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Criminal Law as Public Ordering

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CRIMINAL LAW AS PUBLIC ORDERING

Though 'law and order' is a familiar phrase, the precise meaning of order and its relation to law are issues that criminal law theorists have only recently begun to study closely. This article contributes to that growing literature by exploring order as a verb rather than as a noun. As a noun, order suggests a state of stability and peace. But as a verb, to order may be to command, or more interestingly, to arrange or organize. Indeed, order, the noun, is intelligible to us only after we have engaged in the activity of ordering, only after we have invented or been taught some principle of organization. To see criminal law as public ordering is to see it as the ongoing activity of constructing, maintaining, and revising an order or multiple orders. This account is more descriptively accurate than prevailing theories of criminal law, I suggest, and it also may provide greater leverage for critiques of existing legal practices.

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I *Introduction*

There are nine orders of angels, of which one is called angels, according to the medieval angelologist Dionysius the Areopagite. They are organized into three hierarchies, the first consisting of cherubim, seraphim, and thrones; the second consisting of dominions, virtues, and powers; and the third consisting of principalities, archangels, and angels.[1] There are fourteen orders of animals in the sinologist's encyclopaedia famously, if apocryphally, reported by Jorge Luis Borges: '[A]nimals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.'[2] I hope it will not offend angelologists, sinologists, or criminal law scholars to ask whether these classifications might help us think about criminal law and its relation to order.

Now, in the usual order of things, a reference to this Borges passage is a way to show how far you have already come; it is post-structuralist, postmodern, postcolonial, post-humanist.[3] Scholars cite the Chinese encyclopaedia to show that they

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1 See Dionysius the Areopagite, *The Celestial Hierarchy* (date unknown, but estimated around 500 AD) at 164–5. This work is out of print, but its text is available on the website of the journal *Esoterica*, online: <www.esoteric.msu.edu/VolumeII/CelestialHierarchy.html>.

2 Jorge Luis Borges, 'The Analytical Language of John Wilkins' in *Borges, Other Inquisitions 1937–1952*, translated by Ruth LC Simms (Austin: University of Texas Press, 1975) 101 at 103 (describing an encyclopedia purportedly entitled *Celestial Emporium of Benevolent Knowledge*).

3 The Borges passage is well known among readers of Michel Foucault, who explains that the list 'kept me laughing a long time, though not without a certain uneasiness that I found hard to shake off.' Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Vintage Books, 1994) at xvii. Foucault used the phrase 'heterotopia' to describe Borges's world – a place filled with things that are completely different, not just from the observer

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have already recognized the arbitrariness of some existing set of categories and are prepared to abandon it.[4] The fabulous and the frenzied are the calling cards of a demolition squad. It is possible, however, to take a different lesson from the sinologist's encyclopaedia or the hierarchies of angels. One could recognize a given order as contingent and constructed and yet decide that the construction is one worth preserving. Consider the modern English alphabet, which apparently evolved as Christian missionaries used Latin script to write already existing English words. Some letters – u, j, and w – were added much later than the others. The process was full of chance and contingency, and the 'alphabetical order' so familiar to us today corresponds neither to the chronology of letters' appearance nor to any apparent dictate of the universe. It is a constructed order but a very useful one. Whether the orders of criminal law are similarly worthwhile remains to be seen.

If we take the specific term so productively suggested by Lindsay Farmer – 'civil order' – as a way to understand criminal law, the juxtaposition promises to be interesting.[5] It is nearly axiomatic that civil and criminal are opposites. At least in American law, efforts to classify law as civil or criminal treat the two categories as mutually exclusive. On the other hand, law and order are friendly companions rather than antitheses of one another. Still, they are not exactly the same thing unless we believe the familiar call for 'law and order' to be a redundancy. Order, perhaps, is the result or hoped-for result of law. Farmer suggests something along those lines: '[T]he growth of the modern criminal law is fundamentally concerned with the question of securing civil order: the interaction of self-directed, autonomous individuals in a modern society.'[6] On this account, order is a noun, and civil order is a state of human existence.

In this article, I take a somewhat different approach. Order is also a verb, commonly used in two different senses – in the first, to command and, in the second, to organize or arrange according to some principle. The first sense is easily associated with criminal law, which is often theorized in terms of commands and sanctions. I do not think we should neglect the ways in which criminal law gives orders, but that function is not my primary focus in this article. Rather, it is the second meaning of order as a verb, to organize or arrange, that is of greatest interest here. Order, the noun, is intelligible to us only after we have engaged in the

but also from one another and, thus, not subject to order. Heterotopias are disturbing 'because they secretly undermine language, because they make it impossible to name this and that . . . [because they] contest the very possibility of grammar at its source; they dissolve our myths and sterilize the lyricism of our sentences' (at xviii). Though Foucault is often invoked as postmodernist or post-structuralist, he rejected those labels and called himself a modernist. Perhaps that is why the encyclopedic list made him uneasy, as amusing as it is.

4 See e.g. Allan C Hutchinson, 'From Cultural Construction to Historical Deconstruction' (1984) 94 Yale LJ 209 at 236, n 143 (reviewing James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984)).

5 Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016) [Farmer, *Modern Criminal Law*].

6 Ibid at 193. For a very different account that nonetheless also treats order as a noun, a state of affairs to be pursued by criminal law, see Chad Flanders, 'Criminal Justice and the Liberal Good of "Order"' (2020) 70:Suppl UTLJ 102.

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activity of ordering, only after we have invented or been taught some principle of organization. The orders of angels and animals are useful here because they seem (to me, at least, and to my readers, I hope) so clearly a product of human ordering, even if they purport to describe naturally occurring categories.

This article examines criminal law as a system of public ordering. With the phrase 'public ordering,' I want to call to mind the concept of private ordering, which is often depicted as an alternative to public regulation. Some commentators conceptualize private ordering as a space where law is silent or absent; others identify it as the domain of private law, where law operates mainly to enable and enforce choices made by private actors.[7] There may be good reason to question the public/private distinction that underlies these standard invocations of private ordering, but that issue is not central to my inquiry here. Rather, the concept of private ordering is useful because there is usually no *a priori* conception of 'private order' that we expect private actors to vindicate; it is the very activity of ordering, the practice of constructing an order that is being allowed or protected by the state.[8]

Imagine now an analogous conception of public ordering, in which there is no *a priori* conception of order that we assume (public) law will vindicate.[9] Instead, law is itself the ongoing activity of constructing, maintaining, and revising an order or multiple orders. Under this conception, order (the noun) is the always contingent product of a process of ordering. To imagine criminal law as an activity or process – as the ongoing practice of public ordering – is potentially fruitful, in at least three related ways. First, because ordering is a concept that crosses the public/private dichotomy and indeed the civil/criminal distinction, it may lead us to re-examine criminal law exceptionalism. I use this term to capture the view that criminal law addresses unique problems, serves unique purposes, or operates through unique mechanisms.[10] Criminal law exceptionalism, I argue, encourages the overuse of

7 Cf. Daniel A Farber & Philip P Frickey, 'In the Shadow of the Legislature: The Common Law in the Age of the New Public Law' (1991) 89 Mich L Rev 875 at 886 (distinguishing between (public) 'rules that uphold private ordering and those that override private ordering'). In a few works, Michael Krauss has described criminal law as a form of public ordering that should be contrasted with the private ordering of tort, property, and contract law. See e.g. Michael I Krauss, '"Retributive Damages" and the Death of Private Ordering' (2010) 158 U Pa L Rev 167 at 169–70 [Krauss, 'Retributive Damages'].

