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# Criminalisation theory as a theory of pro tanto criminal proscription

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**ABSTRACT**

Criminalisation theorists who try to explain when substantive criminal law may appropriately be deployed to shrink the scope of our presumptive initial liberty, often take their project as requiring them to identify the sorts of conduct for which may the state criminally *convict*. I argue that this is a mistake. While such theories of 'convictability' have their place, they do not completely explain the use of substantive criminal law to limit our presumptive initial liberty. Convictions ensue only after pleas of justification and excuse fail, but the substantive criminal law coercively limits liberty well before conviction, when it creates a pro tanto criminal proscription. Even those who can escape conviction by pleading a justificatory or excusatory defence were, in fact, subject to authoritative criminal law guidance proscribing (or sometimes, requiring) specified conduct. Although that guidance is sometimes trumped by the *additional* guidance contained in defences, it is not null and void, and it continues to have a liberty-limiting effect. In other words, substantive criminal law already shrinks our initial liberty by pro tanto criminally proscribing some conduct. Therefore, I argue that we also need a theory of criminalisation that addresses the appropriate domain of pro tanto criminal proscriptions.

**KEYWORDS**

Criminalisation; pro tanto offence; criminal proscription; convictability; wrongfulness constraint

## 1. Introduction

While scholars working on liberal normative theories of criminalisation disagree on many points of detail, they generally

> endorse[…] a kind of "presumption in favor of liberty" requiring that whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices.[1]

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[1]J Feinberg, *The Moral Limits of Criminal Law Vol 1: Harm to Others* (OUP 1984) 9. See also J Schonsheck, *On Criminalization* (Kluwer Academic Publishers 1994) 15, 63; TS Petersen, *Why Criminalize?* (Springer 2020) 3; MS Moore, *Placing Blame* (OUP 1997) 749–50.

They then take their task to be explaining when it is appropriate to limit this presumptive liberty by way of the criminal law. In other words, they take their task to be answering the question, 'What sorts of conduct may the state rightly make criminal?'.[2] A good answer may – and probably will – require us to revise some aspects of the criminal law, but if it calls for wholesale revisionism, it is less likely to be plausible. And we would expect a good liberal normative theory of criminalisation to support and explain a framework of criminally proscribed conduct that is recognisably a part of a liberal system of criminal law.

In fleshing out the explananda of a liberal normative theory of criminalisation, most theorists, at least implicitly, seem to take question **Q1**: '*What sorts of conduct may the state rightly make criminal?*' to be functionally equivalent to question **Q2**: '*For what sorts of conduct may the state criminally censure or convict?*'. So, for instance, Simester and von Hirsch argue that 'the state 'criminalises' certain activities by setting out, hopefully in advance and in clear terms, a catalogue of specified actions or omissions that are prohibited, together with ranges of sanctions for violations … [Then], at trial, it convicts persons who are proved to have contravened those prohibitions'.[3] Edwards and Simester say something similar: 'one must also acknowledge the message sent by a criminal prohibition ex ante, namely that the prohibited conduct is not to be done, and that those who disobey will be punished'.[4] Tadros asserts that '[i]n criminalizing conduct, we make a person punishable if they perpetrate that conduct'.[5] Along similar lines, Cornford takes it that '[t]o criminalise conduct […] is to make it punishable';[6] Husak argues that 'the most basic question to be answered by a theory of criminalization is: For what conduct may the state subject persons to punishment?',[7] and Moore agrees.[8]

[2]Feinberg (n 1) 3, 9. T Hörnle, 'Theories of Criminalization' in MD Dubber and T Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2014) 679, 685: 'criminalization theory (i.e., "what kinds of conduct should be declared criminal?")'. This view is also shared by scholars who don't necessarily see themselves as working strictly within a Feinbergian liberal tradition. See RA Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010) 8–9, 11–12.

[3]AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs* (Hart, 2011) 3. Their focus here is on the net prohibition, the commission of which makes a person liable to a conviction. Later, on 6., they seem to focus instead on liability to punishment:

> [B]y criminalising the activity of φing, the state declares that φing is morally wrongful; it instructs citizens not to φ; it warns them that, if they φ, they are liable to be convicted and punished within specified ranges (the levels of which signal the seriousness with which φing is regarded); and, further, the state undertakes that, on proof of D's φing, it will impose an appropriate measure of punishment, within the specified range, that reflects the blameworthiness of D's conduct.

However, on the whole, Simester & von Hirsch's view seems to be that to criminalise conduct is to make it liable to conviction.

[4]J Edwards and AP Simester, 'Wrongfulness and Prohibitions' (2014) 8 *Crim Law and Philos* 171, 182. To be fair, when writing separately, both Edwards, and Simester, have expressly doubted that the justification of criminalisation is the same as the justification of punishment. See J Edwards, 'Criminalization without Punishment' (2017) 23(2) Legal Theory 69, and AP Simester, 'Enforcing Morality' in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 481, 484, respectively. In fact, in another piece, Edwards seems to subscribe to the view that to criminalise something is to make it a criminal offence such that doing it renders one liable to a conviction unless one has a defence. See J Edwards, 'Coming Clean About the Criminal Law' (2011) 5 *Crim Law and Philos* 315, 316–17. So, perhaps both Simester and Edwards use the term 'criminalisation' in different senses in different contexts. I will argue, in Section 4 below, that the term 'criminalisation' does, in fact, lend itself to being plausibly used in different senses.

[5]V Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (OUP 2011) 321. See also 279. He also expresses a similar idea in V Tadros, 'Wrongness and Criminalization' in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 157, 158–59.

[6]A Cornford, 'Rethinking the Wrongness Constraint on Criminalisation' (2017) 36 *Law and Philos* 615, 621.

[7]D Husak, *Overcriminalization* (OUP 2008) 82.

[8]M Moore, 'A Tale of Two Theories' (2009) 28 *Crim Just Ethics* 27, 36.

Plenty of other such examples abound.[9] Although these theorists seem, at first glance, to connect criminalisation to liability to criminal punishment, in view of the scepticism about the strength of that claim convincingly expressed by Edwards,[10] I will read them charitably as subscribing at least to the weaker claim that to criminalise something is to declare that one who does it is liable to a conviction.

I will argue here that, if criminalisation theory is meant to explain when it is appropriate to use the criminal law to shrink (or support the shrinking of) the scope of our presumptive initial liberty, then even this weaker equivocation is an error. Q2 asks about (what I argue is) a subset of the proper explananda of a liberal theory of criminalisation. Instead, the proper way to paraphrase Q1 is, **Q3**: '*What sorts of conduct may the state rightly try to discourage using the criminal law?*'. This framing identifies the proper explananda of a theory of criminalisation meant to explain when it is appropriate to limit our presumptive liberty by way of the criminal law.

To see the difference between these three questions, first consider Q2: '*For what sorts of conduct may the state criminally censure or convict?*'. Notice that ideally, the state would censure or convict only for morally agential conduct that is 'net prohibited', in that it satisfies the elements of a pro tanto offence (i.e., actus reus + mens rea), and no justification or excuse is applies. It must, that is, be conduct that is

(a) intended to bring about some disfavoured outcome or state of affairs, or that is performed with recklessness, or negligence as to bringing about those outcomes or states of affairs, and

(b) morally indefensible, i.e., neither justifiable nor excusable.[11]

If Q2 is treated as being equivalent to Q1, then as per part (b) of the above expansion of Q2, we can only appropriately criminalise conduct that amounts to an unjustifiable and inexcusable wrong. In effect, this (standard) reading of the domain of criminalisation theory sees the task of theories of criminalisation as explaining the appropriate domain of 'convictability',[12] or liability to be convicted. In this article, I contend that despite the ubiquity of this move, making it is a mistake. Theories of criminalisation-as-convictability offer explanations for only a subset of the instances in which the criminal law is used to limit our presumptive liberty. To be sure, theories of criminalisation-as-convictability are independently valuable, insofar as they offer important normative arguments about the proper scope of convictability, and, as I will argue, theories of this sort are an indispensable part of the project of theorising the use of substantive criminal law to limit our presumptive liberty. However, they do not offer an *adequate* account of the normative

[9]See for instance, RA Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Crim Law and Philos* 217, 229; A du Bois-Pedain, 'The Wrongfulness Constraint in Criminalization' (2014) 8 *Crim Law and Philos* 149; Hörnle (n 2) 699; Petersen (n 1) 116–17.

[10]Edwards, 'Criminalization' (n 4).

[11]Feinberg (n 1) 105–106. See also RA Duff, *The Realm of Criminal Law* (OUP 2018) 10, 20, 40–49. Not everyone accepts this stipulation of wrongfulness. For AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization* (Hart 2011) 20–24; Simester (n 4) 482–84; and Edwards and Simester (n 4) 177, the wrongfulness of conduct lies in its being such that, all things considered, one ought not to do it, i.e., the reasons for performing the conduct being defeated by the reasons against doing so. Except for at one point (which I flag below), this difference of opinion does not affect the analysis in this article.

