

# *Criminalisation and Normative Theory*

David Brown\*

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## *Abstract*

Criminal law scholarship is enjoying a renaissance in normative theory, evident in a growing list of publications from leading scholars that attempt to elucidate a set of principles on which criminalisation and criminal law might — indeed *should* — be based. This development has been less marked in Australia, where a stream of criminologically influenced criminal law scholarship, teaching and practice has emerged over nearly three decades. There are certain tensions between this predominantly contextual, process-oriented and criminological tradition that has emerged in Australia, characterised by a critical approach to the search for ‘general principles’ of the criminal law, and the more recent revival of interest in developing a set of principles on which a ‘normative theory of criminal law’ might be founded. Aspects of this tension will be detailed through examination of recent examples of criminalisation in New South Wales that are broadly representative of trends across all Australian jurisdictions. The article will then reflect on the links between these particular features of criminalisation and attempts to develop a ‘normative theory’ of criminalisation.

## **Developing a criminologically influenced tradition of criminal law scholarship in Australia**

A developing tradition of Australian contextual, process-oriented and criminologically influenced criminal law scholarship and teaching practice has unfolded over nearly three decades and is reflected in the leading New South Wales teaching text, *Criminal Laws*, begun in 1984, with the first edition in 1990 and most recent (5<sup>th</sup>) in 2011 (Brown et al 2011). The ‘organising principles’ for this collective project,<sup>1</sup> as set down in 1984 in preparation for the first edition, included: a questioning of the assumptions that ‘criminal laws are the only or the main form of social and legal regulation — that the choice is between criminal prohibition or no regulation at all’; that ‘criminal law’ is a discrete and

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<sup>1</sup> This article is a distillation from a long-term collective project involving a number of authors over more than 25 years. Others directly involved as authors include: David Farrier, David Neal, David Weisbrot, Sandra Egger, Luke McNamara, Alex Steel, Michael Grewcock and Donna Spears. Others involved as colleagues and teachers at University of New South Wales and other law faculties’ criminal law courses over the years are too numerous to mention. Thanks are also due to Russell Hogg for his comments and to the three anonymous referees who provided thoughtful and constructive comments on an earlier draft.

unified area of law'; and that 'there are general principles which run the breadth of the criminal law and logically (or at least consistently) determine the structure of its rules'.<sup>2</sup>

The developing tradition originated in an attempt to reorient criminal law scholarship and teaching away from a hitherto heavily doctrinal approach based on elucidating the 'general principles' of criminal law drawn from an examination of appellate decisions in homicide, sexual assault and larceny, to a contextual, process-oriented and criminologically influenced approach that expanded the field to take in drugs offences, public order offences, criminal process, criminalisation and sentencing. The orientation of this movement<sup>3</sup> was to emphasise the links between substantive law and process, to focus far more on policing, pre-trial decision-making, and the lower courts, and to draw heavily on socio-legal, criminal justice and criminological materials; in short, to develop a criminologically literate criminal law scholarship, teaching and practice. One of the conditions of this movement was the location of criminology in the Australian context predominantly within law schools, rather than within sociology or separate criminology departments, as was the case in the United Kingdom. While this may have retarded theoretical development and the 'characteristic posture of transcendent vision seeking adopted as part of the repertoire of critical exercises' (Meredith 1993:228), another consequence, for both criminology and criminal law teaching and scholarship in Australia, has been a more engaged and practical involvement in criminal justice campaigns, social movements and law reform commissions, and a more politicised, contextual and criminologically informed criminal law pedagogy. (On the engaged character of Australian critical criminology, see Brown 2002:96–101.)

A key element of the tradition has been a commitment to an analysis of the processes of criminalisation prior to any examination of specific offence areas. The 'criminalisation' chapter has, across five editions, contained extracts and commentary emphasising the historical and cultural contingency of crime; the role of traditional criteria such as morality, harm, offensiveness, and the public/private distinction in the processes of criminalisation; along with the importance of social reaction (such as moral panics), the 'overreach' of the criminal law, and the increasing importance of various forms of regulation and governmentality (Brown et al 2011:41–114). The recent works of scholars such as Ashworth (2009), Lacey (2009, 2012, 2012a), Duff (2007), Husak (2008) and Zedner (2007, 2008) have prompted a new section in the fifth edition entitled 'Normative Theories of Criminalisation'. Since then, further normative work on the appropriate principles of criminalisation has emerged, such as Simester and von Hirsch (2011), Zedner and Roberts (2012), Duff and Green (2011), and Duff et al (2010, 2012).

