a general interest, but whose mutual dependence is nevertheless mediated by their competitive and antagonistic relations with each other as putatively equal individual subjects in a civil society characterised by market relations (Cf: K Marx and F Engels, *The German Ideology* (Lawrence & Wishart 1985) 53.)

Grasping criminal justice as a practice of statecraft explains another well-known difficulty for retributive theory: the indeterminacy of the scale of proportional sentences, or of what the upper and lower limits of a proportional sentence should be. It is relatively straightforward for moral retributivism to imagine a system of proportional punishments, ranked and separated by the seriousness of the offences they are responding to in terms of the harm done and culpability (ordinal proportionality); but these factors cannot tell us where the entire scale of punishments should be anchored (cardinal proportionality). The severity of the scale overall appears to be a matter of convention, varying between different periods and jurisdictions.[123] This relativity may be a headache for moral retributivism, but it is meat and drink to the political jurisprudence of crime and punishment.

From the political point of view, the retributive aspect of punishment provides normative nullification of the damage done to the sovereign's authority by the offender's usurpation. Offences will be ranked ordinally by how far the offender went in violating the law (the gravity of the sovereign's interest in the particular conduct which is a function of the harm done) and the extent of the offender's subjective commitment to the offence (intentional, reckless, knowing, suspecting, etc). But how much punishment overall this requires, the cardinal anchoring of the scale, is indeed a contingent question because it is dependent on the overall strength of the sovereign's authority. How little punishment will still do adequate nullifying work, and how much will be excessive, are jurisdictionally and historically specific questions. The same crime will do less damage to the authority of an already strong sovereign than it will do to the authority of an already weak one. The prevalence of crime will be one significant factor in determining the strength of the sovereignty, but far from the only one, since the sovereign may strengthen (or weaken) its political authority in numerous ways unrelated to criminal law.[124] In general though, the greater is the authority that a sovereign enjoys with its subjects – the stronger is their political relation – the less punishment should be needed for any particular offence because the relative damage that that offence does to that particular sovereign's authority will be less. In other words, the 'cardinal' scale of proportionate punishments will decline in severity as the authority of the sovereign strengthens, and vice versa.[125]

Moral philosophy is an ideological standpoint in the technical sense, outlined above, because it provides only a partial account of the criminal law. Its account is true to the extent that preventing much of the conduct that is criminalised is a question of public welfare, and that many offences are widely regarded as moral wrongs so that there is an arguable case that a proportionate response does a kind of justice.[126] However the moral philosophical theory overlooks the logical connections between

123 von Hirsch (n 119) 22–3; see also (n 54).

124 Notwithstanding a persistent crime problem, a sovereign might enjoy a very high degree of loyalty for other reasons, such as a prosperous economy, success in wars, popular engagement in government and so on.

125 Cf: A Brudner, 'The Contraction of Crime in Hegel's Rechtsphilosophie' in M Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014), 160–1.

126 Although the idea of retributive justice is at best controversial. The literature is huge. For a recent demolition of the idea that the criminal justice system can be justified on morally retributive grounds, see Chiao

the state's political authority and the criminal law's defining elements. It discounts the intrinsically political character of criminal law, the law's dependence on the changing conception of the public interest, and the relation of inverse proportionality between the severity and scope of the penal law and the strength of the state's political authority.

By contrast, political jurisprudence not only offers a systematic explanation of criminal law and its normative dilemmas from the standpoint of the ruling ideological understanding of the public interest at any one time, but it does not suffer from moral philosophy's partial perspective in reverse. While moral philosophy overlooks the logical connections between criminal law and the state's political authority, political jurisprudence, as we have just seen, can recognise moral philosophical theory as a partial representation of the criminal law's essential character. Moreover, political jurisprudence can also imagine why this partial way of thinking about the criminal law should be so influential notwithstanding its limitations. Moral philosophy offers a way of thinking about the law, and its justification or reform, from a standpoint that serves the needs of a liberal sovereignty by presenting the problems thrown up by the development of the criminal law and criminal justice as problems that could be resolved by philosophical reflection, rather than as raising fundamental questions about the condition of the state's authority that may in turn pose deeply controversial political questions.[127]

