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Introduction

The Structures of the Criminal Law

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The essays in this volume are drawn from two workshops that were held in the course of 2010 as part of the Arts and Humanities Research Council-funded project on Criminalization.[1] The authors were given the brief of writing on the theme 'Structures of Criminal Law' and, as will quickly become apparent, took up this theme in a variety of different ways, in places going far beyond our original understanding of the relevance of structures. We will shortly go on to say something about how we see the different papers in the collection relating to this theme of 'structures', but before doing so we should first say something about our own choice of this term and how we see it as relating to issues of criminalization—for at first glance it might appear that the issues of structures (to the extent that they are relevant at all) have little to add to the consideration of issues of criminalization.

The bulk of the existing literature on criminalization is concerned with the substance and content of the criminal law. The huge literature on the harm principle, for example, is mainly concerned with questions of content: whether or not the criminalization of certain forms of conduct can be justified in terms of the harm caused or threatened by that conduct. Equally, debates over law reform or policy are dominated by questions of the aims of a particular reform, or whether or not the proposed change is likely to alter conduct and bring about that aim in a particular area of social life. What is often missing from such analyses is an investigation of the constraints that might accompany the use of criminal law, as opposed to law in general. This question can be formulated in a slightly different way from the issue raised in

[1] The aims of and background to the overall project are described in the Introduction to the first volume of papers that it produced: *Boundaries of the Criminal Law* (Oxford: OUP, 2010).

the first collection of essays from the Criminalization project, which was concerned with the question of boundaries.[2] If the question raised in that volume was primarily a matter of substance, of when it was appropriate to use criminal law, as opposed to other types of legal regulation (or none at all), the question here can initially be posed in this form: once it has been decided to use the criminal law, are there any particular constraints that accompany this? This is thus to ask whether the use of the criminal law, with its particular distinctions between general and special part, offence and defence, *actus reus* and *mens rea*, and its special procedures and burdens of proof, might impose constraints on the manner and extent of criminalization. This then goes to the question of whether there are certain structural features of criminal law which contribute to or limit our understanding of what it is proper to criminalize.[3]

This type of issue has been central to one recent important contribution to the debate on criminalization. In his book *Overcriminalization*, Husak has argued that the use of the criminal law operates (or should operate) to impose forms of internal constraint on the content of the criminal law, an argument that he mobilizes against what he sees as trends towards over-criminalization in contemporary law. He identifies four forms of internal constraint that he sees arising from the structure of the criminal law.[4] These are what he calls the 'wrongfulness constraint', the non-trivial harm or evil constraint, the desert constraint, and the burden of proof constraint. The 'wrongfulness' constraint (that 'criminal liability may not be imposed unless the defendant's conduct is (in some sense) wrongful'[5]), for example, is derived from the distinction between offence and defence, and in particular the distinction between justification and excuse, and is used to argue against the imposition of strict liability where, in Husak's view, the conduct criminalized is not properly wrongful. And the desert constraint (that punishment can only be justified where it is imposed on an offender for wrongful conduct—and that it is therefore unjustifiable to punish non-wrongful conduct) is directly linked to the structural feature of criminal law that it imposes punishment rather than any other sort of remedy. This argument is not uncontroversial, relying as it does on certain assumptions about the nature of criminal law, but its

[2] *Boundaries of the Criminal Law* (n 1 above).

[3] See eg A. J. Ashworth, *Principles of Criminal Law* 6th edn (Oxford: OUP, 2009) ch 3. At least some of the principles identified by Ashworth can be attributed to a kind of 'inner morality' of criminal law, and can be understood in terms of structural features of criminal law eg the principle of *mens rea*. See Lon L. Fuller, *The Morality of Law* 2nd edn (Yale: Yale University Press, 1969) ch 2 on the 'inner morality' of law.

[4] D. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: OUP, 2007) ch 2.