8 In Part II, I explore further whether there is a minimum content to the concept of order.

9 I doubt there is a single identifiable conception of public order, or civil order, that is sufficiently independent of criminal law that it could either dictate or explain the various choices that a given society makes with respect to criminal law. Whether there is a single conception of public order and whether that conception is independent of criminal law are in principle two different inquiries. In his contribution to this volume, RA Duff suggests that conceptions of public order or civil order may vary from one society to another and also that a given society's conception of civil order will inform and structure its criminal law. See RA Duff, 'Criminal Law and the Constitution of Civil Order' (2020) 70:Suppl UTLJ 4. I share Duff's view that conceptions of civil order are many, but I think criminal law and conceptions of order are mutually constitutive, in that law is as likely to structure conceptions of order as vice versa.

10 See Alice Ristroph, 'An Intellectual History of Mass Incarceration,' (2019) 60 Boston College L Rev 1949 at 1953–1955 [Ristroph, 'Intellectual History'].

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criminal law; it blinds us to the possibility that some other response – civil law, private ordering, or even doing nothing – would be better than criminal interventions. Second, while the language of order is all over criminal law, it is found most often at the bottom of criminal law's hierarchies, in petty crimes and street policing, such as *public order* offences and *order maintenance* efforts. Criminal law theory has long given prominence to murder and rape as standard exemplars of criminal acts, though such acts make up only a tiny percentage of all crimes. To think of criminal law as the process of public ordering invites more attention to ordinary criminal law – to the enforcement efforts and responses to minor offences that constitute the vast majority of criminal law interventions. Finally, as already suggested, public ordering is a way to reconceptualize what criminal law is by studying what criminal law does: how it operates, or the activities it involves. This, I think, is a more promising line of inquiry than efforts to identify the aims or purposes of criminal law.

In what follows, I first explore briefly the term 'private ordering,' noting some typical usages and relevant implications. Then I elaborate on each of the three opportunities for theoretical redirection just mentioned: a reappraisal of criminal law exceptionalism; increased attention to the low-level interventions of criminal law; and a shift in focus from the purposes of criminal law to its modes of operation.

II *Freedom and contingency in private ordering*

The phrase 'private ordering' is used to describe choices by private entities about how to interact, make, and enforce promises and resolve disputes with one another. Sometimes private ordering is said to be something that law protects or enables, as when contract law enforces choices and commitments made by autonomous private actors, or when divorce law structures 'negotiations and bargaining that occur *outside* the courtroom.'[11] In other contexts, private ordering is depicted as an alternative to law, a way of opting out of legal default rules or a way of resolving issues that law leaves unaddressed altogether.[12] In both usages, typically there is no thick conception of order that we expect private choices to vindicate. Once the activity of private ordering is underway, of course, there may be a conception of 'order' that the activity produces. But the moment before private ordering begins, the world that will result from the process of private ordering is unknown, dependent on the unpredictable choices of autonomous agents. For many champions of private ordering, the contingency of the resulting order(s) is simply the manifestation of freedom.[13] Others argue that the outcomes of private

11 Robert H Mnookin & Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale LJ 950 at 950 [emphasis in original].

12 See e.g. Jennifer E Rothman, 'Copyright's Private Ordering and "The Next Great Copyright Act"' (2014) 2 BTLJ 1595 at 1598 ('[m]uch of the private ordering has developed to address uncertainties or failings of the current law, while other aspects of such ordering have sought to provide alternatives for those who seek something different than what the basic defaults of copyright offer').

13 Martha Ertman notes that private ordering is generally associated with consensual and reciprocal relationships. See Martha M Ertman, 'Mapping the New Frontiers of Private Ordering: Afterword' (2007) 49 Ariz L Rev 695 at 696. Ertman herself suggests that under conditions

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ordering are in fact likely to have certain characteristics, such as efficiency or ingenuity, that a society should embrace. But even when private ordering is said to yield efficient or otherwise desirable results, the term private ordering, and a choice to allow or encourage private ordering, is typically focused on the activity of ordering and not on a specific outcome of that activity.

Again, there is no *thick* conception of order that pre-exists the activity of private ordering and that we expect to see vindicated by that activity. But there may be a very thin conception of order – namely, 'order' may imply the existence of some form of dispute resolution, some system of rules, and some minimal degree of predictability.[14] If, instead, we have chaos and random violence, perhaps we would say that no private ordering, or ordering of any kind, has in fact transpired. One can accept this thin conception of order and, nonetheless, see that it does relatively little to predict or constrain the activity of private ordering. Disputes may be resolved by many different methods, including violent and rule-bound ones, such as duelling, which is sometimes cited as a form of private ordering.[15]

Relatedly, because private ordering does not imply any pre-existing normative account of the ideal or proper order, there is usually no strong presumption of legitimacy attached to an order created by private choices. Indeed, some scholars have examined criminal activity itself, especially organized crime, as a system of private ordering. Especially if state institutions and formal law do not ensure effective contract enforcement, the enforcement of other rights, financing options and debt collection, and other services, criminal organizations may develop to serve these functions.[16] The 'order' enforced by the mafia or another criminal syndicate is not presumed to be legitimate or granted any special moral standing, even if it is more peaceful and efficient than the order that would be produced strictly by public institutions.

Organizations, whether criminal or not, engage in ordering in another sense: they order themselves, typically establishing a hierarchy of members and roles and assigning individuals to specific functions. An organization is thought to be able to accomplish more, and to sustain itself better, than a conglomeration of undifferentiated individuals. The concept of private ordering does not always entail classifications of people, but it is important to note that it sometimes involves such classifications, whether within criminal organizations or in legally and

of pre-existing inequality – a world of haves and have-nots – private ordering could either benefit or harm the have-nots; there is no guarantee which way it will turn out (at 701).

14 For example, Robert Ellickson's famous study of private ordering among cattle ranchers operates on a conception of order as the peaceable resolution of disputes. Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

15 See e.g. Judith Resnik, 'Bring Back Bentham: "Open Courts," "Public Trials," and Public Sphere(s)' (2011) 5 L & Ethics Human Rights 2 at 6, n 9 (characterizing 'vendettas, duels, and private alliances' as forms of private ordering).

16 See Curtis J Milhaupt & Mark D West, 'The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime' (2000) 67 U Chicago L Rev 41; see also John McMillan & Christopher Woodruff, 'Private Order under Dysfunctional Public Order' (2000) 98 Mich L Rev 2421.

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socially approved activities such as internal corporate governance or the construction of familial relationships.

To be clear, it is the term 'ordering' that I wish to deploy in the remainder of this article, not the adjective 'private.' Although some conduct presently regulated by criminal statutes might be better left to private choice, my aim here is not a call for privatization of criminal law or an investigation of the always-incomplete public/private distinction.[17] Rather, I invoke the familiar concept of private ordering because it invites us to think about ordering as an activity instead of order as a specific (and desired) state of affairs. As an activity, ordering is a way of classifying individuals and assigning them specific roles to create a more complex institution and also a way of coordinating the interactions of individuals and institutions. Criminal law does both of these things, and to think of criminal law as a process of ordering yields several related insights, which are discussed in turn below.