[12]I am grateful to Alexander Sarch for suggesting the use of the term 'convictability'.

constraints on using the criminal law to limit the liberty of its addressees. In light of the well-documented 'preventive turn in the criminal law',[13] which often manifests in the use of extremely broadly framed pro tanto offences that give state authorities extensive discretion in policing and prosecution, the need for a theory of criminalisation that does so is pressing.

Given the breadth and depth of disagreements amongst criminalisation theorists, it might seem odd that I am attacking the one proposition – as to the proper explananda of criminalisation theory – on which there seems to be general consensus. However, in addition to other points in favour of my view, I will argue that at least some of the deep disagreements amongst criminalisation theorists stem from their shared – but I think incorrect – assumption that a theory of convictability can explain when it is appropriate to use the criminal law to limit our presumptive liberty. A better approach, at least to theorising the limitation of our liberty through the criminal law is, I contend, to identify the domain of criminalisation theory – Q1 – with explaining pro tanto criminal proscription (to which Q3 refers).[14] In other words, a theory of when it would be appropriate to use the criminal law to limit our presumptive liberty should explain when it would be appropriate to identify some action as being pro tanto criminally proscribed, in the sense that a person performing that action would appropriately be liable to a conviction unless she had valid defence. While I cannot offer a comprehensive theory of 'criminalisation-as-pro-tanto-criminal-proscription' comparable to the standard theories of criminalisation-as-convictability here, I do gesture at one promising theoretical approach (which involves redirecting an existing theory of criminalisation-as-convictability to focus on pro tanto criminal proscriptions) and describe some practical insights that this sort of theory may be able to offer us. But regardless of whether these particular ways of proceeding appeal to the reader, if I am correct, the general approach – theorising pro tanto criminal proscription – is worth pursuing.

Here's how the argument unfolds. I start by explaining in Section 2 my main reasons for thinking that a normative theory of pro tanto criminal proscription can explain the normative constraints on using the criminal law to limit liberty better than criminalisation-as-convictability theories. In Section 3, while addressing some potential objections to my proposal, I clarify some key features of my view, and Section 4 briefly defends referring to normative theories of pro tanto criminal proscription as theories of criminalisation. Then, in Section 5, I describe some intriguing possibilities for advancement in the field that are opened up by thinking of criminalisation in the way that I suggest. Section 6 explains how a normative theory of pro tanto criminal proscription must build upon and interact with a theory of convictability, and Section 7 sets out some preliminary thoughts about what a theory of criminalisation-as-pro-tanto-proscription might look like, what issues it might address, and how it might address them. Section 8 concludes.

[13]For a detailed discussion, see H Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017) ch.1.

[14]This suggestion isn't entirely unprecedented. Even some of those identified previously as criminalisation-as-convictability theorists occasionally refer to pro tanto criminal proscription when speaking of criminalisation. See for instance, Edwards, 'Coming Clean' (n 4), 316–17; Tadros, *Ends of Harm* (n 5), 140; AP Simester, *Fundamentals of Criminal Law* (OUP 2021) 4. It may, therefore, be that my substantive suggestion here would, on reflection, be welcomed by at least some criminalisation-as-convictability theorists.

## 2. Presumptive liberty and pro tanto criminal proscription

Let me say without further preamble that my main reason for thinking that at least one strand of criminalisation theory should focus on pro tanto criminal proscription is that it is simply not the case that the substantive criminal law only limits one's presumptive liberty in respect of conduct that it identifies as being subject to a conviction, all things considered. When the criminal law directs its addressees in advance to avoid certain conduct on pain of having to explain their failure to do so to investigatory authorities, and potentially, in criminal proceedings, it already imposes on the addressees of the criminal law a pro tanto (and not merely prima facie) obligation to avoid that conduct.[15] This pro tanto obligation is defeasible, no doubt, but insofar as any claim that it was defeated in a particular instance is subject to verification by authorities that might take a different view, the pro tanto obligation does impose real limits on one's presumptive liberty. But theories of criminalisation-as-convictability suggest that conduct that is included in a pro tanto criminal proscription is not criminally proscribed vis-à-vis people with justifications (like self-defence or lesser-evils necessity), or supervening excuses (like duress). This view misdescribes the terrain of the criminal law.

Notice that the conduct guidance contained in a pro tanto criminal proscription still applies to persons who are in a position to plead a supervening defence (whether it be a justification or a supervening excuse). It imperatively (in the sense of non-optionally, as opposed to permissively) directs them in a way that limits their presumptive liberty – it tells them not to perform conduct that is identified as being pro tanto criminal. This may be conduct like, for instance, causing the death of others, or damaging or destroying their property. Note that this guidance, although imperative, is defeasible. Now consider an agent 'J', who has a justificatory defence (like self-defence) available to her in respect of contravening the imperative liberty-limiting guidance contained in a pro tanto criminal proscription. People like J are able to *also* rely on *other* guidance within the criminal law. This other guidance is *permissive*, and it carves out an exception to the imperative liberty-limiting guidance contained in the pro tanto criminal proscription.[16] Still, insofar as this exceptional guidance is permissive and not imperative, J would be responding appropriately to the criminal law's guidance even if she chose not to act in terms of the criminal law's permissive guidance, and instead to obey the imperative liberty-limiting conduct guidance set out in the pro tanto criminal proscription. The imperative liberty-limiting guidance in the pro tanto criminal proscription still applies to her, even though some other permissive guidance gives her the option of contravening it. So, we still need some explanation of the state's authority to issue the imperative liberty-limiting guidance contained in a pro tanto criminal proscription to people like J, i.e., to people who are in a position to plead a justificatory defence. Our theory of criminalisation ought to be able to offer that explanation.

Similarly, consider an agent 'E' who is in a position to plead a supervening excuse (like duress) in respect of her contravention of the imperative liberty-limiting guidance in a

[15]JP Fassnidge, 'Criminalisation as a Speech-Act: Saying Through Criminalising' (2024) 18 *Crim Law and Philos* 471, 480.
[16]In respect of the proposition that justifications also provide conduct guidance, albeit of a permissive type, see J Gardner, 'Justifications and Reasons' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon 1996) 102, 117, 124, 126; AP Simester, 'On Justifications and Excuses' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (OUP 2012) 95, 99, 102, 104, 106; M Thorburn, 'Justifications, Powers, and Authority' (2008) 117 *Yale Law Journal* 1070, 1072, 1080; M Dsouza, *Rationale-Based Defences in Criminal Law* (Hart 2017), 22, 96, 104–105.

pro tanto criminal proscription. According to most theories of excuses, E does not fall under any *permissive* exception to that guidance, but she is nevertheless excused (due to some exculpating rationale which is spelled out differently by different theories of excuse) from the criminal conviction that would ordinarily follow from having contravened the imperative liberty-limiting guidance contained in the pro tanto criminal proscription. But being excused from a conviction does not change the fact that the imperative liberty-limiting guidance in the pro tanto criminal proscription applied to E.[17] And so, a theory of criminalisation ought to be able to explain the state's entitlement to issue this sort of imperative liberty-limiting guidance to E and to other agents who might be entitled to plead an excusatory defence.

In sum then, insofar as criminalisation-as-convictability theories define the domain of criminal proscription by reference to the net criminal offence rather than what is pro tanto criminally proscribed, they are underinclusive. They entirely miss the significant implications of the very act of pro tanto criminally proscribing conduct on *all* addressees of the proscription – including those who may be able to plead a justification or excuse defence. Pro tanto criminal proscription is an assertion of the state's power to use the criminal law to regulate an area of conduct by threatening to demand that people answer, on pain of criminal sanction, for having performed tokens of that type of conduct. This is a very significant assertion of power, even if the persons so called to answer have a satisfactory answer. As a matter of principle, we are entitled to an account of the liberal state's normative authority to assert such power.[18] Insofar as criminalisation theory claims to offer an account of when it is appropriate to use the criminal law to limit the presumptive liberty of people in liberal states, it really ought to be able to offer such an account. In other words, criminalisation theory should aspire to explain the state's authority to issue *all* the guidance contained in pro tanto criminal proscriptions, and not just that subset of it that is contained in net criminal proscriptions.

Furthermore, pro tanto criminal proscriptions modify the terrain of conduct for which such addressees may be criminally investigated, and potentially, called to answer in criminal proceedings.[19] This has important practical liberty-limiting effects that add practical weight to our principled demand for an account of the state's authority to issue such guidance. Consider that the investigatory powers of the police and other state investigative authorities are typically triggered by the suspicion that a pro tanto criminal proscription appears to have been contravened.[20] These authorities do not

[17]Note that theories of criminalisation proposed by Simester and von Hirsch (n 3), and Edwards and Simester (n 4) have a complete answer to at least this argument, insofar as they rely on a notion of 'wrongfulness' under which a person who acts without justification acts wrongfully even if they have a supervening excuse available. These theories do, therefore, have an explanation for the state's entitlement to issue imperative liberty-limiting guidance to agents like E.