[5] *Op cit* p 66.

importance for us here lies in the fact that it suggests at least one important new avenue for exploring theoretical issues of criminalization.

The question of burden of proof and its relation to legal structure has also been controversial in relation to two other recent developments in the criminal law, notably the increasingly widespread use of reverse burdens of proof and the use of preventive orders.[6] The first of these concerns the practice of defining crime in a way which places the burden on the accused person to disprove one or more elements of the crime, or the availability of a defence.[7] One of the main criticisms of this development—that such crimes subvert the criminal law which typically places the burden of proof on the state[8]—can be understood in terms of the structure of the criminal law. The concern here is that the criminal law has developed in such a way as to impose certain structural constraints on the use of state power, and that the systematic reversal of such burdens by the state rides roughshod over these important protections.

This also gives rise to questions about the relationship between the structure of crimes and procedural and evidential requirements. Should the burden of proof be placed on the prosecution to prove not only that the defendant committed an offence, but also that he/she was not entitled to a defence? Should the standard of proof be the same in each case? And if not, what implications does this have for the way in which the distinction between offences and defences is to be understood? That there is some normative foundation to the distinction between offences and defences is difficult to deny,[9] but the basis of the distinction is contested. We might refer to the way in which offences and defences guide the conduct of citizens,[10] the role of the distinction at trial,[11] or the role of offences in condemning offenders,[12] or perhaps to more than one of these. The issue, however, which needs to be

[6] For discussion see A. J. Ashworth and L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) 2 *Criminal Law & Philosophy* 21–51; A. J. Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights?' (2004) 120 *Law Quarterly Review* 263–91.

[7] These have been mapped most systematically in A. Ashworth and M. Blake, 'The Presumption of Innocence in English Criminal Law' (1996) *Criminal Law Review* 306.

[8] The term is used by Duff, 'Subverting the Criminal Law' in Duff et al, *Boundaries* (n 1 above).

[9] Though it has been denied. See, G. Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233.

[10] See K. Campbell, 'Offences and Defences' in I. Dennis, *Criminal Law and Criminal Justice* (London: Sweet and Maxwell, 1987) and J. Gardner, 'Justifications and Reasons' in A. P. Simester and A. T. H. Smith, *Harm and Culpability* (Oxford: OUP, 1996).

[11] See R. A. Duff, *Answering for Crime* (Oxford: Hart, 2007) ch 9.

[12] See V. Tadros, *Criminal Responsibility* (Oxford: OUP, 2005) ch 4.

explored further, is that of the ways in which the distinction shapes criminalization.

The second development, of which the British Anti-Social Behaviour Order (or ASBO) is best known, typically takes the form of a civil order, the breach of which will lead to punishment. Such orders are controversial for a number of reasons: that they criminalize behaviour which would not amount to offences under criminal law; that they deliberately seek to circumvent procedural protections relating to the burden of proof and evidential standards by characterizing the initial proceedings as civil; and that the 'two-step' form of the order limits any requirement to investigate the mental state of the offender at the time of the carrying out of the initial course of conduct.[13] However, once again it can readily be seen that at least some of these criticisms rely on claims about the structure of criminal law and the constraints that it places on the state both in terms of the definition of criminal conduct and the proof of that conduct against any individual as a condition of punishment. The two-step structure is criticized for breaking the necessary link between *actus reus* and *mens rea*, and the structuring of the offence in terms of closely connected civil and criminal elements for ignoring what should be a distinct boundary between the two areas.

What these examples suggest is that, even if it is not always referred to explicitly in these terms, the idea that the criminal law has an underlying structure and that consideration of this structure is at least relevant to thinking about criminalization is one that has some currency and importance—and one of the aims of this volume is accordingly to begin to draw out what this might mean for thinking about criminalization. This will not, of course, be a straightforward process, for even if there is agreement on this basic claim, there remains wide scope for disagreement over the type of structure and its implications for the law, such that this claim can at best be regarded as a starting point. However, from this starting point, it quickly became apparent that the issue of structure raises a wider range of issues than we had originally conceived, as the contributors, and the discussion at the workshops, took this initial idea in a number of different directions. The book is accordingly concerned with a range of much broader senses of the importance of structures, of which it is worth singling out three central themes.