III *Doubting (some forms of) criminal law exceptionalism*

It is certainly conceptually possible to embrace 'public ordering' as a description of criminal law and, at the same time, to insist on a stark distinction between criminal law's public ordering and the activity of private ordering that is familiarly associated with contract, tort, or property law.[18] That is, an investigation of criminal law as the activity of ordering does not necessarily erode a sharp civil/criminal dichotomy. But even if a reorientation of criminal law theory around the concepts of order and ordering does not compel the wholesale rejection of criminal law exceptionalism, it creates an opportunity for reassessment, as this Part will suggest.

Criminal law is said to be special in at least three ways, which I will describe as burdens exceptionalism, subject-matter exceptionalism, and operational exceptionalism. First, the burdens imposed on those who violate criminal law are distinctive.[19] Criminal punishment is not always categorically distinct from civil

17 As Duncan Kennedy and others have observed, ostensibly 'private' ordering typically occurs against some background of legal rules and public institutions: 'The state uses force to ensure obedience to the rules of the game of bargaining over a joint product. . . . [The state] is an author of the distribution even though that distribution appears to be determined solely by the "voluntary" agreement of the parties.' Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 Leg Stud Forum 327 at 329.

18 See Krauss, 'Retributive Damages,' supra note 7.

19 The view that criminal sanctions are distinctively burdensome is widely held, even among commentators who otherwise resist criminal law exceptionalism. See e.g. James Lindgren, 'Why the Ancients May Not Have Needed a System of Criminal Law' (1996) 76 BUL Rev 29 (accepting the law and economics premise that criminal law is just one more effort to shape human behaviour through incentives and disincentives, but suggesting that modern criminal law employs uniquely 'brutal' disincentives). The US Supreme Court relied in part on the supposedly distinctive stigma of criminal sanctions to require proof of guilt beyond a reasonable doubt in criminal proceedings, though, tellingly, the Court announced this standard in a proceeding that was technically civil. *In re Winship*, 397 US 358 at 363 (1975) [*Winship*] ('[t]he accused during a criminal prosecution has at stake interest[s] of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction'). See also *Kennedy v*

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sanctions, but criminal law clearly relies upon physical force far more often and more readily than other areas of law.[20] Criminal law is also uniquely stigmatizing, altering the status of the convicted person in lasting ways. Even if a convicted defendant pays a fine or serves a sentence of probation, either of which is potentially less burdensome than some civil penalties, the defendant has nonetheless become a criminal. And to be a criminal is to occupy (often, permanently) a substantially disfavoured political and social status.[21]

The claim of burdens exceptionalism seems easily verified, and I do not wish to contest it. But two other kinds of exceptionalism are also attributed to criminal law and less easily defended. Subject-matter exceptionalism is a claim that criminal law addresses a distinctive set of behaviours or problems – conduct so harmful or wrongful that it threatens the very possibility of social coexistence.[22] As a response to this exceptionally dangerous or blameworthy conduct, criminal law is then said to be exceptionally important, and indeed the claim of subject-matter exceptionalism in criminal law is usually made as part of a justificatory argument about the necessity and special moral importance of criminal law and punishment.[23]

As I explain in more detail in a separate project, we often see subject-matter exceptionalism in aspirational claims about what criminal law should be, but it has never been an accurate description of existing laws.[24] That is, subject-matter exceptionalism is a fiction invented as part of an ideal theory. Across history and apparently across jurisdictions, actual criminal laws have always sprawled fairly widely to reach a wide range of conduct, some of it gravely harmful and much of

Mendoza-Martinez, 372 US 144 at 168–9 (1963) (describing a multi-factor test to distinguish criminal punishment from civil sanctions).

20 Prison sentences are an easy illustration. But criminal law imposes distinctive burdens not just on those formally convicted of crimes but also on those merely suspected of breaking the law or, in some cases, not even suspected of criminal activity. See Alice Ristroph, 'The Constitution of Police Violence' (2017) 64 UCLA L Rev 1182 at 1193–1203 [Ristroph, 'Constitution of Police Violence'].

21 See *Winship*, supra note 19; Alice Ristroph, 'Farewell to the Felonry' (2018) 53 Harv CR-CLL Rev 563 at 604–9 [Ristroph, 'Farewell to the Felonry'].

22 See e.g. Henry M Hart, 'The Aims of the Criminal Law' (1958) 23 Law & Contemp Probs 401 at 410 [Hart, 'Aims of the Criminal Law'] ('[I]t is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility'). RA Duff's contribution to this issue endorses a version of subject-matter exceptionalism insofar as it presents criminal law as concerned with the subset of moral wrongs that 'violate or threaten' the civil order. See RA Duff, 'Criminal Law and the Constitution of Civil Order' (2020) 70:Suppl UTLJ 4. In contrast, Malcolm Thorburn argues against the view that criminal law has 'its own specialized subject matter.' See Malcolm Thorburn, 'Criminal Punishment and the Right to Rule' (2020) 70:Suppl UTLJ 44.

23 See e.g. Hart, 'Aims of the Criminal Law,' supra note 22; Joshua Kleinfeld, 'Reconstructivism: The Place of Criminal Law in Ethical Life' (2016) 129 Harv L Rev 1485 (describing 'a special place in the world for criminal law' in defending the 'embodied ethical life' that is constitutive of social coexistence).

24 Ristroph, 'Intellectual History,' supra note 10. A few other commentators have emphasized the historical breadth of substantive criminal law. See e.g. Darryl Brown, 'History's Challenge to Criminal Law Theory' (2009) 3 Criminal L & Philosophy 271.

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it not.[25] Wherever the state regulates, it tends to use criminal sanctions in at least some instances, in arenas of human conduct ranging from financial markets to consumer safety to transportation to the electoral process to environmental protection and so on.[26] Moreover, even the conduct seen as the 'core' of criminal law turns out not to be as devastating to social coexistence as normative theorists often claim. Criminal law has few success stories, in that there are almost no types of conduct that it has been able to eradicate from human affairs.[27] And yet, though homicides and other violent acts and frauds and thefts and any number of abuses and vices persist, our political and social groups persist as well. I have little doubt that social coexistence would be happier without many of these behaviours, but it is clear both that criminalizing behaviour does not eliminate it and that communities often survive the continued recurrence of criminalized behaviours.

Again, as a descriptive claim, burdens exceptionalism seems easy to verify, and as a descriptive claim, subject-matter exceptionalism is easy to refute. In my view, the most interesting, most complicated, and most difficult type of criminal law exceptionalism to assess is operational exceptionalism. With this admittedly imperfect term, I mean to capture a set of claims about the unique mechanics of criminal law. For example, criminal law is said both to require and provide a degree of determinacy and predictability that is often lacking in other areas of law. The legality principle, frequently expressed with the phrases *nullum crimen sine lege* and *nulla poena sine lege*, holds that criminal convictions and punishments require a pre-existing law that clearly defines the prohibited and punishable conduct.[28] Several corollary principles purport to vindicate this requirement, including the prohibition of *ex post facto* laws, void-for-vagueness doctrine, and principles of strict construction for criminal statutes and a strong preference for codification.[29] Like the claim of subject-matter exceptionalism, the legality

25 Ristroph, 'Intellectual History,' supra note 10. Glanville Williams denied that the category 'crime' could be accurately characterized in terms of the properties of prohibited acts. Instead, Williams argued, the categories crime and criminal were defined by the state's designations and forms of intervention. Glanville Williams, 'The Definition of Crime' (1955) 8 Current Leg Probs 107.