[18]Edwards, 'Coming Clean' (n 4) 325–26 makes a similar, but more modest, argument. He expressly says restricts himself to 'only demand[ing] an account of the state's explanatory reasons, without demanding that these also be normative reasons, let alone normative reasons which are undefeated by those which countervail'. I argue here that in the absence of undefeated normative reasons in support of the creation of a pro tanto criminal proscription, we are entitled to criticise the state's creation of that pro tanto criminal proscription.

[19]I do not mean to suggest that an agent is always, or may always be, required to answer in criminal proceedings for the breach of a pro tanto criminal proscription. As L Duarte d'Almeida, '"O Call Me Not to Justify the Wrong": Criminal Answerability and the Offence/Defence Distinction' (2012) 6 *Crim Law and Philos* 227 explains, that proposition would be far too strong. My claim is simply that where it appears that a pro tanto criminal proscription has been breached, that goes some way towards making it appropriate to call the responsible agent to answer for that breach in criminal proceedings.

[20]See for instance, O Lagodny, 'Basic Rights and Substantive Criminal Law: The Incest Case' (2011) 61 *U Toronto LJ* 761, 764–65.

have to wait until they suspect that a pro tanto criminal proscription has been breached *without justification or excuse* in order to get those investigative powers – indeed, it may be *by* investigating that they will form an opinion as to whether there was an applicable justification or excuse.[21] Therefore, the more broadly the pro tanto criminal proscription is framed, the easier it is to trigger the investigatory powers of state agencies.

Along similar lines, where prosecutors exercise prosecutorial discretion and accused persons are offered sentencing discounts and other inducements to plead guilty at an early stage, the breadth of the pro tanto criminal proscription matters immensely. Even if the net of criminal liability is not, all things considered, cast too widely, a broadly defined pro tanto criminal proscription will shift more of the onus of establishing non-culpability onto the defendant.[22] The distribution of the onus of proof inevitably affects the calculations that a prosecutor and potential defendant must make when deciding whether to prosecute, or to contest a charge respectively. Typically, the more broadly the pro tanto criminal proscription is framed, the greater the bargaining power of a prosecutor in plea bargaining negotiations.[23]

Additionally, of course, if a prosecution commences, then having to answer for one's conduct in criminal proceedings brings with it substantial burdens. Thus, the very prospect of being required to answer to a criminal court for a seeming violation of a pro tanto criminal proscription on pain of criminal sanction is likely to have a significant chilling effect, even on behaviour for which one has a defence, and that therefore should not (if the system works perfectly) attract a conviction. This is partly because the system does not work perfectly, and partly because, even if it did, the possibility and consequences of adverse publicity, and the demands on one's resources of time, money, and energy,[24] may sometimes make abstention the more sensible option.

In fact, sometimes this chilling effect on behaviour is the very point, even when the behaviour would, all things considered, be tolerated, permitted, or even welcomed. This is most easily illustrated by reference to instances in which convictions are effectively precluded even though no formal defence is recognised, but the same point also applies to cases in which a formal defence is recognised. Consider, for instance, the

[21] As notoriously happened in the case of Andy and Tracey Ferrie, a couple living on a remote farmhouse, who shot and injured burglars who were raiding their property. After a police investigation, the Crown Prosecution Service in England & Wales, decided not to press charges and instructed the police to release the couple from their bail. M Fricker, Mirror, 'No Charges: Couple in the Clear after Burglars Shot in Raid on their Remote Farmhouse', 6 September 2012. <https://www.mirror.co.uk/news/uk-news/melton-mowbray-shootings-andy-and-tracie-1306426>; Evening Standard, 'Why the CPS will not Charge Andy and Tracey Ferrie Arrested after Shooting Home Intruder', 6 September 2012. <https://www.standard.co.uk/news/crime/why-the-cps-will-not-charge-andy-and-tracey-ferrie-arrested-after-shooting-home-intruder-8112490.html>.

[22] It is true, as one anonymous reviewer points out, that doing so will normally require only that the defendant discharge a relatively light evidential burden in raising a defence. But evidential burdens are still far from insignificant, both normatively and practically, especially when one considers that not all defendants can afford (or will choose, for whatever reason, to engage) competent legal advice.

[23] See in this connection, Duff, *Realm* (n 11) 2, 24. Recent examples of offences that have been criticised for framing the pro tanto criminal proscription overbroadly include the extremely broad 'assisting or encouraging' offences under the Serious Crime Act 2007, ss.44, 45, and 46 (England & Wales), which make it an offence to do '*any* act *capable* of encouraging or assisting the commission of an offence' [emphasis supplied] with the intention to encourage or assist the commission of the offence or the belief that an offence will be committed, and that it will be assisted or encouraged by the agent's conduct. The extreme breadth and vagueness of this pro tanto proscription mens rea is counterbalanced in s.50 by a similarly broad and vague general 'defence of acting reasonably'. For criticism of this way of drafting offences, see JJ Child and others, *Simester & Sullivan's Criminal Law* (8th edn, Hart 2022) 322, 324, 326, 337–39; D Ormerod and R Fortson, 'Serious Crime Act 2007: The Part 2 Offences' [2009] *Crim LR* 389.

[24] J Rogers, 'Restructuring the Exercise of Prosecutorial Discretion' (2006) 26 OJLS 775, 788–93.

English offence of encouraging or assisting the suicide or attempted suicide of another person under s.2 of the Suicide Act 1961. This is always a serious crime in England & Wales, even though, in terms of the Director of Public Prosecution's publicly available policy for the prosecution of this offence,[25] a significant set of cases that satisfy the offence definition – those involving providing consensual and compassionate assistance and encouragement – are unlikely to be prosecuted. One might plausibly reconstruct the intention behind retaining the formal criminalisation of the subset of offence tokens that are likely to be tolerated as being to make even persons who might benefit from this toleration extremely reluctant to engage in the formally criminal conduct. Similarly, the English Court of Appeal has refused to recognise any common law defence of necessity applicable to drivers of fire engines who cross a red light in emergency situations, even while expressing the hope that in practice, the police and the judicial system would effectively collude in letting off such drivers.[26] Thus, for a significant period of time,[27] the law formally insisted that all drivers who cross a red light – even those who, like fire engine drivers responding to emergencies, 'should be congratulated'[28] – committed a crime. Again, quite plausibly, one might reconstruct the system's intention as being to make even drivers of emergency vehicles agonise over every traffic rule that they break, so as to discourage overzealous law-breaking.[29]

While these examples relate to behaviour, for engaging in which a person would technically be liable to a conviction, one can easily see that the same kind of thinking could also motivate the creation of a pro tanto criminal proscription. Therefore, if we think that the use of the criminal law to discourage permissible conduct is at least potentially problematic, we should be as concerned about the possibility of doing this using pro tanto criminal proscriptions as we are about the possibility of doing this using convictable offences.

All in all, the threat of being investigated, actually being investigated, being made subject to a greater burden in relation to establishing one's innocence, and having to answer for one's conduct in criminal proceedings, are all intrusions into one's presumptive liberty that are enacted through or facilitated by pro tanto criminal proscriptions contained in the substantive criminal law. It therefore matters a great deal how broadly or narrowly a pro tanto criminal proscription is set out. Insofar as criminalisation theory claims to explain when it is appropriate to use the substantive criminal law to limit this presumptive liberty, we should expect it to provide an explanation for the creation of pro tanto criminal proscriptions. Theories of criminalisation-as-convictability offer none.[30]

[25]Director of Public Prosecutions, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide', <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide>.

[26]*Buckoke v Greater London Council* [1971] Ch 655, 668–70.

[27]Regulation 36(1)(b) of the Traffic Signs Regulations and General Directions 2002 (England & Wales) now creates a qualified exception to the red-light rule for emergency vehicles including those being used for the fire brigade.

[28]*Buckoke* (n 26) 668.

[29]For a further example, consider the manner in which Scots law deals with consensual sexual intercourse amongst older children (aged thirteen to fifteen). s.37 of the Sexual Offences (Scotland) Act 2009 makes all such acts criminal, even though the government made it clear when legislating, that its intention was that the provision be enforced discretionally and only rarely in practice. Its rationale for legislating in this way was expressly to use the law to 'make clear that society does not encourage underage sexual intercourse'. See I Callander, 'Regulating Consensual Sexual Behaviour between Older Children' (2019) 23(2) *Edinburgh Law Review* 177, 177–78; Scottish Government, *Sexual Offences (Scotland) Bill Policy Memorandum* (SPCB 2008) para.110.

[30]See for instance, Duff, *Realm* (n 11) 46–47.

## 3. A moving target?

One objection that a sceptical reader might have is that often the same factor may be incorporated either into the stipulation of a pro tanto criminal proscription or made relevant to a defensive plea. Where such factors end up in the structure of the offence may be down to jurisdictional legislative practices or worse, legislative caprice. As such, refocusing criminalisation theory to explain pro tanto criminal proscription undermines the area of study – it requires criminalisation theory to take aim at a moving target, and thereby limits the insight it can provide.