[13] For a full discussion of such criticisms see A. P. Simester and A. von Hirsch, *Crimes, Harms, and Wrongs* (Oxford: Hart, 2011) chs 11–12.

I. The Structure of the Criminal Law

The first sense concerns the internal structure of the criminal law itself. One kind of issue here is raised by the familiar distinctions in terms of which offences are traditionally analyzed: the distinctions between, for instance, offence and defence, between *actus reus* and *mens rea*, between action and outcome, between evidential rules and rules of substantive law. Are these distinctions that it is (still) useful to draw—or do they obfuscate and distort as much as they illuminate? Do these distinctions have any real normative significance; or are they, at best, 'helpful expository device[s]',[14] which might assist 'convenient exposition' of the law by legislators, judges, and textbook writers,[15] and which should be dropped when they lose that pragmatic utility? Would our understanding of the logic of the criminal law be improved by drawing more, or different, or fewer such distinctions? In this context, for example, Andrew Cornford examines the tension between resultant harm (often portrayed as a matter of moral luck) and agent culpability in the criminal law: in particular, he argues that different general considerations will typically apply to offences of attacking and of endangering.

Other issues arise in relation to the classification of crimes. Crimes were traditionally classified by reference to the type of wrong or harm (the 'mischief') involved, but recent expansions of the criminal law, involving the creation of new 'objects of criminalization' (new kinds of interest to be protected, against new kinds of mischief) put that schema under increasing pressure. As Mike McGuire suggests in his essay, we might even see persons and their attributes as the objects of the criminal law rather than, or alongside, their actions. In the growing range of crimes of preparation, possession, and association, and of *mala prohibita*, offences are often defined far more broadly than the mischief at which they are supposedly aimed requires, capturing conduct that is ever more remote from that mischief—which can make it harder even to identify a mischief at which the offence could plausibly be aimed, and to sustain the orthodox classificatory schema. Furthermore, the orthodox conception of crimes as wrongful or harmful actions that must be proved against a defendant is also undermined by the legislative tendency to weaken fault requirements and to relieve the prosecution of some of its traditional burden of proof (whilst laying heavier probative burdens on the defendant); the presumption of innocence, once portrayed as the 'golden

[14] A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart, 2003) 71.

[15] D. Ormerod, *Smith and Hogan: Criminal Law* 11th edn (Oxford: OUP, 2005) 35.

thread' running 'throughout the web of English Criminal Law',[16] now seems to have been, if not broken, seriously frayed. As Peter Ramsay in his essay indicates, this is especially pertinent in the area of terrorism law, where the scope of the law has been stretched well beyond that found in any other area, and where the relationship between criminal offences and those values which many see as providing the core concern of the criminal law has been stretched to breaking point.

Consideration of the structures of criminal law in this first sense also raises further fundamental questions about the proper standards to apply to criminalization decisions—the question of whether criminal responsibility should be defined in 'subjective' or in partly 'objective' terms, for instance. It also raises a question addressed by Marcia Baron about the role that a conception of the 'reasonable person' should play in setting the standards against which defendants' actions are to be judged. It might seem that serious doubt must be cast on the way such a standard is characterized once we reflect upon the way in which, as Sharon Cowan brings out, different conceptions of self and identity, particularly the sexual self, are beginning to impinge on the criminal law.