There are certain tensions between a predominantly contextual, process-oriented and criminological tradition that has, in a post-structuralist vein, pursued a critical approach to the search for 'general principles' of the criminal law, and the more recent revival of interest in developing a set of principles on which a 'normative theory of criminal law' might be founded. Key aspects of those tensions — the status of criminal law and criminalisation as unitary objects or fields, the unproductive division between 'critical' and 'normative', and the need for wider integration of criminology, penology and other disciplines with criminal

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<sup>2</sup> For a discussion of the organising principles and the general project approach to constituting criminal law, see Chapter One: Some Themes, 1–40. This article draws heavily on that chapter.

<sup>3</sup> *Criminal Laws* built on A P Bates, T L Buddin and D J Meure, *The System of Criminal Law* (Butterworths, 1979), which incorporated chapters on drugs offences, road traffic offences and public order offences, as well as a detailed treatment of criminal procedure. In Australia, *Criminal Laws* has been joined by other critical and contextual teaching texts such as S Bronitt and B McSherry, *Principles of Criminal Law* (Thomson Reuters, 2001; 3<sup>rd</sup> ed, 2010) and B McSherry and B Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004).

law — will be discussed before moving to examine recent features of criminalisation in New South Wales (cf Loughnan 2010).

### *Criminal law and criminalisation as unitary objects or fields*

The Australian ‘contextual approach’<sup>4</sup> has questioned the notion of criminal law, its institutions, processes and practices, as constituting a unity possessing an essence or manifesting ‘a single social function’ (Hirst and Jones 1987:22). The processes of criminalisation and the power to punish have been approached in specific contexts as particular forms of social calculation, in the belief that what are essentially different forms of regulation will continue to be developed by policy-makers under the broad label of ‘criminal law’ and that it will be increasingly difficult to identify ‘general principles’ underlying all criminal offences. Having said that, and despite scepticism at the possibility of developing a normative theory of criminal law through the agency of moral philosophy, rather than sociological critique and empirical analysis, the attempt to establish a set of normative principles that generally should be taken into account in decisions to criminalise particular forms of behaviour, as part of an exercise to combat ‘over-criminalisation’ and promote debate over the appropriate limits of the criminal law, has been broadly supported.

However, as Lacey notes, there are a number of difficulties besetting such an enterprise, including the lack of conceptual tools and empirical knowledge to ‘underpin even the initial assertion about “overcriminalisation”’ (Lacey 2009:941); the dangers of slippage between the ‘conceptual, the empirical and the normative’ (2009:944); the importance of distinguishing between criminalisation as outcome and criminalisation as a social practice (2009:950); and the suggestion that ‘from a sociological point of view, the proposition that criminalisation is a sufficiently unitary phenomenon to form a distinct object of inquiry is seriously problematic’ (2009:950):

[W]e must avoid the prevailing tendency to slip unconsciously between claims about formal and substantive criminalisation; to promote normative claims as if they had no institutional or political conditions of existence; and to make generalisations which make no reference to the existing empirical or historical position which would give them substance (Lacey 2009:960).

To accept that what we know as ‘criminal law and process’ encompasses a number of different forms of regulation is not to accept the appropriateness of any particular form as a method of responding to particular behaviour. Nor is it to be confined to description, rendered incapable of making normative claims as to the principles that should guide the making of choices about the appropriateness of particular regulatory options and their specific form, both within the criminal law and its linked regulatory civil, administrative and contractual hybrids. Certainly, if we assume that criminal law and criminalisation are unitary objects or fields, the formulation of a rational, coherent, logical, and just set of normative principles governing the decision to define certain conduct as criminal and specifying the form such offences should take, is a clearer, more certain enterprise. If,