26 Subject-matter exceptionalism often implies that these types of offences are peripheral to criminal law. In contrast, Farmer argues that financial and market crimes have increasingly been brought within the core subject matter of criminal law. See Lindsay Farmer, 'Civil Order, Markets and the Intelligibility of Criminal Law' (2020) 70:Suppl UTLJ 123.

27 Of course, much depends on what counts as success. If criminal law 'succeeds' whenever it achieves any measure of deterrence, or whenever it imposes formal punishment on a guilty person, then one can find success stories. But here I am interested in the particular claim of subject-matter exceptionalism – that criminal law responds to and mitigates uniquely harmful or wrongful conduct that would otherwise make social coexistence impossible.

28 See e.g. Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects' (2005) 26 Stat L Rev 41.

29 As noted below, the various forms of criminal law exceptionalism often intersect. Courts sometimes emphasize the distinctive burdens of criminal law to explain the necessity of distinctive interpretive approaches. See e.g. *Staples v United States*, 511 US 600 at 618 (1994) (noting that 'felony is as bad a word as you can give to man or thing' to argue for strict construction of a felony gun possession statute).

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principle is partly aspirational – a framework to critique existing practices. But unlike the claim of subject-matter exceptionalism, which I suspect few would defend as an accurate description of existing law, the legality principle is sometimes discussed as though it were substantially realized in practice – as though it were only 'slightly unrealistic.'[30] Even as law's indeterminacy, or at best partial determinacy, has been increasingly acknowledged and accepted as inevitable in other legal fields, we assume that criminal law requires, and can deliver, determinacy.[31]

Operational exceptionalism also captures the apparent procedural exceptionalism of criminal law, which in the United States is partly a constitutional dictate: the federal constitution regulates criminal procedure in far more detail than it regulates civil procedure.[32] Still another form of operational exceptionalism identifies unique separation of powers concerns *vis-à-vis* criminal law.[33] And the different forms of criminal law exceptionalism may interact – for example, the purported unique moral importance of criminal law alleged by subject-matter exceptionalists may trigger a kind of operational exceptionalism, in which empirical risk assessments and cost-benefit analysis become less influential in the making and implementation of criminal justice policies than such analysis is in other areas of policy-making.[34]

Operational exceptionalism is, again, more complicated and harder to verify or refute than the other forms of criminal law exceptionalism discussed above. One can easily identify seemingly exceptional attributes of criminal law in operation, such as the presumption of innocence and the requirement of proof beyond a reasonable doubt, and just as easily identify reasons to think that these distinctive procedural requirements play little role in the actual operation of criminal law.[35] One can find many judicial paeans to the legality principle in criminal law and also many instances in which the principle is betrayed. I am sceptical

30 See John Calvin Jeffries, Jr, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985) 71 Va L Rev 189 (describing legality and corollary principles as a 'coherent, if slightly unrealistic' scheme disallowing judicial crime definition).

31 See Ristroph, 'Intellectual History,' supra note 10.

32 See Samuel Walker, *Popular Justice: A History of American Criminal Justice*, 2d ed (New York: Oxford University Press, 1998) [Walker, *Popular Justice*] ('[t]he Fourth, Fifth, Sixth, and Eighth Amendments included seventeen specific guarantees related to the criminal process' at 38).

33 Rachel E Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 Stan L Rev 989 at 1011–34.

34 Criminal justice policies are highly influenced by intuitions and reactions to individual incidents. When an identifiable individual has been gravely harmed by an identifiable offender, appeals to statistics or aggregate data are sometimes seen as offensive and inappropriate. See Rachel E Barkow, 'Criminal Law as Regulation' (2014) 8 NYU JL & Liberty 316 (discussing aftermath of Willie Horton's furlough and new offences and the cancellation of the otherwise very successful furlough program in Massachusetts).

35 The overwhelming majority of criminal convictions in the United States are the product of a guilty plea rather than a trial in which the prosecution must prove the charges. Data on guilty pleas and plea bargaining in other countries is not as readily available, but the practice appears to be quite common in other common law jurisdictions as well. See Carol A Brook et al, 'A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States' (2016) 57 Wm & Mary L Rev 1147 at 1167.

  DOI: 10.3138/utlj.2019-0066

that the features of law-in-general that produce some indeterminacy – the limits of language, the need for interpretation, the opportunities for enforcement discretion – are less present in criminal law than in any other field, and some of these features may actually be even more prevalent in criminal law. Operational exceptionalism is a family of different claims, though, and some of these claims have more merit than others.

The suggestion here is not that every exceptionalist claim is wrong but rather that at least some forms of criminal law exceptionalism have distorted our thinking.[36] Aware of the heavy burdens imposed by criminal law, jurists and scholars have strained to construct a conceptual account of criminal law that could justify those burdens, and subject-matter exceptionalism and operational exceptionalism are components of that conceptual account. But we should not assume that criminal law is capable of fulfilling the conditions of its own legitimacy. Claims of subject-matter exceptionalism are directly contradicted by history and experience, as may be some of the specific claims of operational exceptionalism.

Return now to the concept of private ordering. As explained in the previous Part, we can think of ordering as an activity that involves the production of an order; the resulting order is contingent and man-made rather than natural. Most discussions of private ordering depict it as an alternative to legal regulation. The tasks left to private ordering are ones that could be addressed through public law but are instead left to private entities.[37] Advocates of private ordering challenge the claim that ordering is a distinctly public activity, manageable only by official public institutions. But underlying that challenge is the point that seems important here: ordering is what public institutions, especially legal institutions, do, whether or not these institutions are the only ones that can accomplish that task.

Ordering, as I have already suggested and as I will elaborate in the next two subparts, describes much of the operation of criminal law. It also describes much of civil law, and much activity among private actors. The concept of ordering unsettles the claims of subject-matter and operational exceptionalism. To see criminal law as the activity of ordering raises the possibility that the order created by criminal law is neither natural nor necessary. It encourages us to consider whether we have imposed the exceptional burdens of criminal punishment for no good reason, when the conduct we are targeting or the goals we are pursuing could be addressed through less burdensome means.

IV *Ordering and the ordinary*

In sharp contrast to claims of subject-matter exceptionalism, which characterize criminal acts as extraordinary threats to social cohesiveness, much of the conduct targeted by criminal law is in fact quite ordinary. The word 'crime' triggers images of homicides, rapes, and robberies, but those acts comprise only a small portion of criminal law's targets. More often, criminal laws target rowdiness and

36 Ristroph, 'Intellectual History,' supra note 10.

37 See e.g. Steven L Schwarcz, 'Private Ordering' (2002) 97 Nw U L Rev 319 at 319, n 3 (describing private ordering as the privatization of law).