This is an important objection, but it is misconceived at two levels. First, my suggestion is not that criminalisation theory should explain the drafting choices of any given set of lawmakers (understood broadly to include any authority that creates criminal law). It is that criminalisation theory should explain pro tanto criminal proscription understood as imperative liberty-limiting guidance issued by the substantive criminal law, since it is these sorts of limitations on our initial liberty for which I argue that we need an explanation. We should therefore focus not on the actus reus and mens rea of an offence as drafted by the lawmaker (be that a legislator, or some executive acting under delegated authority, or, in common law jurisdictions, the occasional court). We should focus instead on that portion of the guidance in a convictable criminal offence that imperatively limits the liberty of its addressees, wherever it happens to appear in the offence as drafted. I happen to think that an ideal lawmaker would include guidance of this sort, and only of this sort, in pro tanto criminal proscriptions, but that is not a claim I need to defend here to identify the distinctive, and static, domain of criminalisation theory.

But a sceptic may persist. She may say that it is not always clear when a term that narrows the overall scope of a convictable offence works by limiting the plenary reach of the offences (and therefore, on my view, shapes the pro tanto criminal proscription), and when instead, it works by creating an exception to some broader imperative liberty-limiting guidance (and therefore, on my view, is a defence). For instance, consider this hypothetical, but perfectly realistic, set of provisions:

> §1. A member of the police force may arrest and confine a person if they reasonably suspect that the latter has committed an indictable offence.
>
> §2. A person who is not a member of the police force may not confine another person unless they reasonably believe that the latter has committed an indictable offence.
>
> §3. A person who violates §2 commits an offence.

Focus primarily on §2. My view straightforwardly commits me to saying that the 'unless they reasonably believe … ' portion of that provision is actually a defence insofar as it carves out a situation-specific exception to the general liberty-limiting guidance against confining other people. But what of the part of this provision that reads, 'A person who is not a member of the police force'? There seem to be at least two ways to construe that clause. First, we could treat the plenary liberty-limiting guidance of §2 as guidance against confining other people, and treat membership of the police force as also carving out an exception (albeit one qualified by §1) to that guidance. This would make being a member of the police force a 'defence' to the offence under §3

read with §2. And second, we could read the plenary liberty-limiting guidance of §2 as having been addressed only to people who are not members of the police force – only these people are told not to confine other people (though some exceptions, as specified in the 'unless' clause, apply). This would simply limit the plenary scope of the pro tanto criminal proscription. But, if both ways of construing the structure of §2 are available, then it is not clear which construal my proposal as to the domain of criminalisation theory requires us to take as the 'proper' explanandum. Once again, my proposal as to the domain of criminalisation theory seems to require us to take aim at a moving target.

This deeper challenge relies heavily on the premise that both ways of construing the structure of §2 are available. But that premise is incorrect: the first way of construing §2 sketched above is unnatural, and implausible. Membership of the police force (or indeed any other official body) is not seen as a defence to criminality – a police officer, for instance, would protest that she does not commit even a pro tanto offence when she performs a routine arrest in the ordinary course of her official responsibilities. She is *authorised* to make arrests – indeed, that is an integral part of her job. She does not, even in principle, have to appear as a defendant in a criminal court to justify every arrest that she makes. As I have argued elsewhere,[31] cases like that of police officers making arrests, judges sentencing convicts to prison, jailors imprisoning duly sentenced convicts, and surgeons cutting into the body of patients while performing consensual surgery, are not cases in which the concerned agents plead defences to pro tanto criminal offences. In these cases, the right that underlies the prima facie objection to the agent's action is internally limited. It is designed to be displaceable in a manner that is prescribed by the law granting that right, and in each of these cases, it has been so displaced, and the agent concerned is acting within the realm of that displacement. Accordingly, in these cases, not even the actus reus of an offence has been committed. It is a mistake to conflate such rights-displacement cases with cases of justification (or indeed, any other supervening defence).

## 4. But is this a theory of 'criminalisation'?

I think that normative theories of pro tanto criminal proscriptions have a good claim to the tag 'criminalisation'. Using the term in this way is perfectly natural and tracks folk speech.[32] We do say that X has been criminalised even if some instances of X-ing do not result in convictions, because some defence applies, or because the exercise of prosecutorial or police discretion will pre-empt a conviction. We also call for the

[31]M Dsouza, 'Justifications and Rights-Displacements' (2023) *Crim Law and Philos* <https://doi.org/10.1007/s11572-023-09696-2>. See also M Dsouza, 'Undermining Prima Facie Consent in the Criminal Law' (2014) 33 *Law and Philosophy* 489, 494–97; M Gur-Arye, 'Justifying the Distinction between Justifications and Power (Justifications vs. Power)' (2011) 5 *Crim Law and Philos* 293; M Gur-Arye, 'Criminal Law Defences Divides' (2021) 23(1) *Jerusalem Review of Legal Studies* 167.

[32]This may be because in folk speech, it is perfectly sensible to use the term 'criminalisation' to mean subtly different things depending on the context. For instance, when discussing the effects of criminal punishment, it may be a sensible to use the term 'criminalisation' to mean 'exposing someone to criminal sanction'. See for instance, V Chiao, 'Equality, Assurance and Criminalization' (2014) 27 *Can J L & Jurisprudence* 5. My overall contention here is that when the context is a discussion of a liberal normative theory of when substantive criminal law may appropriately be used to limit our presumptive liberty, the most appropriate way to use the term 'criminalisation' is as 'creating a pro tanto criminal proscription'.

decriminalisation of offences that are on the statute books, even if they are rarely, if ever, prosecuted.[33] In fact, even those who theorise criminalisation-as-convictability sometimes lapse into referring to the creation of a pro tanto criminal proscription as 'criminalisation'.[34] Of course, I do not think that theories of criminalisation-as-convictability use the term 'criminalisation' in an unnatural sense, or one that is divorced from folk usage; my claim is simply that on these parameters, my preferred usage is not an inferior way of using the term.

That said, my primary concern is not with staking a claim to particular terms and nomenclature. I have no especial objection to some label other than criminalisation being used to refer to the sort of theorisation (of pro tanto criminal proscription) that I argue we need, provided that the independent importance of that sort of theorising is granted. I have set out some conceptual reasons for thinking that theorising pro tanto criminal proscriptions is an independently valuable enterprise in Section 2. In addition, I will argue in the next section that thinking about criminalisation in the way that I suggest also highlights some alternative ways of thinking about the structure of the criminal law, and suggests avenues for making progress on persistent disagreements within the criminalisation literature.

## 5. Alternatives highlighted

Consider first the implications of my suggestion about the realm of criminalisation theory for our understanding of the structure of the criminal law. Focusing criminalisation theory on pro tanto criminal proscriptions rather than convictability means that we do not need to adopt even a prima facie view on the structure and exculpatory power of defences en route to answering the question, '*What sorts of conduct may the state rightly make criminal?*'. In other words, we can now theorise exculpation (which relates to defences) separately and on its own terms, rather than as an element of criminalisation theory. Our theory of criminalisation can focus instead on inculpation (which relates to the pro tanto criminal proscription). While such a theory of criminalisation will be unable to incorporate a view as to justifying and excusing factors, that simply means

[33]Examples of this usage of the word 'decriminalise' (and its cognates) are legion. For instance, in 2018, when the Supreme Court of India struck down s.377 of the Indian Penal Code 1860, which criminalises 'unnatural offences', insofar as it relates to gay sex, this was hailed as a seismically significant act of 'decriminalisation', even though the gay sex was rarely prosecuted in the decades leading up to the Supreme Court's ruling. *Navtej Singh Johar v Union of India* AIR 2018 SC 4321; see also The Economist, 'How India Decriminalised Homosexuality', 12 September 2018. <https://www.economist.com/the-economist-explains/2018/09/12/how-india-decriminalised-homosexuality>. Similarly, although sex work is rarely prosecuted in Belgium, it remains a criminal offence, and there have been calls to 'decriminalise' it. See The Brussels Times, 'Scrap Laws against Sex Work, Says Justice Minister', 2 April 2021. <https://www.brusselstimes.com/163077/scrap-laws-against-sex-work-says-justice-minister-vincent-van-quickenborne-daan-bauwens-exploitation-criminal-gang-landlord-pimps-victim-police-law>. Along similar lines, in the four years for which Section 217 StGB (Germany) was in force and made it a criminal offence to assist suicide, there were no convictions under the provision, and yet, when the German Federal Constitutional Court struck down Section 217 StGB as unconstitutional, this was seen as an act of decriminalisation. See H Göken and F Zwießler, 'Assisted Suicide in Germany: The Landmark Ruling of the German Federal Constitutional Court of February 26, 2020' (2022) 23 *German Law Journal* 661, 663; BVerfG, 2 BvR 2347/15, <https://www.bundesverfassungsgericht.de/e/rs20200226_2bvr234715en.html> (26 February 2020).

