

Part I

Introduction

Regulating Deviance
The Redirection of Criminalisation
and the Futures of Criminal Law

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I. INTRODUCTION

THE CRIMINAL ATTACKS that occurred in the United States on 11 September 2001 have profoundly altered and reshaped the priorities of criminal justice systems around the world. Domestic criminal law has become a vehicle for criminalising ‘new’ terrorist offences and other transnational forms of criminality. ‘Preventative’ detention regimes have come to the fore, balancing the scales in favour of security rather than individual liberty. These moves complement already existing shifts in criminal justice policies and ideologies brought about by adjusting to globalisation, economic neo-liberalism and the shift away from the post-war liberal welfare settlement. Put together, such developments raise profound questions about the nature of Western criminal justice systems: what have they been and what are they becoming; how do we understand the idea of ‘liberal’ criminal law and justice; how (and through which general principles) are criminal laws shaped; and what practical and normative resources are at the disposal of criminal justice systems? By examining current changes in the law, and placing them in an overall understanding of what the criminal law is, has been and should be, the chapters presented here together seek to indicate answers to such questions.

The redirection of criminalisation can be described in terms of particular issues such as whether security concerns can be balanced with the traditional rights of the accused; the widening boundaries of the criminal law to include offences of preparation and planning; the scope and justification of offences against the person such as rape, assault and offences of ‘indecentcy’; underlying shifts in penal ideology, including the role of ‘victim-driven’ criminalisation and their impact on criminal justice practice; the relationships between procedure, substantive criminal law and sentencing; and

how a liberal theory of criminal law and justice is to be understood either normatively, critically or historically, or as a combination of all three. The ensuing chapters draw on many of these particular issues.

The inherent plurality of conceptions of the criminal law is caught in this collection's sub-heading: the 'futures' of criminal law. This denotes not just the variety of perspectives that can be adopted in examining the regulation of crime and deviance, but also the differences in terms of place, form and structure that an international and comparative perspective must embrace.

At another level, it is important to recognise that any endorsement of a critical method to understand criminal law and justice must be sympathetic to the variations in historical and cultural experience even in societies that, on the face of it, share common law heritages or trajectories. While many of the chapters are concerned with increased authoritarianism in the law and the neo-liberal state, it is important to see that developments are not all one way. For example, one impact of neo-liberal economic and political globalisation has been a certain liberalisation, in some places at least, in relation to issues of sexuality. The majority of chapters are concerned with the broadening scope of the criminal law, but Singapore's recent debates, discussed in chapter nine, on the possibility of decriminalising homosexual acts as part of broader criminal law reforms provide the opportunity to revisit the delineation of the boundaries of the criminal law from a decriminalisation perspective rather than one that assumes a broadening out of the criminal law.

This collection consists of 12 chapters grouped into five parts: this Introduction; Shifts in Criminal Justice Policies; The Quest for Security; The Scope and Justification of Sexual Offences; and Codification and the Liberal Promise. The following sets out the background to each of these parts.

II. SHIFTS IN CRIMINAL JUSTICE POLICIES

The next chapter, by Alan Norrie, explores different ways of understanding the development of the criminal law in recent years, in terms of changing forms of citizenship and their relationship to law, as well as in terms of changing models of society and how these shape general expectations of the law. Norrie uses these models to explore three broad developments in the criminal law: first, an increasing emphasis on the retributive understanding of criminal behaviour, which is seen in the stress upon the responsibility of individuals for their actions; second, an increasing emphasis on notions of dangerousness for a minority of criminals, for whom exceptional forms of punishment or control are necessary; and third, the development of new forms of criminal justice alongside traditional ideas

of crime and punishment. This includes, for example, the development of new forms of control, including preventative detention and control orders for suspected terrorists, and hybrid forms of control and punishment such as the anti-social behaviour order. These developments occur in the context of two linked changes: increased stress on a neo-liberal conception of individual legal subjectivity and increased reliance on the authoritarianism latent in the liberal state and its law.