<sup>4</sup> This is a loose and over-encompassing term used for shorthand convenience. It is somewhat anodyne and I am tempted to adopt the tongue-in-cheek suggestion of one of the anonymous reviewers, that it be termed the ‘Oz tradition’. The alternative or bracketed ‘criminologically influenced’ is cumbersome and tends to downplay the influence of other disciplines, such as history, politics, sociology, gender studies, feminism and cultural studies. The term ‘critical’ is being avoided for reasons spelt out in the following section. It is acknowledged that this ‘contextual/criminological’ tradition is but one stream of Australian criminal law scholarship, as represented in the discussion here by Brown et al (2011). An older pragmatic common law approach hostile to theorisation of any sort continues unabated, is particularly strong among practitioners and is still dominant in some law schools. There are a number of doctrinally oriented textbooks in use which either do not, or only minimally, discuss criminalisation. Indeed, in terms of number, if not influence, these traditional texts still far outnumber the contextual genre.

however, on the basis of descriptive and empirical evidence, we call that assumption into question, then the task becomes a murkier, more uncertain one. Borders become fluid or blurred, or dissolve, pragmatic questions and issues as to investigation and enforcement practices, the way specific offences are constituted and defined in practice and translated into forms of evidence and procedure through policing, pre-trial and court processes, come to the fore. Empirical studies in a socio-legal or criminological mode become more important and necessary to provide detailed context and to map likely effects of particular choices. Normative decisions of what 'ought to be done' are then made on the basis of pragmatic assessments of likely and actual effects, rather than on the basis of the flow-through of some foundational principle. To some working within a philosophical or jurisprudential tradition, this 'criminological' or 'socio-legal' approach can seem chaotic, instrumental, relativist and unprincipled. This article will argue otherwise.

### *Beyond 'crits' v 'normatives'*

Nicola Lacey embarks on an elegant discussion of two approaches to what she calls 'criminal law theory': 'critique' and 'the philosophy of the criminal law' (Lacey 1998). Philosophical theories of criminal law she takes to be those broadly represented by Anthony Duff, which seek to elaborate upon the principled nature of criminal law. Critical theory, in contrast, represented in the work of Alan Norrie, questions the assumptions about 'rationality, coherence and systematicity as features of and ideals for both theory itself and criminal law doctrine' (Lacey 1998:10). Lacey quotes Norrie's statement, 'if the philosophy of punishment is essentially contradictory in its forms, and if these forms are based upon legal ideology, then it ought to be possible to understand not only the philosophy of punishment but also the theory and practice of the criminal law as contradictory', as at the core of the critical position. Her conclusion after a careful review is to suggest that:

[P]hilosophical analysis which does not answer some of the demands of critical method constitutes an intellectual practice which has little to do with criminal legal practices or, indeed, with any practice other than itself. Conversely, ... the view of what counts as 'rationality' or 'coherence' taken by many critics is both unduly narrow and inappropriately abstract, with the result that their own position turns out to be unsatisfactory in a curiously similar way to that of their 'philosophical' opponents (Lacey 1998:11).

The Australian contextual approach, as represented by *Criminal Laws* (2011), has been closer to the 'critical' than the 'philosophical' camp. In particular, a central methodological approach has been that there is no 'external' vantage point from which to offer descriptions or theories of practice, because knowledge does not stand outside and above the institutional practices through which it is produced. As Russell Hogg notes, 'crime is not external to the practices of criminal justice: we are only enabled to know it through these practices' (Hogg 1983:9). Or as Lacey puts it:

'[T]heories of criminal law', whether written by or for philosophers or lawyers, are inevitably interpretations of social practices whose practitioners themselves have interpretations which are an object of the theorisation. The implication is that 'at large' philosophising which is not addressed to any particular system or practice of criminal law is, like a map of imaginary terrain, not an exercise in criminal law theory but rather an exercise in philosophising itself. It may be a stimulating intellectual or an engaging aesthetic exercise, but it is not one which particularly claims the attention of those interested in criminal law any more than the imaginary map claims the attention of an explorer with a particular journey in mind (Lacey 1998:16).

Leading normative theorist Anthony Duff makes a similar point when he argues that 'to deny the possibility of a priori normative theorizing is not to deny the possibility of rational

normative theorizing: it is rather (or should be) to insist that such theorizing is possible and intelligible only within some human practice' (Duff 2005:364).