[34]See for example, Tadros, 'Wrongness' (n 5) 159; Duff, 'Modest' (n 9) 221; Simester (n 4) 484; Simester and von Hirsch (n 3) 6, 8; N Jareborg, 'Justification and Excuse in Swedish Criminal Law' (1987) 31 *Scandinavian Stud L* 157, 159, 161, 170. Note that I do not dispute that the term 'criminalisation' can quite sensibly be used in other contexts in senses that differ subtly from what I suggest here, but in all the pieces cited, this term is being used in the context of theorising what should be a crime.

that we need to supplement it by explaining such defences on their own terms.[35] In combination with that sort of explanation then, we continue to have the theoretical resources to explain the same overall set of substantive criminal law explananda. In fact, isolating theories of criminalisation from theories of defences also helps us to avoid the temptation to assume that offence stipulations and defences share the same features and/or work in the same ways.[36] The possibility – which, to be clear, has always existed though it was obscured by criminalisation-as-convictability thinking – that the criminal law principles of inculpation and exculpation work in subtly different ways, and by reference to different epistemic perspectives, is now brought into much sharper focus. We now have the logical space to theorise inculpation (in the form of pro tanto criminal proscriptions) and exculpation (in the form of defences) separately, rather than under a single umbrella theory of culpability. This, in turn, lets us take seriously the possibility that inculpation and exculpation may work in subtly, but importantly, different ways.[37]

Even though nothing I have said here shows that we *must* theorise inculpation and exculpation separately, the very possibility is tantalising. Elsewhere[38] I have defended one way of fleshing out this possibility. In brief, I suggest that we may plausibly think that when a liberal criminal law issues conduct guidance that imperatively limits its subjects' presumptive liberty on pain of criminal sanction – in other words, when it promulgates a pro tanto criminal proscription – it must explain how that intrusion is consistent with its liberal foundations. On the other hand, when the criminal law issues permissive liberty-expanding conduct guidance (of the sort that we see in justificatory defences), it expands the subjects' liberty by creating exceptions to its own imperative conduct-limiting guidance. Therefore, this sort of criminal law conduct guidance need not be reconciled with the criminal law system's claim to being liberal. And this means that we must evaluate the breadth of offences and defences by reference to different considerations.

A different avenue for progress relates to a troublesome set of disagreements amongst criminalisation theorists about how the wrongfulness of some conduct relates to its criminalisation. Many theorists of criminalisation-as-convictability believe that in a liberal state, criminalisation is subject to a 'wrongfulness constraint', such that conduct is appropriately criminalised only if it is a wrong,[39] or if it is wrongful.[40] This is because they take

[35]And of course, the literature already abounds with theories of defences. For obvious reasons, my preferred one is set out in Dsouza, *Rationale-Based Defences* (n 16), but the plentiful writing in this area includes TM Funk, *Rethinking Self-Defence: The 'Ancient Right's' Rationale Disentangled* (Hart 2021); B Sangero, *Self-Defence in Criminal Law* (Hart 2006); M Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387; MN Berman, 'Justification and Excuse, Law and Morality' (2003) 53 *Duke Law Journal* 1; E Colvin, 'Exculpatory Defences in Criminal Law' (1990) 19 OJLS 381; K Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49(3) *Law and Contemporary Problems* 89; J Hrushka, 'Justifications and Excuses: A Systematic Approach' (2005) 2 *Ohio State Journal of Criminal Law* 407; F Leverick, *Killing in Self-Defence* (OUP 2006); PH Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82 *Columbia Law Review* 200; and P Westen, 'An Attitudinal Theory of Excuse' (2006) 3 *Law and Philosophy* 289.

[36]Something that I have expressed concerns about in other work – see Dsouza in *Rationale-Based Defences* (n 16) and 'Justifications' (n 31).

[37]See for instance, suggestions to this effect in Dsouza, *Rationale-Based Defences* (n 16) Ch.2; M Dsouza, 'Criminal Culpability after the Act' (2015) 26 KLJ 440; M Dsouza, '*Criminally Ignorant* – An Invitation for Broader Evaluation' (2021) 12 (2) *Jurisprudence* 226, 232–33.

[38]Dsouza, *Rationale-Based Defences* (n 16) Ch.2. See also, Dsouza, 'Criminal Culpability' (n 37).

[39]J Gardner, *Offences and Defences* (OUP 2007) 80; RA Duff and SE Marshall, 'Public and Private Wrongs' in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Gerald Gordon* (Edinburgh University Press 2010) 71.

[40]Berman (n 35) 7; A Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* (OUP 2000) 153; Simester (n 4) 483; Edwards and Simester (n 4) 172; Simester and von Hirsch (n 3) ch. 2; Feinberg (n 1) ch. 3; Duff, *Realm* (n 11) ch.4; RA Duff, *Answering for Crime* (OUP 2007) 81; A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225, 244; Moore, 'A Tale' (n 8) 32; Moore, *Placing Blame* (n 1) 753–57, 769–70, 778; Husak (n 7) 72–77; du Bois-Pedain (n 9).

the state's commitment to liberalism to entail that the 'state should not create crimes that will subject offenders to punishment without good reason to believe that the punishment to which such persons will become subject would be justified'.[41] However, even amongst those who accept the wrongfulness constraint, there are disagreements about how that constraint should be fleshed out. For instance, one disagreement relates to whether the concerned wrongness/wrongfulness needs to exist prior to criminalisation, or whether it can be the result of the criminalisation.[42] A second relates to whether the wrongfulness constraint is an all-things-considered constraint on criminalisation, or a presumptive – or more precisely, 'pro tanto' – one.[43] But I suspect that all of these disagreements have their roots in the interlocutors' shared assumption that a theory of when it is appropriate to use substantive criminal law to limit our presumptive liberty is also a theory of convictability.

This assumption is, I have argued, false. The substantive criminal law limits our presumptive liberty well before the stage of conviction, at the time that it issues pro tanto criminal proscriptions. And since not everyone who breaches a pro tanto criminal proscription is liable to a conviction – one may have defences to criminal liability, including defences that deny the wrong/wrongful conduct – it is implausible to think that pro tanto criminal proscriptions are subject to the sort of wrongfulness constraint contemplated in these disagreements.

If we abandon this assumption and, instead, think of criminalisation in terms of creating pro tanto criminal proscriptions, we see that the real question is whether a wrongfulness constraint applies to convictability. Thus framed, the first disagreement mentioned above resolves into a question of whether conduct must be wrongful prior to it being made liable to a conviction. Tadros offers this example to show that it need not: suppose, says Tadros, at time T0, so many people carry knives in public that it is necessary for an agent 'D' to also carry a knife, for self-defence. Now, say we make it a convictable offence to carry a knife in public without justification, and that doing so has the consequence that at time T1, significantly fewer people carry knives. Few enough, in fact, that at T1 there is no need for D to carry a knife for self-defence. In this case, Tadros argues, even though D's conduct was not a moral wrong at T0 (because D needed the knife for self-defence), the same conduct by D will be a moral wrong at T1 because knife carrying in public has been made a convictable offence.[44]

But notice that Tadros implicitly accepts that it is (and always was) morally wrong to carry a knife in public without justification. Tadros says that what has changed between T0 and T1 is that unjustified knife carrying in public has been made liable to a conviction, and that is correct, but not precise enough in two ways. The first is picked up by Duff, and does not require us to change the way in which we think about normative criminalisation

There are subtle differences in the conceptions of wrongfulness adopted by the aforementioned theorists, but they are not very important to the enterprise of this paper.

[41]Husak (n 7) 82. See also Feinberg (n 1) 108–09; Moore, 'A Tale' (n 8) 32; Edwards, 'Criminalization' (n 4) 70.

[42]Tadros, 'Wrongness' (n 5) disputes the relatively orthodox position that conduct should be wrong/wrongful prior to criminalisation, and argues that the wrongness/wrongfulness of the conduct can appropriately be the result of the criminalisation.

[43]Cornford (n 6) disputes the relatively orthodox position that the wrongfulness constraint is an all-things-considered constraint on criminalisation. He suggests that it is only a presumptive constraint, and that there can sometimes be good reasons to override it and criminalise non-wrongful conduct.

[44]Tadros, 'Wrongness' (n 5) 169–70.

theory.[45] I therefore focus on the second. Tadros' claim is inadequately precise because a more precise way to describe what the lawmaker did between T0 and T1 is that the lawmaker enacted a pro tanto criminal proscription; the general justificatory defensive plea of self-defence was always in place, and it remained untouched. In Tadros' example, this change results in a reduction in the prevalence of knife carrying in public, but the legal change made would be exactly the same even if pro tanto criminally proscribing knife carrying in public had absolutely no effect on the levels of knife carrying in public, such that D remained justified in, and therefore not liable to a conviction for, herself carrying a knife in public. Thinking of criminalisation as convictability obscures what has really changed in Tadros' example, because changes in pro tanto criminal proscriptions will also result in downstream changes to what is liable to conviction. If we think of criminalisation as pro tanto criminal proscription we are encouraged to be more precise about what has changed between T0 and T1, and this more precise specification reveals that Tadros' example is beside the point. Obviously, conduct need not be wrongful before being pro tanto criminally proscribed, and equally obviously, it need not be wrongful even after being pro tanto criminally proscribed, since people who breach pro tanto criminal proscriptions can always plead supervening defences that show that their conduct was not actually wrongful, all things considered. The key change in Tadros' example is what the legislature did *in combination with* the effect it has on the public, and in ascribing the effect of the change solely to what the legislature did – i.e., create a new pro tanto criminal proscription – Tadros reaches a misleading conclusion.