An important task for philosophers of criminal law is to ask whether, and how, we should reshape traditional ideas and conceptions of and within the criminal law in the light of such recent developments. Should we criticize such developments as being inconsistent with the principles by which an acceptable system of criminal law must be structured? Or should we instead recognize that a changing world requires a more adaptable criminal law, whose basic structures and doctrines may need to be rethought or recast to meet the new challenges and dangers that we face? This question is addressed by Alan Norrie, who argues that the basic forms of the criminal law need to be rendered more flexible by incorporating a more complex range of moral factors into procedural decisions to prevent the more rigid forms of the law from leading to injustice in practice.

II. The Structure of Law

A second sense of structure has to do with the place of the criminal law within the larger structure of law. One set of questions here concerns the distinguishing marks of criminal law and its relationships with other aspects of law, including both private law and public law (topics that figure in different ways

[16] *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey).

in the papers by Haque and Thorburn). What are the distinctive features of criminal law as a particular type of regulation? What makes it appropriate to use the criminal law, rather than some other mode of legal regulation: is this just a question of which mechanism is most likely to be a cost-effective means to our social or political ends? What sense can be made of the traditional slogan that the criminal law should be used only as a 'last resort'? Thorburn argues that these questions require us to reflect on criminal law as part of a whole—as just one part of a legal system which is to be understood as having the crucial moral task of making it possible for individuals living together in a polity to secure their claims of individual moral freedom.

Other questions in this context have to do with how the criminal law is made, and by whom. How should a legislature go about deciding what to criminalize; what principles should guide such decisions? (This question clearly overlaps with those falling under the first sense of 'structure' discussed above.) What other people or bodies should have a role in making and developing the law: what kind of discretion should be allowed to, for instance, the police, prosecutors, judges, and juries—and how should it be exercised? This reminds us that achieving justice in the criminal law requires us to evaluate the substantive criminal law not only in the terms in which it is articulated in legislation and in case law, but also in the course of its application. One aspect of these questions concerns the relationship between the 'law in the books' and the 'law in action'—in action on the streets, in police stations, in prosecutorial offices, in the courts: how far is the law made, how far should it be made, in action rather than in a legislature; what principles should guide such law-making, and how can it be made accountable? As Norrie suggests, there may be difficult moral problems whose solution cannot be found in the forms of the substantive law itself, but must be sought elsewhere.

Such questions as these also draw attention to the relationship between substantive criminal law and other dimensions of criminal justice, both pre- and post-trial. What is the proper role of police or prosecutorial discretion in applying, or in making, the law? What considerations should bear on decisions about whether to take a case to trial, or to divert it from the criminal process (thus, in a sense, decriminalizing it)? What kinds of issue should be decided during a public trial rather than, for instance, in a prosecutor's office or at the sentencing stage? What role should juries, or other lay participants, have in the criminal process? Such questions also remind us of the complexity of the idea of criminalization: the processes involved in criminalizing (or indeed in decriminalizing) a type of conduct are not captured by the formal legislative process of statutory enactment.

III. Social and Political Structures

A third sense of structure concerns the relationships between legal structures and social and political structures. The criminal law is both a social and a political institution, and central to the issue of criminalization is the question of how the law is, or ought to be, related to social and political beliefs, values, and institutions. Those relationships can be analyzed in a number of ways.

The relationship between criminal law and broader political structures has a number of dimensions. The first, and perhaps most obvious, is the relationship between criminal law and the political processes through which it is made—for instance the way in which governments seem increasingly to resort to criminal law as a political response to social problems, through the creation of new crimes,[17] or through the escalation of punishments attached to existing crimes,[18] or of ever broader ancillary crimes. More broadly, however, as Haque urges, we should give attention to the wider context of international law both in the way in which context itself figures in the characterization of offences, and with a view to seeing what domestic law might learn from the evolving concepts of international law.