In chapter three, Lucia Zedner explores the second of Norrie's three developments in the criminal law—dangerousness—by tracing the history of regulating those considered dangerous via models of risk-management through to the current emphasis on the 'precautionary principle' which underpins current pre-emptive measures. These deploy new legal tools and technologies against serious crime and terrorist threats, raising profound questions about the liberal assumptions underpinning most criminal justice thinking.

In chapter four, Leslie Sebba argues that the main thrust of the expansion of criminalisation in traditional areas in the last three decades has been in the area of what may be termed 'victim-driven'—or at least 'victim-oriented'—criminalisation. This type of criminalisation explains the creation of offences such as stalking and sexual harassment, new forms of child abuse, hate crimes, holocaust denial and human trafficking, as well as the expansion of some existing crimes such as rape. His chapter indicates how such developments can be read in different ways—as part of an increasing authoritarianism, but also as an extension of the law's promise to criminalise genuine harm, or perhaps both together. Importantly, the ambiguity of some of the developments that are occurring can be read in the fact that they reflect *both* views. It is this that in part provides authoritarian law with its popular mandate.

From this overview of general shifts in criminal justice policies, the chapters in the next part turn to focus more specifically on measures to regulate crime and deviance in the form of curtailing terrorist activities and anti-social behaviour.

III. THE QUEST FOR SECURITY

Andrew Ashworth in chapter five takes up Norrie's third highlighted development of increasing regulation by examining the spread of 'civil preventative orders'. He argues that the state is rightly concerned with the prevention of harm and reduction of the risk of harm, but that preventative measures involving coercion require justificatory scrutiny. He focuses on rationales for preventative measures in order to evaluate the normative foundations for the various manifestations of the preventative state, and how these might be subjected to control.

Chapter six then focuses more closely on justifications for ‘civil preventative orders’. Peter Ramsay points out that such orders have been condemned by liberal criminal law theorists, yet the existence of the power to impose them, and to punish individuals for the breach of them, is not controversial among mainstream politicians, the judiciary, the police and local authorities and it is supported by a large majority of the public. In developing a theory of ‘vulnerable autonomy’ to help explain the use of civil preventative orders, Ramsay aims to show that in the political world beyond the liberalism of academic criminal law theory, a hugely influential normative argument for such orders already exists, and serves to legitimise this form of penal obligation in practice. Further exemplifying the development of increased regulation, Ramsay indicates the internal malleability of liberal theory, and how it may be pressed against common or traditional understandings towards authoritarian goals. Ramsay picks up Norrie’s argument about the shifting historical forms of liberal theory to indicate how liberal law can change under the impact of authoritarian governmental measures. The picture is not always or necessarily clear.

The broad thrust of current developments and their implications do not, of course, leave specific legal forms untouched. Bernadette McSherry in chapter seven turns to the broadening scope of inchoate crimes to include offences of planning and preparation. Concentrating on the case of Faheem Khalid Lodhi, who in 2006 was convicted by the New South Wales Supreme Court of three offences relating to the preparation or planning of a terrorist act, this chapter explores whether such offences should exist at all, whether they can be defined adequately and what punishment they should attract. In the process, it highlights the contours of what liberal criminal lawyers have assumed to be the core understanding of what the law should be, raising questions as to whether such an understanding represents a historical moment that is passing, or something more stable and permanent.

Such concerns do not occur in a vacuum. Decisions to extend legal form and thereby to criminalise in a broader, more authoritarian way occur in the context of public debates that are frequently weighted in favour of particular legal outcomes. This nexus is highlighted in the pairing of McSherry’s essay with Mark Nolan’s in chapter eight, where he concentrates on what social science can offer the criminal law. Governments often take a tough ‘law and order’ stance without recourse to contextual material or statistical data. The ways in which public perceptions are shaped by how questions are formulated and asked is highlighted here, and Nolan’s chapter provides an overview as to how well-thought-out social science methodology and insights from social psychology can inform public debate on issues of criminalisation. It is apparent that the authoritarian reshaping of the criminal law may be over-determined by political currents, but it is not inevitable, or beyond the reach of responsible policy formation.