So, thinking of criminalisation as pro tanto criminal proscription helps us see that Tadros' argument cannot convince. But should we independently think that conduct must be wrongful prior to it being made liable to a conviction? There can hardly be any sensible disagreement on the proposition that a good system of substantive criminal law should at least aspire to answer this question in the affirmative. One way in which it may come closer to achieving this aspiration is, of course, by defining the scope of the overall convictable offence with greater precision. But if we think about criminalisation as relating to the drafting of pro tanto criminal proscriptions, we are more attuned to a second possibility: that of improving the precision of the overall convictable offence by working with the sub-units of a convictable offence, i.e., the pro tanto criminal proscription, and the defence stipulations. It becomes more obvious that these sub-units can be adjusted independently, and crucially, by reference to different sets of normative considerations.

Now consider the second disagreement, as to whether the wrongfulness constraint is an all-things-considered, or merely presumptive, constraint on criminalisation (understood as making something convictable). While most theorists who address this question think of the wrongfulness constraint as an all-things-considered constraint, Cornford (who also treats criminalisation as relating to convictability) thinks that it is only a presumptive constraint, and that there can be sufficient countervailing reasons to override

[45]Duff notes that what has changed from T0 to T1 is that fewer people are carrying knives in public at T1. While that change does not affect the *type* of conduct that is subject to a conviction, it does affect the availability of the plea of self-defence defence in respect of any individual *token* of knife carrying in public. This would be true whether the said change resulted from the enactment of the offence Tadros describes, or from any other reason. Hence, Tadros' argument works by conflating tokens of conduct with types of conduct. Duff, 'Modest' (n 9) 220–21.

the presumption against criminalising conduct that is not wrongful.[46] He argues that, 'criminalisation always and inevitably facilitates the condemnation and punishment of some non-wrongful conduct'.[47] This is because, firstly, it is epistemically impossible for a practically useful system of criminal law to ensure that it will never convict innocent persons, and secondly, the criminal law is a blunt instrument that must apply generally over whole populations and diverse sets of facts, and so must necessarily define crimes in unavoidably over-inclusive terms.[48] Therefore, he concludes that 'it is sometimes permissible to criminalise non-wrongful conduct, all things considered',[49] and then identifies some factors that may plausibly be considered when identifying *when* we should criminalise non-wrongful conduct.

While Cornford is right to say that in some respects almost any criminalisation decision will be unavoidably overinclusive,[50] his move from that proposition to the claim that it is *permissible* to over-criminalise (in the sense of convicting people for non-wrongful conduct) is suspect. There are standards of perfection that the systems we humans design – in this context, the criminal law – can never meet, simply because we, the designers, are ourselves epistemically fallible. Thus, we cannot eliminate the possibility that officials will err in applying the law, and we are more reliant than we would like to be on the defendant not pleading guilty even where a full trial would reveal their innocence. But the fact that some over-criminalisation is inevitable is just a reason not to unduly fret over unavoidable over-criminalisation. It is not a normative reason to think that over-criminalising is *justifiable* or *permissible* even when it is avoidable. The factors that Cornford identifies as favouring over-criminalisation are only relevant if we assume that *avoidable* over-criminalisation is permissible in principle. If the over-criminalisation is *un*avoidable, then it is incoherent to demand a normative justification for it; one cannot but do something that is unavoidable. But Cornford provides no argument to support his assumption that *avoidable* over-criminalisation is permissible in principle. Nor does, to the best of my knowledge, anyone else. We should not, then, accept Cornford's (implicit) claim that avoidable over-criminalisation can be justified.

Of course, proponents of the view that the wrongfulness constraint is an all-things-considered constraint on criminalisation-as-convictability may still have a problem. Their view seems to commit them to insisting that if we ever convict someone whose conduct is not wrongful, the system has misfired, despite the impossibility – given the inherent epistemic fallibility of the criminal justice system – of always getting it right. In terms of substantive criminal law, that might be a bullet worth biting, but at least in a procedural sense, that seems too demanding a standard to insist on, given that meeting it is impossible. But they can weaken their position a little to address this problem. They can say that when considering the set of convictions for non-wrongful conduct, we should distinguish between those that are truly unavoidable, in the sense of being the inevitable consequence of our epistemic fallibility as humans, and those that are just difficult to avoid. Even though we should be concerned about exposing people to a criminal conviction for non-wrongful conduct, the former subset of

[46]Cornford (n 6) 633–48.
[47]ibid 633.
[48]ibid 633–34.
[49]ibid 638.
[50]See also Simester (n 4) 486; Edwards, 'Criminalization' (n 4) 75–77.

convictions is morally tolerable – not permissible or justified, mind – simply because it makes no sense to demand the impossible of our criminal law. However, we should aspire to eliminate or reduce the latter subset of convictions – those resulting from the bluntness of the criminal law – as far as possible. In other words, the supposed wrongness constraint on convictability pushes us to eliminate *avoidable* convictions of people who did not act wrongfully. And thinking of criminalisation as creating a pro tanto criminal proscription offers both, a theoretical explanation for why this is, and some guidance on how to go about doing that.

Consider the theoretical explanation first. Pro tanto criminal proscriptions affect, but do not determine overall convictions or criminal punishment – other factors, including the breadth of the defences available also matter. This is why nobody suggests that pro tanto criminal proscriptions are subject to a wrongfulness constraint, even though they, like overall convictable offences, can be over and underinclusive. A focus on the normative appropriateness of pro tanto criminal proscriptions also illuminates why the criminal justice system is not undermined by the fact that it will inevitably convict some people who did not act wrongfully. Let's say that we are satisfied that the pro tanto criminal proscription of some conduct was legitimate in terms of our theory of pro tanto criminal proscription. We have, at this point, made a positive, and normative, case for legitimately convicting people who violate that proscription. This positive case can be defeated, for instance, by defendants successfully pleading a (suitably drafted) supervening defence. But if it is not defeated, it is legitimate to convict those who violate the pro tanto criminal proscription. On this overall picture of the path to a conviction, the legitimacy of any conviction is undermined, inter alia, by pro tanto criminal proscriptions that are framed over-inclusively, or defence stipulations that are framed under-inclusively. Conversely, the legitimacy of any failure to convict is undermined, inter alia, by pro tanto criminal proscriptions that are framed under-inclusively, or defence stipulations that are framed over-inclusively. But notice that we are not committed to insisting on impossible standards of precision when framing pro tanto criminal proscriptions or defence stipulations; we can judge over and under-inclusiveness by reference to standards that are relativised to what is practically possible, and what is practically possible may change over time. Thus, the legitimacy of a criminal justice system's path to a conviction will not be undermined either by unavoidable convictions of people who did not act wrongfully or by unavoidable non-convictions of people who did.

This line of argument also tells us something practical about how to eliminate avoidable convictions of people who did not act wrongfully. Some obvious ways to do this involve making improvements outside the realm of substantive criminal law. For instance, we may need to progressively improve the quality of our investigative procedures and evidence laws, and be less credulous about guilty pleas. But we can also take steps within the realm of substantive criminal law; we can, for instance, draft pro tanto criminal proscriptions and defence stipulations more precisely.

For an illustration, consider Cornford's own example of how the offence of sexually touching a child under the age of 16[51] is over-inclusive insofar as it also captures the non-wrongful conduct performed within the context of consensual and non-exploitative

[51]Sexual Offences Act 2003, s.9 (England & Wales). Scotland also adopts the same approach to legislating about sexual acts amongst children. See s.37 of the Sexual Offences (Scotland) Act 2009, Callander (n 29).

relationships between 18-year-olds and mature 15-year-olds. Cornford argues that the imperative to protect young children from being exploited by adults justifies exposing the 18-year-old in this example to a criminal conviction,[52] and yet, it requires no great feat of imagination to see how the offence could have been drafted to better target truly problematic instances of such conduct. Canada, for instance, only presumes that a child who consents to sexual activity is being exploited if the activity involves someone who is older than the child by a specified number of years (which depends on the age of the child), and is not in a position of trust or authority etc towards the child.[53] Such a provision could potentially save the 18-year-old defendant in Cornford's example. Of course, framing the offence in this way increases the risk that some cases of factually wrongful conduct will be missed, but in considering the trade-offs, it should matter to us that it will also reduce the risk of convicting people for non-wrongful conduct. We may still never be able to achieve perfect targeting in a workable system of criminal law, and to that extent, the claim that the wrongfulness constraint is an all-things-considered constraint on convictability continues to be too strong, at least insofar as we accept that in a procedural sense, some convictions for non-wrongful conduct are tolerable. But Cornford's suggestion that we treat the wrongfulness constraint as merely a presumptive constraint on convictability surrenders too much ground.