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laziness, drunkenness and sloppiness, neglect and certain kinds of forgetfulness, various petty forms of self-preference, various forms of pleasure-seeking, ordinary non-conformity (which is not an oxymoron, as I explain below), and a wide range of other acts so common that they are better described as features of social coexistence than threats to it. Tellingly, many of the acts in this motley array are classified as 'public order offences.' Moreover, the interventions of criminal law include various policing activities that are not necessarily concerned about any specific act so much as monitoring daily life to generate and maintain a state of affairs labelled as 'order.' This Part examines public order offences and order maintenance policing to investigate concepts of order, and activities of ordering, that are central to ordinary, non-exceptional criminal law.

Consider first the public order offence, which, though conspicuously absent from most exceptionalist theories of criminal law, is enjoying renewed (and welcome) scholarly attention.[38] The term 'public order offence' is frequently used and rarely defined. Sometimes, it seems to operate as a default category to describe offences other than offences against the person or property. In the United States, the federal government classifies the following as public order offences: weapons possession; drunk driving; 'court offenses; commercialized vice, morals, and decency offenses; liquor law violations; and other public order offenses' – a sprawling and circular definition that nonetheless gives some sense of the category.[39] Public order offences frequently lack a specific individual victim, and they are often 'petty' in that they are seen to cause relatively trivial social harm and they carry relatively light penalties.[40] Given this pettiness of harm and sanction, public order offences have not traditionally been seen as paradigm crimes – especially not among criminal law exceptionalists.[41] But, in sheer numbers, public order offences

38 There is substantial (but not complete) overlap between offences classified as public order offences and those classified as misdemeanours, and there has been an explosion of interest in misdemeanours in recent years. See Megan Stevenson & Sandra Mayson, 'The Scale of Misdemeanor Justice' (2018) 98 BUL Rev 731 at 766 [Stevenson & Mayson, 'Scale of Misdemeanor Justice'] (discussing the connection between misdemeanours and public order offences); see also Issa Kohler-Hausmann, *Misdemeanorland* (Princeton, NJ: Princeton University Press, 2018) [Kohler-Hausmann, *Misdemeanorland*]; Alexandra Natapoff, 'Misdemeanors' (2012) 85 S Cal L Rev 1313; Jenny Roberts, 'Crashing the Misdemeanor System' (2013) 70 Wash & Lee L Rev 1089 at 1106–9 (discussing the overlapping categories of misdemeanours, public order offences, and order maintenance policing).

39 US, Department of Justice, Bureau of Justice Statistics, *Prisoners in 2016* (NCL No 251149) (2018) at 18, table 12. There does not appear to be a consensus on whether low-level drug offences are properly included in the category of public order offences. The Department of Justice categorizes drug offences as their own separate category, but scholars often describe possession offences as public order offences.

40 See Josh Bowers, 'Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute' (2010) 110 Colum L Rev 1655 at 1659 (describing public order offences in similar terms and listing 'disorderly conduct, public urination, unlicensed street vending, prostitution, aggressive panhandling, and simple drug possession' as examples).

41 By paradigm crimes, I mean those which dominate public, and scholarly, perceptions of crime. A decent list would be the so-called 'index crimes' of the *Uniform Crime Reports*: non-negligent homicide, forcible rape, aggravated assault, robbery, burglary, larceny, motor vehicle theft, and arson.

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are indeed central to criminal law. The empirics of public order offences are difficult, for reasons discussed below, but one can gather some sense of scale by looking at recent studies of misdemeanours. Misdemeanour cases (which are very often but not universally public order cases) constitute a sizeable majority of criminal prosecutions – between 74 and 83 per cent, by one recent estimate – and probably a much greater percentage of all arrests.[42] Without treating the categories 'misdemeanour' and 'public order offence' as interchangeable, one can nevertheless see enough overlap between them to recognize that public order offences are far more typical of criminal law than homicides, rapes, and robberies.

One obstacle to precise empirical claims in this context is the absence of a clear and widely shared definition of the phrase 'public order offence.' That lack of definition is itself telling. It should suggest to us that public order is not a precise and fixed state of affairs, but is instead the shifting outcome of a dynamic process of public ordering. This would help explain why Lindsay Farmer observes that 'there is no single or simple concept of civil order which it is the aim of the criminal law to secure or produce' even as he depicts criminal law as an effort to secure civil order.[43] Civil order, like public order, can mean 'different things at different times,'[44] and I would suggest that it can even mean different things at the same time, depending on which enforcement official is doing the ordering.

One might expect to discern a clearer conception of order by examining the law of disorderly conduct. Any jurisdiction that criminalizes disorderly conduct must define the offence by statute or ordinance. Indeed, disorderly conduct is an exclusively statutory offence, not one that existed at common law.[45] But the statutory definitions prove slippery, leaving one to conclude that even this specific offence is a catch-all category that allows official enforcers to determine on the spot what counts as disorder. A typical statute includes a *mens rea* element of intent to cause, or recklessness in causing, 'public inconvenience, annoyance, or alarm.'[46] The conduct elements are typically defined broadly, including an array of different actions such as 'engag[ing] in fighting or violent, tumultuous, or threatening

42 See Stevenson & Mayson, 'Scale of Misdemeanor Justice,' supra note 38 at 746–7 (examining recent data as well as older studies and concluding that approximately three misdemeanour cases are filed for each felony filing); Kohler-Hausmann, *Misdemeanorland*, supra note 38; Jenny Roberts, 'Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Courts' (2012) 45 UC Davis L Rev 277 at 280–1.

43 Farmer, *Modern Criminal Law,* supra note 5 at 63.

44 Ibid at 48. Although Farmer emphasizes the historical contingency of the concept of civil order, he nonetheless offers what I would characterize as a thin account of the minimum content of civil order. For Farmer, criminal law aims at civil order insofar as it seeks 'to curb passions and impulsive behavior, stabilizing expectations about the conduct of others and helping to establish relationships of trust.' Criminal law thus manages 'the interaction of self-directed, autonomous individuals in a modern society' – which is, of course, the function typically attributed to private ordering as well (at 193).

45 27 CJS Disorderly Conduct § 1; see also *State v Boyer*, 198 A (2d) 222 at 224–5 (Conn Cir Ct 1963).

46 *McKinney's Laws of NY* § 240.20. Many states define disorderly conduct in the same or similar terms, which come from the Model Penal Code's disorderly conduct statute. Model Penal Code § 250.2.

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behavior; mak[ing] unreasonable noise; us[ing] abusive or obscene language [in public]; . . . creat[ing] a hazardous or physically offensive condition by any act which serves no legitimate purpose.'[47] In practice, disorderly conduct statutes are often used to arrest those who insult or challenge police officers, but this is hardly their only application.[48] Contemporary disorderly conduct convictions may be based on turning over furniture and throwing things at walls in one's own home (some, but not all, jurisdictions require the offensive conduct to take place in public), drunken shouting inside a police station (or nearly anywhere else), fighting or encouraging others to fight, or mishandling a weapon, to take a few examples from recent cases.[49]

Disorderly conduct can be thought of as ordinary non-conformity: fairly common behaviour that is nonetheless 'out of place' and unwelcome in a particular setting. There is much overlap between disorderly conduct and disturbing the peace, and some jurisdictions define one in terms of the other.[50] Of particular interest here is the way that disorderly conduct functions as a residual category – a charge to be brought in place of a more specific charge such as assault, resisting arrest, trespassing, or harassment. Indeed, as a statutory innovation that did not exist at common law, disorderly conduct may have arisen to preserve the flexibility to punish bothersome, but previously uncriminalized, behaviour.[51] That this residual category would be labelled 'disorderly conduct' reinforces my suggestion that 'order' is not a fixed status but merely the outcome of a continual and dynamic process of ordering.