IV. THE SCOPE AND JUSTIFICATION OF SEXUAL OFFENCES

The boundaries of the criminal law are tested not only in relation to security issues. They have long been tested in relation to sexual practices. Justice Michael Kirby has summarised this as follows:

Protecting minors is a proper role of the state. Preventing unwilling [infliction] of violence, injury and loss is a proper role of the state. Protecting the community from gross indecencies in public before unwilling observers, is part of the function of the state, derived from the sovereign's role as keeper of the peace. But intruding into the bedrooms of adults is now considered to be an excess of state power.¹

In this section are presented two chapters which, focusing on issues of sex, gender and law, cast further light on questions of liberalism and law in the criminal justice field. Kumaralingam Amirthalingam in chapter nine revisits the classic liberal territory of the famous Hart–Devlin debate in assessing Singapore's moves towards the decriminalisation of homosexuality. His analysis provides a timely reminder that the scope of the criminal law may not be forever expanding; from time to time what have been considered offences are no longer thought to be so. Criminal offences will vary across times, across countries.

Amirthalingam's chapter is a worthy reminder that it is by no means clear that social issues should find their resolution through the criminal law. The normative issues of engagement with and openness to other ways of 'being' which lie behind decriminalising homosexuality are also relevant to tackling the often serious threats or harms that recent changes to the criminal law are supposed to address. Whether, to the contrary, the adoption of illiberal methods in the criminal law will help sustain the basic contours of a liberal society is surely open to doubt. However, it would be wrong to think that such issues are simply resolved at the normative level, since, as this collection makes clear, there are deeper historical, social and political forces at work which either sideline traditional liberal ideals and law or push it in new authoritarian directions.

Taking a different tack in chapter ten, Ngaire Naffine focuses on the crime of rape and, arguing from a feminist perspective, considers whether it is in fact the true 'core' crime represented by liberal understanding. While one of the main themes of this book is the broadening of the scope of the criminal law, she argues that such an extension is not always, as often represented, widening from a legitimate core to a more questionable periphery. Rather, the core itself may be questioned.

¹ M Kirby, 'Crime in Australia—Change and Continuity' (1995) 7 *Criminology Australia* 19, 21.

Murder and rape are typically regarded as ‘core’ crimes, for example in the work of John Gardner who endeavours to explain the true nature of crime and the real basis of criminal responsibility. Naffine argues that Gardner’s conceptions of the reasonable person in provocation of ‘real rape’ assume the quality of a chimera and that this in turn casts doubt on the soundness of the ‘core’ crime concept within criminal law theory. This is achieved only by standing ‘the core’ at such a remove from empirical reality and real social concerns as to miss much of the normative truth behind how the law actually works. Naffine’s message is an important one: what we understand as a project of criticism of a liberal criminal law must be reflexive as to the meaning of that law, and must not rest on false or simplistic assumptions.

V. CODIFICATION

Concerns about the changing shape of the criminal law often lead to a focus on the potential of codification to control illiberal tendencies. Criminal codes provide a structure for the criminal law in many jurisdictions around the world. While the 19th-century attempts to codify the criminal law failed in the British Isles, the codes drafted in Britain were taken up with enthusiasm by imperial administrators in India and other parts of the British Empire. Indeed, the dominance and influence of codes in common law systems is revealed not only in chapters eleven and twelve, which examine the Australian experience, but also in the key role of the Model Penal Code in the United States. This Penal Code has been the source of judicial inspiration for common law development and the intellectual focus of much American criminal law scholarship.² Although the United Kingdom appears stubbornly resistant to the advocacy of codes by law reformers and leading scholars, the liberal aims of codification are nevertheless championed through academic work and, on occasion, receptive appellate courts. This begs the question of whether codification really offers a solution to many of the problems which beset the modern criminal law. A critical consideration of codified systems in chapters eleven and twelve reveals that they too have their own difficulties of interpretation and that the liberal promise of the code is oversold.