In sum, we *should* care about how pro tanto criminal proscriptions are framed – we should prefer less over and under-inclusive framings to more over and under-inclusive ones respectively. So, if the Canadian framing of the law on child sexual offences does not let too much wrongful conduct go unpunished, the fact that it is less over-inclusive than the corresponding law in England and Wales means that we should prefer the Canadian model.[54] But theories of criminalisation that focus on convictability have little, if anything, directly to say on how we should draft offence stipulations.[55] In contrast, thinking of criminalisation as the creation of pro tanto criminal proscriptions forces us to care about how we draft the pro tanto criminal proscription. A good theory of criminalisation understood as the creation of pro tanto criminal proscriptions gives us better access to the middle ground between the positions of Cornford and his interlocutors. And at a more general level, a good theory of criminalisation-as-pro-tanto-criminal-proscription helps us defend the wrongfulness constraint against the challenges to it raised by Tadros and Cornford.

## 6. Whither theories of convictability

Nothing in my argument is meant to diminish the independent importance of theories of criminalisation-as-convictability. Not only do theories of convictability attempt to provide a normative theory of a substantial subset of the instances in which the state may appropriately use its substantive criminal law to limit our presumptive liberty, arguably, they address the central instances in which the state may do this. The set of conduct that can appropriately be pro tanto criminally proscribed will contain, and be larger than,

[52]Cornford (n 6) 640–41. Callander (n 29).
[53]Criminal Code (R.S.C., 1985, c. C-46), s.150.1(2), s.150.1(2.1) (Canada).
[54]See also a suggestion to this effect by Callander (n 29) 203.
[55]See for instance, Duff, *Realm* (n 11) 10.

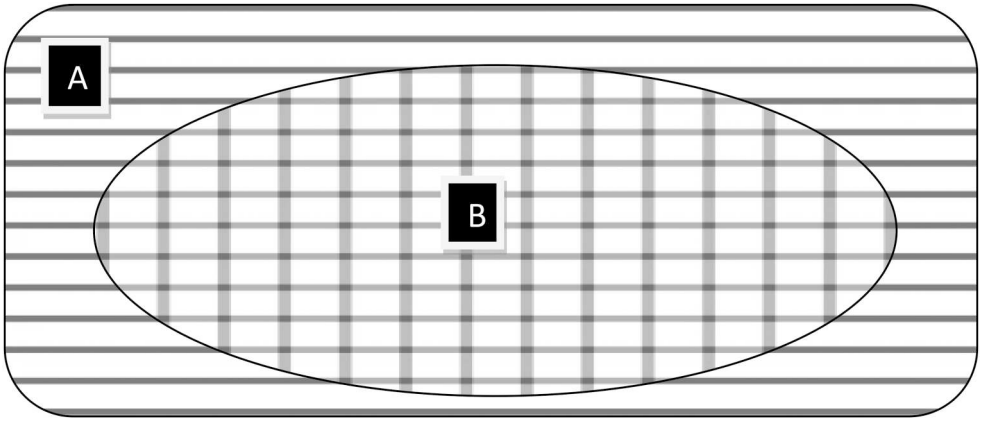


**Diagram 1.** Pro tanto criminally proscribable conduct and net criminally proscribable conduct.

the set of conduct for which one can appropriately be convicted (i.e., the set of net criminally proscribed conduct). Diagram 1 below represents the relationship between conduct that can appropriately be pro tanto criminally proscribed (the entire area within the rounded rectangle A) and conduct for which one can appropriately be convicted (the area within the oval B).

I doubt it is possible to completely theorise appropriate pro tanto criminal proscription without first having theorised appropriate criminal convictability. That is because, for any given offence, what can appropriately be pro tanto criminally proscribed will depend on, and must include, all relevant conduct for which a conviction is appropriate, and, given the foregoing discussion on the wrongfulness constraint, we have much more guidance as to the latter than we have as to the former. In other words, I think that it is likely that the boundaries of what can appropriately be pro tanto criminally proscribed will radiate outwards from the boundaries of conduct for which we can appropriately convict. We therefore cannot do without an explanation of the proper domain of convictability, and for that, we must turn to theories of criminalisation-as-convictability.

That said, I do think that we can make some general progress on theorising the area within the rounded rectangle A, but outside the oval B (i.e., the area filled in with only horizontal lines), even before we complete the task of theorising the matters falling within the oval B. Of course, we will not be able to identify the specific terms that the appropriate pro tanto criminal proscription in respect of some offence 'X' should take without first having pinned down what conduct a conviction for X should cover. But, I think, it might be possible to identify some principles that ought to govern the move outwards from the conduct that is covered by any (full) offence token to the conduct that may appropriately be pro tanto criminally proscribed in respect of that offence token. Moreover, I think that such principles can immediately help us to evaluate whether the offence stipulations associated with existing offences are over or under-inclusive. In the next section, I set out some tentative thoughts as to how we might make progress in the endeavour of identifying such principles.

## 7. The way forward

It is beyond the scope of this article to defend a full theory even of the general principles that govern the move from appropriately convictable conduct to appropriately pro tanto criminally proscribable conduct, but I do want to use this section to gesture at what I think might be a promising start. I suspect that insights from some theories of criminalisation-as-convictability could offer us useful guidance in this enterprise.

The foregoing discussion about the merits of the wrongfulness constraint suggests that even if there is a wrongfulness constraint on appropriate convictability, what we can appropriately pro tanto criminally proscribe is not a subset of wrongful conduct. A normative theory of criminalisation-as-pro-tanto-criminal-proscription therefore cannot start with the set of wrongful conduct and then whittle that down to arrive at the set of properly criminalised conduct. Instead, in a liberal state, we should start with the set of conduct that is properly the business of a liberal state,[56] and then whittle *that* down to arrive at the set of properly criminalised conduct. And Duff and Marshall's theory of criminalisation-as-convictability adopts precisely that starting point: the notion that a liberal state's criminal law is centrally concerned with activities in the public, as opposed to the private, realm.[57] It, then, is one excellent candidate theory to adapt for our purposes.[58]

With some necessary simplification, the Duff and Marshall view on criminalisation-as-convictability is that we have a positive, though not conclusive, reason to criminalise any public moral wrong, where a public moral wrong is understood as wrongdoing in the public realm.[59] In coming up with a theory of criminalisation-as-pro-tanto-criminal-proscription, we can repurpose this basic idea. We could argue that we have a positive, though not conclusive, reason to criminalise (i.e., pro tanto criminally proscribe) any pro tanto public moral wrong (in the Duff and Marshall sense of a 'public moral wrong'). This would mean treating an agent's conduct as a pro tanto public moral wrong if, but for *additional* factors that deny its wrongfulness, it is a public moral wrong.[60] Indeed, we might plausibly hypothesise the following variant of the wrongfulness constraint to govern pro tanto criminal proscription:

[56]This approach aligns with that of the Wolfenden Committee on Homosexual Offences and Prostitution who famously declared that 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'. Home Office, *Report of the Committee on Homosexual Offences and Prostitution* (HMSO 1957) para.61.

[57]Duff and Marshall (n 39) 71–72; SE Marshall and RA Duff, 'Reply' in PH Robinson, SP Garvey and KK Ferzan (eds), *Criminal Law Conversations* (OUP 2009) 229; SE Marshall and RA Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 13–14; Duff, *Realm* (n 11) 52, 78–79; Duff, 'Modest' (n 9). See also Dsouza, *Rationale-Based Defences* (n 16) 19–20; 48–49; 67–68. Note that Duff and Marshall's theory has been subject to various criticisms, including from feminist perspectives. See for instance, MM Dempsey, 'The Public Realms: On How to Think About Public Wrongs' (2020) 7 *Law, Ethics and Philosophy* 158. A full theory of criminalisation would require me to address such critiques, but that is unnecessary for the tentative use to which I propose to put Duff and Marshall's views here.

[58]Although discussing this one exemplar suffices to make my general point, note that there are also other theories that we could consider adapting, since they too accept similar foundational claims. For instance, V Chiao, *Criminal Law in the Age of the Administrative State* (OUP 2018) ch.5 develops an account of criminalisation (as convictability) which also takes a focus on the non-private areas of one's life as the starting point when setting subject-matter constraints on criminalisation (see especially 161–63).

[59]Duff and Marshall (n 39) 71–72; Marshall and Duff, 'Reply' (n 57) 229–30, 233–38; Marshall and Duff, 'Criminalization' (n 57) 13–22; Duff, *Realm* (n 11) 52, 78–79; Duff, 'Modest' (n 9).

[60]Duff, 'Modest' (n 9) 221 even suggests that it is appropriate to define this sort of pro tanto wrong (he calls it a presumptive wrong) as a criminal offence.

> *Pro tanto wrongfulness constraint*: Conduct is appropriately pro tanto criminally proscribed only if it is pro tanto publicly morally wrongful.