However, there has not been a self-conscious adherence to a 'critical' standpoint in the Australian contextual approach. There has been a similar motivation to expose injustice in the 'normal' functioning of criminal justice, apparent in the work of leading critical theorist, Andrew Norrie (Norrie 2001, 2005). But there has been a tendency for work such as Norrie's to end up substituting a principle of necessary non-coherence for the philosophers' constant reworking of doctrinal principle in the name of analytic coherence (Duff, 2005:358), in part because of a tendency to assert or assume an underlying logic of repressive functions to the criminal law. In contrast, the Australian contextual approach has followed Hogg's early suggestion that:

[A] fruitful avenue for research in the future must reject the search for an adequate theory or model of criminal justice as an organised system which might be represented in a *particular* field of knowledge with identifiable boundaries. In its place inquiry might take the form of an investigation of practices which produce and organise this knowledge. If the system of criminal justice is a social construction then the way to proceed if we are to change it, is not by imposing some logic upon it from above, which in turn serves to bolster it, but by dissecting it from below: to analyse the practices which constitute it as a field of power, their sources, effects, and the myriad networks of power and knowledge they enter (Hogg 1983:12).

### ***Integrating criminology, penology, criminal justice into criminal law scholarship: Adverse to normative theorising?***

Within this approach, considerable emphasis has been placed on integrating criminological, criminal justice and penological perspectives and research with criminal law. One of the major limitations of much criminal law theory, whether of the 'critique' or 'philosophical/normative' genre, is its tendency to derive the appropriate formulations for criminal law from an analysis of the logical, moral and ethical coherence or desirability of various theories, principles and ideas, with little recourse to sociological, criminological and criminal justice research studies and empirical evidence as to the relationship between the discursive and non-discursive aspects of criminal justice practices. A prime example of this is in the area of sentencing, where so much of the debate, as Garland pointed out long ago, assumes that 'moral philosophy is the most appropriate means of evaluating penal practice', which in turn entails 'a conception of penalty as a moral object' and of punishment as mere negation:

[S]ocial institutions such as penal sanctions find it difficult to confine themselves to the realm of philosophical negativity. They insist on materiality, substance, and positive significance. They involve definite techniques, practices, knowledges, objectives and ideologies, all of which carry definite social and political implications and clearly require to be evaluated, criticised, or justified in a detailed and concrete manner (Garland 1983:82; see also Garland and Young 1983).

Garland's point is a key one, often overlooked in the interminable debates in moral philosophy over the justifications for punishment. It is an analysis that legal philosophers would benefit from revisiting. Moreover, it applies as well to the operations of criminal law, constituted as they are by the practices, sensibilities and habitus of a range of criminal justice agencies and organisations, often grouped together under the label 'criminal justice system'. While this is a shorthand term of some utility, its use tends to promote the notion that these agencies and actors: public, police, prosecutors, lawyers, judiciary and corrections workers are operating a unified system in pursuit of an agreed and uncontradictory set of

principles and aims. The implausibility of this can be seen in the slippage between judicial comments on sentence as to (the contradictory) factors of retribution, deterrence, remorse, rehabilitation and so on, and the actual lived experience of imprisonment by the person sentenced. The lived sentence, shot through as it is with physical and emotional privation, is governed largely through risk-based managerialism, manifested in a variety of programs currently organised around the concept of 'criminogenic needs', access to and engagement with which affect both the possibility of any sort of coherent 'pathway' through or narrative of the 'meaning' of a sentence, and the likelihood of being granted parole and thus the determination of an estimated release date (Hall 2013).

This is more than just a point about the necessity for normative theory to grapple with the empirical. It is a theoretical point that an adequate analysis of the criminal law and of the principles that might desirably guide its constitution and operation cannot be derived solely from an exercise in moral philosophy. The network and complex of criminal justice and penal practices cannot, as Garland notes, be adequately understood as simply 'philosophy-in action' or 'materialised morality' (Garland 1983:83) for politics, policing, the operation of law in the court process, are all semi-autonomous domains that have their own conditions of existence, rationalities, institutional means, technologies, languages, practices and limits that cannot be reduced to the realisation of any particular moral philosophy or principle of law, nor rendered amenable and ruly through the dictates of reason.

Another example of slippage between supposedly agreed-upon principle and any sort of concrete analysis is the familiar trope that while 'marginal' areas, such as public order offences, may be contentious, we can all agree on the central categories of murder, rape and theft. But can we? Even the most 'categorical' of wrongs 'such as murder and other kinds of serious physical assaults, rape, attacks on property' that it 'would be hard to imagine not being criminal in any legal system' (Duff 2007:143) become somewhat less 'categorical' as soon as empirical and contextual evidence is admitted. In relation to murder, for example, does this include deaths on unsafe worksites, or from workplace asbestos inhalation, from smoking tobacco, from pollution, neglect, failure to render assistance, police killings, euthanasia, deaths in custody, deaths caused by omissions, deaths caused by state or corporate action, killings by householders in defence of their property, deaths occasioned where provocation and self-defence are argued, and so on?