The specific statutory offence of 'disorderly conduct' targets ordinary non-conformity, but it does so as just one part of the broader range of criminal offences and interventions that Caleb Foote once grouped under the label 'vagrancy-type law.'[52] Foote focused on vagrancy, disorderly conduct, intoxication, and the formally unconstitutional, but nevertheless widespread, 'arrest on suspicion' or the practice of making an arrest based on generalized suspicion rather than probable cause to believe that a specific offence had occurred. Writing in 1956, Foote noted that vagrancy-type law accounted for more than a third of all reported arrests and probably the plurality of criminal convictions.[53]

Vagrancy-type law served three major functions, according to Foote. It allowed a jurisdiction to manage people spatially, since vagrancy was traditionally the crime of

47 Ibid. The New York statute was upheld against a constitutional challenge in *People v Tichenor*, 658 NYS (2d) 233 (NY Ct App 1997) [*Tichenor*].

48 This was the case in *Tichenor*, ibid. See also Joshua Bowers, 'Annoy No Cop' (2017) 166 U Pa L Rev 129.

49 See e.g. *State v Russell*, 890 A (2d) 453 (RI 2006) (upholding disorderly conduct conviction for conduct in defendant's own home).

50 See e.g. Fla Stat § 877.03 ('[b]reach of the peace; disorderly conduct'). Breach of the peace was a crime at common law; disorderly conduct is a strictly statutory offence used by some jurisdictions to replace breach of the peace.

51 27 CJS Disorderly Conduct § 1 (noting that disorderly conduct is a statutory offence that did not exist at common law).

52 Caleb Foote, 'Vagrancy-Type Law and Its Administration' (1956) 104 U Pa L Rev 603.

53 Ibid at 613–14.

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being out of place.[54] Foote traced the origins of vagrancy law to the collapse of feudalism and the perceived need for a substitute mechanism of controlling labourers.[55] In the United States, vagrancy-type law served two additional functions: it allowed arrests when no probable cause for a specific crime existed,[56] and it served as the 'catch-all of the criminal law,' allowing '"conviction" for almost any kind of conduct and the [use] of the House of Correction as an easy and convenient dumping ground for problems that appear to have no other immediate solution.'[57] Vagrancy laws were used to punish both those without regular employment and those who travelled in search of employment – along with all manner of 'rogues and vagabonds,' 'dissolute persons,' '[l]ewd, wanton, and lascivious persons,' and other 'disorderly persons.'[58]

The ordinance just quoted was found unconstitutionally vague by the US Supreme Court in 1972, and, in some respects, vagrancy law may do less work now than it used to do.[59] But it is still the case that an officer can usually find a reason to stop and question, and likely arrest, any person perceived to be out of place, non-conforming, or otherwise threatening to 'public order.'[60] Moreover, disorderly conduct can be an important stepping-stone to arrest, further investigation, and more serious subsequent charges.[61] Indeed, one sees frequent references to disorderly conduct as the crime that purportedly warranted the initial police intervention but not the crime of ultimate conviction: an officer makes an arrest for disorderly conduct, proceeds to search the defendant, and finds contraband or other evidence that supports more serious charges.[62]

54 In Pennsylvania, the site of Foote's study, vagrants were 'persons who come from outside the state, follow no labor, are without visible means of support, and are unable to give a ... "reasonable account of themselves or their business in such place."' Ibid at 609.

55 Ibid at 615.

56 Ibid at 625–30.

57 Ibid at 631.

58 Jacksonville Ord 26–47, quoted in *Papachristou v City of Jacksonville*, 405 US 156 (1972).

59 Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Oxford University Press, 2016); *Commonwealth v Forrey*, 108 A (3d) 895 at 898–9 (Sup Ct Pa 2015) (reversing conviction for disorderly conduct based on screaming at police officers); cf. *People v Baker*, 984 NE (2d) 902 at 907–9 (NY Ct App 2013) (finding arrest for disorderly conduct, based on abusive language to police officers, not supported by probable cause).

60 In New York City, disorderly conduct has been the most frequent type of conviction resulting from misdemeanour arrests for decades. In New York, disorderly conduct is a technically non-criminal 'infraction' that 'serves as an all-purpose generic charge to mark the defendant for a specific length of time at a specific level of seriousness.' Kohler-Hausmann, *Misdemeanorland*, supra note 38 at 153, 154–8, table 4.1.

61 In Arizona, disorderly conduct is classified as a 'violent crime' for purposes of assessing probation eligibility for subsequent offences. See *Montero v Foreman*, 64 P (3d) 206 (Ct App Ariz 2003). More generally, any offence, even a civil traffic offence that allows police to stop individuals and especially to arrest them is critical as an on-ramp onto other penal interventions. Ristroph, 'Constitution of Police Violence,' supra note 20; see also *Atwater v City of Lago Vista*, 532 US 318 (2001); *Utah v Strieff*, 136 S Ct 2056 (2016).

62 See e.g. *Negron v State*, 2009 WL 2581714, 4 (Del Sup Ct 2009) (finding public urination to provide adequate grounds for disorderly conduct arrest, which then led to search and discovery of cocaine and, ultimately, conviction on cocaine possession and distribution charges).

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In thinking of order and ordinary criminal law, we should note that 'order maintenance' is a central function of modern policing even beyond specific offences defined in terms of order or disorder. It may help to contrast order maintenance with another familiar explanation of the police function – 'fighting crime' or the detection of crime and the apprehension of criminals. The detection/apprehension model starts with the idea that specific acts are designated as crimes, and the role of the police is to detect those acts and apprehend the actors. Order maintenance, in contrast, is not tethered to any specific list of prohibited acts – nor, indeed, I would argue, to any stable and well-defined account of order. Rather, order is a state of affairs that must continually be produced, managed, and maintained. Because disorder is unpredictable, shifting shape and always presenting itself in new ways, police need broad discretion to engage in the ongoing activity of ordering.

Though 'order maintenance policing' drew considerable scholarly attention only late in the twentieth century, police officers have functioned as producers of order for as long as there have been police officers. In the United States, police forces developed in response to perceived needs for crisis management and social coordination, which are not strictly problems related to the detection and investigation of substantive offences. Immigration and industrialization brought rapid changes to American cities in the early decades of the republic, and, by the 1820s and 1830s, the upheavals were manifest in frequent riots, racial and ethnic conflicts, and sometimes violent protests by labourers.[63] Police forces were introduced to address these problems, with a focus on maintaining order.[64] Order maintenance is thus not a twentieth-century invention. And the power to maintain order nearly inevitably entails the power to decide what counts as disorder, and so policing has always been an activity of ordering.