Unlike moral philosophy, political jurisprudence confronts the fundamentally political character of criminal law as public law, and it does not strive to reconcile the content and the practice of this political institution with some morally coherent or appealing scheme. Political jurisprudence can, therefore, account for the tensions in criminal justice and criminal law that moral philosophy struggles to explain. Moreover, in its very lack of abstract philosophical ambitions for criminal law, political jurisprudence also provides a more compelling practical standard of criticism for the law and the state's penal practice: sovereign authority itself.

VII. The immanent critique of criminal justice

The public law concept of substantive criminal law is that the obligations the law contains are the reflex of rights of the sovereign such that violation of these rights damages the universality of the sovereign's authority, creating liability for remedial action in the form of punishment. Criminal law is an instrument that realises the political authority of the representative of the unity of *all* subjects over *each* subject. Rather than seeking to justify the practice of state punishment, this political jurisprudence identifies a concept of criminal law that, although it is grounded in the political characteristics of the state

(n 2). For a contemporary review of the fundamental problems of injustice and the criminal law, see Lacey (n 36).

127 Cf: Norrie (n 64) 20–5.

which maintains the law, nevertheless contains a critique of punishment arising from within the state and the law itself.

The concept of crime as a usurpation of the sovereign's rights, and therefore a practical denial of the state's authority, implies that every punishment is also a marker of damage to the state's authority.[128] Alice Ristroph expresses doubt that the damage to the universal authority of law done by violation of the criminal law, and the repudiation of the sovereign's authority that is entailed, can ever be 'fully' repaired by punishment.[129] Certainly, we can say that state punishment is always an inferior option because it means that the sovereign's rights have in fact been usurped, even if punishment is at least to some extent effective in nullifying the damage both practically and normatively. From the point of view of the state's authority, it would be *better* that fewer subjects were caused to usurp that authority; and best of all would be a sovereign with subjects so loyal and confident in their government as to render unnecessary penal nullification of the relatively few usurpations that did occur. As we noted in the previous section, the amount of retributive punishment required for any particular offence will be reduced in proportion to the strength of the sovereign's authority, that is to the strength of the political relations between subjects and sovereign. It becomes possible to imagine circumstances in which our loyalty to the representative of our unity would be so strong that such crimes as we do still endure nevertheless did little damage to its authority.[130] Or, as Thorburn observes, 'good government involves ordering a society so that criminal wrongdoing is infrequent and the resort to punishment in response is even more seldom'.[131]

The invocation here of political authority and sovereignty as the key categories in understanding the criminal law and punishment will no doubt set alarm bells ringing in many liberal minds. For a long time, the distinct category of authority has tended to be elided into mere power. Authority is, as a result, likely to be confused with authoritarianism, raising the spectre of unaccountable state power, in which obedience is achieved through fear and the oppressive application of a severe penal regime. However, once we grasp the nature of the criminal law in terms of the relational concept of authority identified by political jurisprudence, the distinction between true political authority and mere power comes into view, and with it an entirely different critical perspective on the practice of state punishment. It turns out that there is a relation of inverse proportionality between the authority of the sovereign, on the one hand, and the frequency and severity of punishment, on the other. The political jurisprudence of criminal law identifies a path to the

128 See text (n 39).

129 See (n 43).

130 As I have argued elsewhere, the only way to enhance the state's sovereignty to this degree is through the radical democratisation of government (see Ramsay, 'A Democratic Theory of Imprisonment' (n 113)). Such a strengthening would lead to an ever more authoritative unity between citizens and the sovereign power, closing the political distance between citizenry and sovereign, radically reducing crime and requiring only the mildest penal regime.

131 Thorburn (n 4) 50.

reduction, or even the abolition, of the state's penal *power.* That path is enhancing the state's political *authority*.

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