Similarly, certain legal philosophers discuss rape/sexual assault at a high level of abstraction as a core example of a pure moral wrong clearly warranting criminalisation on any normative theory. Yet, in practice, despite decades of feminist agitation and law reform, there is still a marked reluctance to report sexual assaults, the rates of filtering out of complaints by the police and decisions not to prosecute by the Director of Public Prosecutions are high, conviction rates are low and the prospects of success on appeal for those few who are convicted are good. Repeat perpetrators in institutions (for example, sections of the church, orphanages and welfare homes) have been sheltered and protected for decades, sent off to other locations to repeat their depredations when their activities finally attracted too much attention. All of this indicates moral ambiguity, rather than consensus, the limitations of a reliance on criminal law to promote bodily integrity, and the difficulties involved in doing so where vulnerability becomes licence and cultural narratives of sexual desire and availability can be constructed in the flimsiest of garb, and read as implicit in even the most coercive of circumstances, both within legal culture and process and in the broader community.

Ngairé Naffine uses the low levels of reporting, prosecution and conviction to challenge the usefulness and legitimacy of ignoring the 'mundane and worrying realities' (Naffine

2009:232). She argues that ‘criminal law theory does not serve us well when it is preoccupied with pure rights and wrongs and Platonic forms, which bear little relation to actual current conventional ways of defining criminality and practically assigning (and failing to assign) blame’ (2009:231). Lacey argues that ‘an adequate theorisation of criminal law has to be more historically grounded, more informed by the insights of other disciplines, and more reflective about its own assumptions than is much criminal law theory in Britain and North America’ (Lacey 1998:11–12). Arguably, Australian contextual criminal law scholarship has, for some time, tended to range across doctrinal criminal law, criminal justice studies, criminology and penology.<sup>5</sup> Lauterwein’s recent book-length treatment of the differences in approaches to the issue of the limits of criminal law between Germany and Australia sees the Australian criminological approach as having been inimical to the development of normative principles:

In Australia, possible reasons for the criminalization of certain conduct are *described*, while no normative statements on the legitimacy of the reasons are made. This provides for a comprehensive analysis of the history and the politics of criminal law.

In Germany, legitimate reasons for criminalization of conduct are established in order to make statements on the legitimacy of particular offences. This provides a framework for legislative critique.

While the Australian approach aims to describe the politics of criminalization, the German one aims to *influence* these politics (Lauterwein 2010:118, emphasis in original).

If we accept for a moment the initial characterisations of the two styles, the pragmatic question arises: Which of the approaches is most likely, empirically, to *influence* the processes and outcomes of criminalisation? It is not self-evident that the answer is a normative approach based on the declared function of criminal law being ‘the protection of legal goods/interests’, a function that then provides both a guide to statutory interpretation and a limiting principle restricting any criminalisation beyond the limits of this principle. This is no more self-evident than a criminologically influenced approach, which describes and unpacks the institutional and political conditions of the existence of the processes and outcomes of criminalisation, with a view to arguing in normative fashion how those conditions of existence might be changed to promote specified normative principles, to promote a ‘goal of normative legal theorizing’, as Lauterwein puts it, ‘influencing legislation and decision-making by the courts’ (Lauterwein 2010:119). The point is that this assessment cannot be made a priori; it depends on a detailed analysis of the particular historical, political, legal and cultural conditions of lawmaking and interpretation evident in significantly different polities. Local traditions, in Australia, for example, of common law pragmatism, of limited constitutionalism and the absence of a Bill of Rights, and of a predominantly part-time, practitioner-oriented, vocational legal education until the 1970s, are part of those conditions of existence.