Unsurprisingly, much of the literature on order maintenance policing focuses on police discretion.[65] Some defenders of order maintenance policing argue that close monitoring of petty offending deters more serious crime; separately, social norms scholars argue that order maintenance policing reinforces extra-legal norms that are actually more important to the prevention of crime. Critics of order maintenance policing contest the empirical connection between petty public order offences and more serious crime, and some argue that order maintenance gives enforcers such broad discretion that the resulting regime should not be characterized as one of 'law.' The discourse of order maintenance thus raises questions about a number of dichotomies familiar to criminal law scholarship – between petty offences and serious crimes, between legal rules and extra-legal

63 See Lawrence Friedman, *Crime and Punishment in American History* (New York: BasicBooks, 1993) at 68–9; Walker, *Popular Justice*, supra note 32 at 50–2.

64 See Walker, *Popular Justice*, supra note 32 at 52 ('[t]he major change was that preventive patrol now became the central focus of law enforcement').

65 See e.g. Bernard Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (Cambridge, MA: Harvard University Press, 2005); Debra Livingston, 'Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing' (1997) 97 Colum L Rev 551; Tracey Meares & Dan Kahan, 'Law and (Norms of) Order in the Inner City' (1998) 32 Law & Soc'y Rev 805.

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norms, and between law-properly-so-called and discretion. Each of these dichotomies appears less stable as we study closely the concept of order, and this raises the possibility that the purported dichotomies may serve ideological ends more than descriptive accuracy. For example, the emphasis in criminal law theory on murder, rape, and robbery almost certainly helps legitimate a system that most often punishes very different and less harmful conduct.[66] Similarly, certain legal outcomes may appear more legitimate if presented as required by law rather than chosen by actors with discretion, and yet discretionary human choices arguably just are part of law.[67] Full reappraisal of these dichotomies could become one more payoff of a scholarly turn to the concept of order. Within the narrower confines of this article, order maintenance is most important as one more illustration of the activity of ordering.

V *The orders of criminal law*

Enforcement activities, especially policing, have been under-emphasized in descriptions of criminal law.[68] But I do not wish to reduce criminal law to policing, and in this final Part, I identify some other ways in which criminal law operates as an ordering process. It may help to recall the two meanings of order as a verb: to command and to organize or arrange. Police officers certainly issue commands at times, and criminal law more broadly sometimes involves commands to the public. But the Austinian command-and-sanction model of criminal law is incomplete and sometimes misleading. On this model, criminal law commands individuals not to engage in certain acts and imposes sanctions on those who disobey. 'Do not murder, rape, or rob' is the essence of criminal law, according to one classic account.[69] In practice, however, criminal statutes are not addressed directly to private individuals. Instead, criminal statutes simply describe activity that is subject to punishment.[70] These statutes are nearly always framed as decision rules directed at enforcement agents: they specify conditions under which public officials are authorized to intervene – perhaps to initiate prosecution and punishment, or perhaps to negotiate other outcomes. Quite often, the interventions of criminal law are designed to order in the second meaning identified above: to classify people and arrange them in a specific manner.

A few ready examples illustrate criminal law's ordering function. Most broadly, substantive laws and adjudicative procedures are designed to identify certain persons as criminals – a status that adheres to the convicted person indefinitely,

66 See Ristroph, 'Farewell to the Felonry,' supra note 21.

67 See Ristroph, 'Intellectual History,' supra note 10.

68 See Alice Ristroph, 'The Thin Blue Line from Crime to Punishment' (2018) 108 J Crim L & Criminology 305.

69 Hart, 'Aims of the Criminal Law,' supra note 22.

70 For example, Pennsylvania's influential homicide statutes provides: 'A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being. . . . Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.' 18 Pa Stat § 2501(a)–(b).

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shaping his or her opportunities, duties, civic and political standing, and future legal liabilities.[71] Consider some of the consequences that can follow a felony conviction in many American jurisdictions: registration obligations; ineligibility for public employment; denial of licensure in other occupations; bans on gun ownership; ineligibility for public housing and other welfare benefits; curtailment of parental rights; exclusion from juries and from public office; and of course disenfranchisement.[72] To say who can work and live where, who can associate with whom, and who can participate in civic life is to create and enforce an order, and this is clearly a major function of criminal law even if we label these consequences of a criminal conviction 'civil' or 'collateral.' Indeed, because the majority of criminal convictions are not followed by a custodial sentence, the stigma of conviction and these purportedly 'collateral' consequences are as or more important to criminal law as prison or jail.[73] And, as I have emphasized, these consequences are designed to classify and arrange: to mark the convicted person as eternally suspicious; to assign him or her a lower social status; and to exclude him or her from various professions, activities, and opportunities.

Of course, nearly any complex human activity will involve some classifications and role assignments. While I do not argue that criminal law's ordering is always categorically distinctive – I resist most forms of criminal law exceptionalism, after all – I do want to emphasize that the ordering we see here is something more than the temporary and often trivial classifications involved in all complex interactions. For many individuals, the consequences of a criminal conviction are sufficiently life-altering, and status-altering, that they are often compared to exile, infamy, or civil death.[74] For others, a criminal record is not quite equivalent to internal exile, but it is nonetheless a mark that affects significantly one's economic, social, and political opportunities. This ordering function is almost certainly

71 See James Jacobs, *The Eternal Criminal Record* (Cambridge, MA: Harvard University Press, 2015); Margaret Colgate Love, 'Deconstructing the New Infamy' (2001) 16 Criminal Justice 20 [Love, 'Deconstructing']; Gabriel J Chin, 'The New Civil Death: Rethinking Punishment in the Era of Mass Conviction' 160 U Pa L Rev 1789 [Chin, 'New Civil Death']; Nora V Demleitner, 'Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences' (1999) 11 Stan L & Pol'y Rev 153 [Demleitner, 'Preventing Internal Exile'].

72 Christopher Uggen, Jeff Manza & Melissa Thompson, 'Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders' (2006) 605 Annals American Academy Political & Social Science 281 at 297 (chart). Many jurisdictions impose at least some of these burdens on those convicted only of misdemeanour offences. See Chin, 'New Civil Death,' supra note 71 at 1790. For a normative critique of disenfranchisement that would extend voting rights to all convicted persons, including those presently serving prison sentences, see Corey Brettschneider, 'A Democratic Theory of Punishment: The Trop Principle' (2020) 70:Suppl UTLJ 141.

73 A few commentators have pointed out that the adjective 'collateral' is misleading and have proposed alternative terms, such as 'invisible punishment.' See e.g. Jeremy Travis, 'Invisible Punishment: An Instrument of Social Exclusion' in Marc Mauer & Meda Chesney-Lind, eds, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002) 15 at 16.

74 See Chin, 'New Civil Death,' supra note 71; Demleitner, 'Preventing Internal Exile,' supra note 71; Love, 'Deconstructing,' supra note 71.