I cannot, of course, fully defend this pro tanto wrongfulness constraint here, but not only is it intuitively plausible, there is already some support for it in the literature, even though the focus of those discussions is not on how a liberal legislator should draft pro tanto criminal proscriptions.[61] The plausibility of the pro tanto wrongfulness constraint also points to a clear direction of travel for future analysis.[62] If the pro tanto wrongfulness constraint is correct, then we should only pro tanto criminally proscribe conduct that, but for *additional* factors that deny its wrongfulness, would be a public moral wrong. Of course, we need not settle philosophical arguments about how we identify (publicly) morally wrongful conduct before we can apply this insight to existing offences. We can, for the purposes of analysing whether a given offence's pro tanto criminal proscription is drawn appropriately in relation to the conduct for which it convicts, assume that the offence convicts only for wrongful conduct. Even if that were true, the contours of the offence could be liable to criticism on the grounds that the offence stipulation (or indeed, the defence stipulation – though that is a matter for another paper) is over or under-inclusive.[63] This sort of criticism would be immensely valuable, because, as previously noted, framing pro tanto criminal proscriptions and defence stipulations more precisely is one important way in which we can minimise avoidable convictions of people who did not act wrongfully.

There is some sporadic recognition of the importance of drafting offence definitions appropriately in the existing criminalisation theory literature,[64] and the occasional discussion of the considerations that might, with some modification, be relevant to offence drafting,[65] but little sustained discussion of what a liberal theory of criminalisation can tell us about *how* to draft pro tanto criminal proscriptions. However, the drafting of pro tanto criminal proscriptions would be a central concern of a normative theory of criminalisation as pro tanto criminal proscription.

While I cannot undertake the task of systematically discussing the manner in which we should draft pro tanto criminal proscriptions here, one rich vein of material that

[61] Most notably, Duff, *Answering* (n 40) 217–18, 224–28 makes much the same suggestion about the proper scope of an offence stipulation, by which he means the same thing as I mean by pro tanto criminal proscription. However, his focus is on defending the distinction between offences and defences, and therefore, while he does discuss which parts of an overall convictable offence belong in the pro tanto criminal proscription, and which belong in the defence stipulations, he does not use the pro tanto wrongfulness constraint to identify the limits that ought to apply to a liberal legislator in creating a pro tanto criminal proscription. For another such similar, albeit far briefer, discussion, see Simester, *Fundamentals* (n 14) 438.

[62] My thanks to Alexandra Giannidi for helping me clarify my thinking on this point.

[63] This sort of criticism could be the normative foundation of the type of constitutional check on criminal lawmaking that du Bois-Pedain argues is appropriate for supplementing the insights offered by the more traditional theories of convictability. See A du Bois-Pedain, 'The Place of Criminal Law Theory in the Constitutional State' in AP Simester, A du Bois-Pedain and U Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart 2004) 306, 319. I say a bit more about what the jurisprudence of the constitutional review of criminal law can offer to a theory of pro tanto criminal proscription momentarily.

[64] For instance, Duff, *Realm* (n 11) 69, who recognises that we should avoid enacting pro tanto criminal proscriptions against non-wrongful conduct, though he then shifts his focus to the net effect of what the criminal justice system including prosecutors and investigators do (i.e., 'substantive criminalization') rather than 'formal criminalization'. In previous work though, he offers a somewhat more sustained discussion of how pro tanto criminal proscriptions should be framed. See Duff, *Answering* (n 40) 224–28.

[65] For instance, Duff, *Answering* (n 40) 224–28; Duff, *Realm* (n 11) 46–47, 67–70; Edwards, 'Criminalization' (n 4) 75–78; Cornford (n 6) 639–44; Husak (n 7) 120–77.

this endeavour would benefit from tapping into lies beyond what is currently thought of as the domain of criminalisation theory. In many legal systems – here, I discuss the German and US legal systems, but they are certainly not unique – criminal offences are subject to review from a constitutional law perspective. It is to the jurisprudence regarding the constitutionality of criminal offences that I refer.

While the focus of the German constitutional law review is not restricted to pro tanto criminal proscriptions, the analytical framework it employs is fine-grained enough to offer some useful guidance for our present purposes.[66] In fact, Lagodny explains that to conduct this analysis, 'it is necessary to distinguish between the prohibition as such, on the one hand, and the power to blame and to punish, on the other'.[67] By 'prohibition', Lagodny means the criminal offence as it emerges as a whole from the statute, rather than just the pro tanto criminal proscription, but many of the factors relevant to the analysis of prohibitions apply just as sensibly to pro tanto criminal proscriptions as to defence stipulations. Importantly though, there is no reason to assume that they apply *in the same way* to pro tanto criminal proscriptions and defence stipulations. In brief, the full German analysis requires us to.

1. identify the state's action;
2. identify the basic rights encroached upon by this action;
3. consider the objective or purpose of the state's action;
4. consider the effectiveness or suitability of the state's action with regard to this purpose;
5. examine its necessity (i.e., whether there are less intrusive, yet equally effective means to achieve that purpose); and
6. consider the proportionality of the state's action.[68]

The consideration of this last factor – the proportionality of the prohibition – is meant to ensure that the prohibition is neither excessive from the point of view of the person subject to the prohibition, nor inadequate from the perspective of the interests being protected by the prohibition.[69]

In the United States, the Fifth Amendment to the Constitution guarantees that no person shall be 'deprived of life, liberty or property without due process of law'.[70] This has spawned the 'void-for-vagueness' doctrine, as per which a statute or rule (the focus is on criminal provisions, although the doctrine also applies to other types of provisions) is found to contravene the due process clause when it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement'.[71] The extensive jurisprudence on the void-for-vagueness doctrine highlights a range of factors that should be

[66] c.f. Feinberg (n 1) 4–5, who deliberately distances his moral philosophy focused analysis of criminalisation from an examination of the constitutionality of criminal offences.
[67] Lagodny (n 20) 764.
[68] ibid 764. For a recent example of these principles being put into action, see BVerfG, 2 BvR 2347/15, <https://www.bundesverfassungsgericht.de/e/rs20200226_2bvr234715en.html> (26 February 2020), which struck down a provision of the German StGB that criminalised assisting suicide.
[69] Lagodny (n 20) 768.
[70] US Const Amend V.
[71] *United States v Williams* 553 US 285, 304, 128 S Ct 1830 (2008). See also *Sessions v Dimaya* 138 S Ct 1204, 1212 (2018).

considered when evaluating the constitutionality of a statute or rule, and while this is not the place for a detailed discussion of those factors, it is worth noting that this doctrine applies to the *net* criminal prohibition, as opposed to just the pro tanto proscription. Again though, insofar as the analysis is meant, not only to provide fair notice, but also to channel discretion in order to guard against arbitrary and discriminatory enforcement,[72] many of the factors relevant to the analysis of prohibitions apply just as sensibly to pro tanto criminal proscriptions as they do to defence stipulations. After all, inasmuch as overinclusive pro tanto criminal proscriptions give the enforcement authorities greater discretion, one way of limiting that discretion is to ensure that pro tanto proscriptions are not drafted overinclusively.

While some features of these analytical frameworks may not be as apt for theorising pro tanto criminal proscriptions as they are for constitutionally reviewing criminal prohibitions *tout court*, it is easy to see that they can nevertheless contribute plenty that is of value. A fuller theory of criminalisation-as-pro-tanto-criminal-proscription will be able to consider whether any of these factors is irrelevant or redundant, whether they need to be supplemented by other factors, and how they should be balanced against each other. For the present purposes, it suffices to show that the type of analysis being suggested is practicable, and that there are already resources in the wider literature relating to criminal offences that can inform this fuller theory of criminalisation. The suggestion in this paper is no pie in the sky. It is attainable, plausible, and has the potential to significantly further the analysis not only of when it is appropriate to limit our presumptive liberty by way of the criminal law, but also, of the internal dynamics of the different components – both inculpating and exculpating – of a criminal offence.

## 8. Conclusion

If criminalisation theory is meant to explain when it is appropriate to use the criminal law to limit the presumptive liberty of people in liberal states, then criminalisation theories that focus on explaining legitimate convictability identify only a subset of the correct explananda, and therefore cannot provide an adequate account. I have argued here that for a normative account of the liberty limiting effect of the criminal law, we need a theory of criminalisation that focuses on explaining legitimate pro tanto criminal proscription, since it is when pro tanto criminally proscribing conduct that the substantive criminal law starts to limit our presumptive liberty. Speaking of this sort of theory as a theory of criminalisation is perfectly natural. More importantly, thinking about criminalisation in this way highlights the possibility of analysing culpability and conviction disjunctively. Culpability theory can be broken down into separate theories of inculpation and exculpation, and when thinking of convictability, we can disjunctively theorise the ideal approaches to framing pro tanto criminal proscriptions, and to framing defence stipulations. As an added benefit, thinking of criminalisation in terms of theorising pro tanto criminal proscriptions helps us cut through some persistent disagreements amongst theorists. And while I have not attempted to defend a fully worked out theory of criminalisation-

[72] 32 Fed Prac & Proc Judicial Review § 8141 (2nd edn).

as-pro-tanto-criminal-proscription here, I have ventured some thoughts about what such a theory could look like, the sorts of issues it could address, and how. Further work needs to be done to explore the full potential of the avenue of analysis described here, but the fruits of this initial foray suggest that it will be work well rewarded.

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No potential conflict of interest was reported by the author(s).

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