The fundamental difference of approach is that normative (or ‘jurisprudential’ per Lauterwein) legal theorists tend to look mainly to the internal rationality, logic, coherence, and justice of the desired normative principles. The sociological/criminological approach tends to reflect upon the political, legal and cultural conditions of existence of particular instances of criminalisation with a view to normative ends of influencing the promulgation,

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<sup>5</sup> Such is the ‘North Atlantic’ hegemony in this field that such Australian scholarship, and the sustained activist and engaged political and educational practice from which it emerges, have been largely ignored by the leading British and American scholars. For the ‘normatives’, it is ‘insufficiently theoretical’, read philosophical. For the ‘crits’ it is insufficiently ‘critical’, read ‘theoretical’, and moreover takes legal doctrine seriously.

adoption and increased influence of specified principles; in particular, process rights of the type championed consistently by one normative theorist, Andrew Ashworth, which are often grouped under terms such as ‘due process’, the ‘right to a fair trial’ and ‘proportionality’. Ashworth’s work shows that these two broad approaches are not entirely mutually incompatible, particularly with the trend away from the more abstract type of legal philosophising in favour of a more contextualised ‘practical philosophy’ (Duff 2007:142–3). I will return to this point after an examination of some of the key features in the recent creation of new criminal offences in New South Wales.

## **Key features in the recent creation of new criminal offences in New South Wales**

It might help focus the discussion to engage in an analysis of some of the key features of recent examples of criminal offence creation in New South Wales, features which arguably seem typical across a range of Australian jurisdictions. How and why are new offences created? What specific legal form do they take? (For a similar exercise see Loughnan 2010.) Five key features will be discussed:

- The lack of reference to a set of desirable principles in decisions about criminalisation.
- The role of law and order populism.
- The linking of process and substantive law — new offences are linked to evidentiary and procedural changes and extensions of police powers.
- The use of criminal penalties in regulatory fields — the expansion of hybrids and blending and blurring.
- The increasing importance of risk prevention, precaution and ‘pre-crime’.

### ***The lack of reference to a set of desirable principles in decisions about criminalisation***

The first and most commonplace feature to note is that parliamentary debates, ministerial statements and second reading speeches rarely make any reference to a set of desirable principles governing the creation of new criminal offences of the sort suggested by Andrew Ashworth or Lord Williams. Ashworth quotes Lord Williams of Mostyn in response to a Parliamentary question about the basis of criminalisation. The answer was that criminal offences ‘should only be created when absolutely necessary’ and that:

In considering whether new offences should be created, factors taken into account include whether:

- the behaviour in question is sufficiently serious to warrant intervention by the criminal law;
- the mischief could be dealt with under existing legislation or by using other remedies;
- the proposed offence is enforceable in practice;
- the proposed offence is tightly drawn and legally sound;
- the proposed penalty is commensurate with the seriousness of the offence;
- there is consistency across the sentencing framework (Ashworth 2000:229).



While noting the aspirational nature of this rare example, Ashworth remarks that a brief analysis of the criminal laws created in England in 1997 ‘suggests that the laws being enacted bear little relation to the government’s supposed principles’. He describes the construction of criminal law as ‘unprincipled and chaotic’ and admits that any attempt to define criminal law in terms of its content is destined to fail. Criminal law is ‘not the product of any principled inquiry or consistent application of certain criteria, but [is] largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups, and so forth’ (Ashworth 2000:226). A similar characterisation is apt in Australia. While Parliamentary draftspersons have recourse to some established principles in drafting the wording of new criminal provisions — as clearly do specialist committees such as the Australian Model Criminal Code Officers Committee (‘MCCOC’) (see Brown et al 2011:34–7; Goode 2002, 2009; Leader-Elliott 2002; Bronnitt and Gani 2009) and the New South Wales Legislation Review Committee — such concerns are largely absent from political, media and even legislative debate over the appropriate limits of the criminal law. Particular criminal laws are increasingly the product of particular political campaigns, rather than the work of bodies of eminent lawyers concerned to ensure that individual offence definitions are in line with ‘general principles of criminal law’. Ashworth does not contend that criminal law is ‘grounded in a stable set of established doctrines’ (2003:v). He recognises that there is ‘ample evidence that the arguments and assumptions that influence the development of the law form a disparate group, sometimes conflicting and sometimes invoked selectively’ and that political factors often influence the shape of legislation (Ashworth 2003:v). He stakes this claim even more strongly later: ‘the boundaries of criminal law are explicable largely as the results of exercises of political power at particular points in history’ (Ashworth 2009:2). He goes on to note that:

it is not argued or assumed here that there exists some objective benchmark of criminality, or some general theory which will enable us to tell whether or not certain conduct ought to be criminalized. The range of actual and potential crimes is so wide and varied that this seems unattainable (Ashworth 2009:22).