In chapter eleven, Simon Bronitt and Miriam Gani point out that the codification of the common law has been presented as the vehicle for delivery of improved accessibility, consistency, comprehensibility and certainty in the criminal law. They examine this liberal promise of codes and codification from both an explanatory and a normative perspective, using

² A point made in a recent contribution to the literature on codes by P Robinson and M Dubber, ‘The American Model Penal Code: A Brief Overview’ (2007) 10 *New Criminal Law Review* 319.

Australia's *Criminal Code* (Cth) as a case study. Codification has always represented the liberal lawyer's promised land, but Bronitt and Gani cast critical light on what a code can deliver, their broad message being that a liberal understanding of law is not necessarily easy to sustain or put into practice, particularly in an illiberal climate of 'law and order' politics. Responses to the reshaping of liberalism may, as many of the chapters in this collection suggest, lie not in law itself but in the broader historical, social, political and policy contexts that law embodies and reflects.

In chapter twelve, Ian Leader-Elliott pursues themes raised by Bronitt and Gani in examining the construction of offences against the person in the Australian *Criminal Code* (Cth). He argues that the Model Criminal Law Officers Committee's original choice of using such offences to help formulate the fault elements set out in Chapter 2 of the *Criminal Code* was unwise. He argues that offences against the person, which are predominantly concerned with the imposition of punishment for causing harm to others, are not typical of the diverse range of offences in a modern criminal code. The Committee's choice to formulate general fault elements based on these offences has therefore caused confusion with the delineation of fault more broadly. This is a more specific engagement than that presented in other essays, but it does illustrate the intrinsic complexity and difficulty in arranging the criminal law in the light of underlying general principles of a liberal normative kind.

VI. CONCLUSION

A penal code is therefore primarily a product of its time and of the current condition of civil society.³

The chapters in this collection reveal the continued durability of liberal ideas in the criminal law, as well as exposing the challenges these ideas face, resulting from their inherent malleability as well as from widespread derogation within current criminal law discourse and practice. The ideas that (re)shape and (re)form the criminal law in each generation are not solely the products of lawyers, far less legal scholars or academics. As George Fletcher points out, the key principles of criminal liability have been 'crystallized primarily in the writing of scholars rather than the opinions of courts'.⁴ Yet in the modern law, the scholars' role in constituting the boundaries of criminalisation receives scant attention, whether due to academic self-effacement or the narrow ledge of political legitimacy which legal scholars typically occupy.

³ GWF Hegel, 'Philosophy of Right' (1821) para 218 in AW Wood (ed) and HB Nisbet (tr), *Elements of the Philosophy of Right* (Cambridge, Cambridge University Press, 1991) 251.

⁴ GP Fletcher, *The Grammar of Criminal Law* (Oxford, Oxford University Press, 2007) 91.

This generates a tension in the academic role. On one hand, many legal scholars are not external spectators of the law, but rather play a constitutive role as a caste of (more or less) authoritative legal interpreters engaged in the rationalisation and modernisation of the criminal law. On the other hand, they bear responsibility to interrogate the problems of the law, and to seek to understand its inherent dynamics, its shifts and developments. Legal scholars do not represent a homogenous caste, and the chapters in this collection reflect some of the scholarly diversity of opinion as well as the general concern that criminal law is moving in new and dangerous directions. While there may be many different ‘futures’ for the criminal law, a focus on present developments gives rise to real concerns as to the present direction of travel. In identifying such changes and by seeking to understand them in the context of deeper social developments, this collection seeks to contribute to debate about how matters will and ought to proceed.