There are also questions about how certain political beliefs or ideologies shape the development of the criminal law. As Peter Ramsay suggests in his essay, the process of criminalization will depend not only on moral disagreements that people have about what the state should prohibit, but also on people's feelings of vulnerability in the face of crime. And as Paul Robinson argues in his contribution, conflicts between the moral judgements of citizens and the content of the criminal law may be costly. Anyone attempting to achieve reform of the criminal law must take note not only of the best normative view, but also of the constraints that in practice operate on the content of the criminal law that are imposed by the more or less reflective feelings and judgements of citizens. In the light of this, it is important too to consider how political structures can impact on criminalization and the criminal law: to attend, for instance, to the role of elected judges or

[17] Recent examples might include 'grooming' (Criminal Justice and Immigration Act 2008 s 63) or smoking in certain public places. This is discussed in P. Ferguson, '"Smoke Gets in Your Eyes . . . ": The Criminalisation of Smoking in Enclosed Public Spaces, the Harm Principle and the Limits of the Criminal Sanction' (2010) 31 *Legal Studies* 259–78.

[18] eg Husak, *Overcriminalization* (n 4 above) *passim* on drug crimes.

prosecutors,[19] of pressure groups such as victims' movements,[20] or of second chambers or 'super-majorities'.[21]

The relationship between criminal law and social structures is even more complex and diffuse. Few would deny that criminal law must draw on social beliefs, and depends for its legitimacy on some minimum level of social acceptance, but it is much harder to unpack the content of such a claim, or to determine just how this relationship between criminal law and social structures and beliefs is mediated. This relationship has obvious implications for the definition of crimes. Claims about fair labelling, which have become commonplace in writing about the criminal law, depend on claims about the social meaning and acceptance of crime definitions.[22] Equally, much recent academic discussion about the extent to which offence definitions should be set in descriptive terms, or should use morally laden concepts, focuses on the audiences to whom those definitions can be seen to be addressed (judges, citizens?), and on how the law can best guide actors (judges, juries) involved in the decision-making process (Baron). These debates must appeal to claims about the 'fit' between legal doctrines and concepts on the one hand, and social attitudes and beliefs on the other (Robinson). But such claims about fit also raise deeper questions about the relationship between social and moral beliefs about wrongs on the one hand, and the criminal law's definitions of offences on the other—whether from the perspectives of moral and political philosophy, to which theories of criminalization so often appeal, or from the less familiar but no less important perspectives of criminology and social and political theory (McGuire, Ramsay).

Some of the central questions in this context are, roughly, empirical and sociological: in what ways do existing social attitudes, beliefs, and values influence the development or workings of the criminal law; how far can the criminal law shape such attitudes? Others, however, are clearly normative: how far should the criminal law aim to reflect, and how far to shape or to modify, the attitudes, values, and beliefs of citizens of the society whose law it is? What is the proper role of the criminal law in the political and social structure of what aspires to be a democratic polity (Ramsay, Robinson, Thorburn)? To what extent must the criminal law reflect the values of the

[19] W. Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 506.

[20] M. D. Dubber, *Victims in the War on Crime. The Use and Abuse of Victims' Rights* (New York: New York University Press, 2002); V. Bergelson, *Victims' Rights and Victims' Wrongs. Comparative Liability in Criminal Law* (Stanford: Stanford University Press, 2009).

[21] D. Dripps, 'Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies' (2005) 109 *Penn State Law Review* 1155.

[22] eg A. Ashworth, *Principles* (n 3 above) 78–80; J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217–46.

society in which it operates, and to what extent may it have a role in shaping those values?

This volume of essays addresses all of these issues. It opens up a range of questions in the philosophy of the criminal law, many of which have not adequately been addressed. At the same time, we recognize that there is much more work to be done to develop a comprehensive account of the internal structure of the criminal law, the way in which it operates in its institutional context, its place within the law in general, and its relationship with a range of social and political structures. Our aim, in collecting these essays together, is to advance our understanding of these issues, but also to stimulate further work—work which moves beyond traditional questions about the role of harm and wrongdoing and their relationship with the criminal law to questions about the forms of the criminal law and its place within broader social and political contexts.