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more prominent in American criminal law than in other jurisdictions since in the United States collateral consequences are particularly severe and painfully tied to the country's racial history.[75] But at earlier points in history, other jurisdictions have used criminal law to define the borders and internal hierarchies of a political community, so one need not view this function as a uniquely American one.[76]

I have focused so far on convictions as an ordering mechanism, but criminal law classifies individuals in many other ways as it seeks to manage large populations. A few scholars have studied the use of arrests and interventions short of conviction as information-gathering and regulatory devices, by which the government can identify and track non-citizens, for example, or flag and monitor specific individuals as potential troublemakers.[77] More generally, the proliferation of algorithmic risk assessment instruments illustrates the extent to which criminal law is concerned with sorting individuals into categories in order to better manage them. Risk assessment instruments are used throughout criminal proceedings – to determine bail, sentences, security classifications, or parole release.[78] The instruments typically look for various factors associated with criminal offending such as age, sex, education, employment history, criminal history, mental health, and so forth, and the instruments quantify these factors to sort specific individuals into various risk categories.[79] Recent studies raise concerns about the automation of criminal law decision-making, the lack of transparency in risk assessment tools, and the racial effects of these instruments.[80] Those concerns are important, but I suspect that some unease with algorithmic risk assessment arises simply because the instruments make obvious a role of criminal law that has long been overlooked or under-emphasized: the fairly cursory sorting of allegedly suspicious or dangerous people for purposes of imposing various forms of state intervention. Criminal law is continually sorting and arranging people, sometimes according to extra-legal categories (such as age) but often according to principles or concepts (such as 'felon') that criminal law itself has constructed. Criminal law is in this sense an ordering process and one that must take responsibility for race and class disparities, or other inequalities, in the orders that it creates.

75 Michael Pinard, 'Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity' (2010) 85 NYU L Rev 457.

76 The classification 'felon,' and the denial of various rights or forms of membership to felons, originated long before the United States existed as a country. See Ristroph, 'Farewell to the Felonry,' supra note 21 at 570–4.

77 Eisha Jain, 'Arrests as Regulation' (2015) 67 Stan L Rev 809; see also Kohler-Hausmann, *Misdemeanorland*, supra note 38 at 144 ('[o]ne of the primary penal techniques in managerial misdemeanor courts is that of marking – the practice of indexing certain behaviors and status determinations about individuals').

78 Christopher Slobogin, 'Principles of Risk Assessment: Sentencing and Policing' (2018) 15 Ohio St J Crim L 583.

79 Ibid.

80 See e.g. Jessica M Eaglin, 'Constructing Recidivism Risk' (2017) 67 Emory LJ 59; Rebecca Wexler, 'Life, Liberty, and Trades Secrets: Intellectual Property in the Criminal Justice System' (2018) 70 Stan L Rev 1343.

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VI *Conclusion*

A familiar and widespread conception of criminal law depicts a criminal charge as a necessary and distinctive response to serious wrongdoing. On that traditional account, substantive laws define the types of wrongdoing that will be subject to liability, and the criminal process operates to identify, apprehend, and punish wrongdoers. This article has suggested that the concept of order, and especially the concept of ordering as an activity, can generate an alternative and much more accurate account of criminal law.

On the alternative account, criminal law involves a range of different authorized interventions, some of them indistinguishable from 'civil' interventions except by label and some of them more physically coercive or stigmatizing than any civil sanction.[81] The everyday work of criminal law is a series of enforcement decisions about when and how to deploy these various interventions, and the outcomes of these decisions are often unpredictable. Indeed, criminal law is best understood as a process through which the state manages an array of perceived problems. These problems targeted by criminal law are not themselves exceptional; there is no natural or pre-legal content to the terms 'crime' or 'criminality.' Instead, criminality is a concept long used by governments to manage a range of different troublesome people and acts – from acts of interpersonal violence to violations of property rights to various forms of risk creation to trivial manifestations of unproductivity, recalcitrance, or non-conformity. Many of the problems targeted by criminal law are identified by written statutes, but not all – enforcers often adapt statutes to new purposes, and some enforcement interventions do not require evidence of a particular statutory violation anyway.[82] Substantive criminal law is broad, but it is not distinctive: nearly every kind of behaviour addressed

81 It is not difficult to identify the physically coercive interventions of criminal law: arrest, detention, incarceration, and capital punishment. The range of other interventions I have in mind is far too unwieldy to be covered adequately here, but, by way of illustration, these interventions include: 'stops' and other informal police actions short of arrest; the 'drunk tank' and various uses of pretrial detention; the (adjudicative) 'process as punishment' (Malcolm M Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979)); various forms of deferred adjudication; drug courts and other specialized courts; charging pretext offences; misdemeanour case processing as a regulatory measure (Kohler-Hausmann, *Misdemeanorland*, supra note 38); and supervision through probation and parole. Some of these interventions were developed in the twentieth century; others are older. The key point is that to conceive criminal law as the definition and formal punishment of specific crimes is to ignore vast swaths of 'the law in action.' Issa Kohler-Hausmann makes similar arguments in developing a 'managerial model' of criminal justice in contrast to the adjudicative model. Cf. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors* (2014) 66 Stan L Rev 611.

82 For example, police officers do not need any statutory authority to approach and question individuals under circumstances not arising to a 'seizure,' as that term is defined by the US Supreme Court, and even some seizures, such as Terry stops, do not require specific statutory authorization. See e.g. *United States v Guardado*, 699 F (3d) 1220 at 1225 (10th Cir 2012) ('[d]irect evidence of a specific, particular crime is unnecessary' to establish reasonable suspicion of general criminality that will justify a stop).

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through criminal law could be, and often is, addressed also through civil law. Moreover, substantive criminal law does relatively little to discipline process or determine outcomes; instead, decisions in the enforcement process determine who will become a criminal.

The classification of offenders and suspicious persons is central to the work of criminal law as I have just described it. Though some may like to imagine criminal law as being concerned with acts rather than persons, acts themselves are not punishable. Criminal law operates by classifying people and designating them for various interventions. Were his critical eye trained in a different direction, Jorge Luis Borges could have concocted an encyclopaedia entry classifying criminals rather than animals: 'Criminals are (a) murderers, (b) white collar, (c) strictly liable, (d) disorderly persons, (e) deportable, (f) sexual predators, (g) federal, (h) in need of supervision but not immediately dangerous, (i) aggravated felons, (j) inchoate, (k) organized, (l) having just accessed a computer without authorization, (m) violent, (n) competent to stand trial.' There is an order in these classifications, but it is an order produced by criminal law itself. And it is always incomplete, always in need of adjustment and further specification, and always reliant in the meantime on residual (*et cetera*) categories such as disorderliness, just as angels are the ninth sub-category of angels, just as 'animals included in the present classification' was the fictitious encyclopaedia's eighth sub-category of animals.

Thus the concept of order invites us to re-examine what criminal law is and how it operates. Order is not very useful, in my view, as a statement of the aims of criminal law; there are too many different ideas about what constitutes order, and the law itself is forever reordering. As a description of law's activities, though, order (as a verb) bears more promise. To think of criminal law as a process of ordering is to call into question some of its claims to exceptionalism, for other areas of law and even extra-legal human interactions are also concerned with ordering. But if one believes, as I do, that we resort to criminal law far too often, imposing great burdens for few benefits, then escape from exceptionalist thinking is welcome. Such an escape may free us from the notion that criminal law protects a distinctive state called order, one we could not secure any other way. The abandonment of criminal law exceptionalism, and the reconceptualization of criminal law as a form of ordering, may allow us to imagine and pursue other ways of ordering ourselves.

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