### *The rise of law and order populism*

Periodisations can be dangerous, but I have elsewhere (Brown 2005:243–57) offered a rough one for criminal justice in New South Wales. From 1970 to the mid-1980s, a period of reform was driven largely by ‘progressive’ critiques of criminal justice practices seeking the restriction of police powers and the curbing of various violent, abusive and discriminatory criminal justice practices. This period was supplanted from the mid-1980s onwards by criminal justice reform driven by the rise of victim concerns, the increased politicisation and media exploitation of law and order culminating in the development of an ‘uncivil politics of law and order’ (Hogg and Brown 1998) and a ‘new’ (Pratt et al 2005) or ‘popular’ punitiveness (Pratt 2007) demanding increased police powers, restricted judicial discretion in sentencing and heavier penalties.

The former period actually produced a number of decriminalisations in the area of public order offences: the abolition of vagrancy, begging, prostitution and public drunkenness as criminal offences and a liberalisation of offensive behaviour. The latter period saw a retreat on prostitution and offensive behaviour together with an unrelenting recourse to the criminal law to ‘solve’ crises of political legitimacy over law and order issues. The primary political imperative became that of being seen to manage crises and controversies; being seen to be ‘doing something’ became more important than what was *actually* done and its effects. The *easiest* (rather than ‘toughest’) response was the familiar one of expressions of outrage over particular cases, coupled with promises of ‘tough’ action, usually in the form of a litany of

law and order ‘common sense’: more police, more powers, heavier penalties, and longer sentences (see generally Hogg and Brown 1998; Weatherburn 2004; Brown 2002a). In this mode, criminal law tends to be a symbolic gesture, offered as an immediate solution to social problems. A prime example of this general approach is the bidding war that regularly breaks out between all major political parties in the lead up to state and territory elections.

One of the consequences of the ‘uncivil politics of law and order’ and ‘popular punitiveness’ for criminal justice policy is that a number of conditions necessary to promote a more principled approach to criminalisation are undermined. One is the tendency to sideline, bypass or ignore official Law Reform Commissions, Royal Commissions, the MCCOC or other ‘expert’ reports, judging them to be unresponsive to political imperatives that require instant responses to legitimisation crises around particular cases. Another is the loss of credibility suffered by the judiciary, public service bureaucracy and academia in the face of a more general ‘anti-elites’ movement, expressing the rise of a ‘public voice’ challenging traditional forms of expert discourse (Ryan 2005; Loader 2006).

### *Process changes: Extensions to police powers, procedure, the example of bail*

Criminalisation does not just involve the creation of new or amended substantive offences; it also involves changes to police powers and to the laws of evidence and criminal procedure. The relevance to the issue of criminalisation of extensions of police powers and changes to the laws of evidence and procedure is that such changes, of which there have been many in recent years, become significant factors in determining whether particular forms of behaviour are found to constitute specific criminal offences.

A pertinent example of criminalisation through process involves the issue of bail, and the growth of remand in custody, a category comprising 23 per cent of all Australian prisoners (ABS 2012:14) and 25.7 per cent in New South Wales (ABS 2012:32). One outcome of the reform-oriented period in the 1960s and 1970s described above was the *Bail Act 1978* (NSW), which sought to make bail more available by moving from cash bail to recognisances and sureties and providing for a right to bail for summary offences and a presumption in favour of bail for all offences except armed robbery. In an indication of the hyper activity of the New South Wales legislature and the centrality of process issues to the electoral politics of law and order, there were 89 amending Acts between 1979 (when the Act came into force) and 2011, a 32-year period. Terminological changes accounted for 41 of these Acts; 19 were machinery/process provisions, some of great significance such as s 22A, which limited bail applications to one. This technocratic, cost-saving change rapidly increased the remand population as lawyers deferred making bail applications for days and weeks until full instructions are obtained and the best application can be put forward. What Steel calls ‘punitive changes’ (Steel 2009:223) — alterations to the structure of the Act involving the whittling away of the presumption in favour of bail and creating a morass of exceptions to the presumption, no presumption, and presumptions against bail in relation to a wide range of offences — accounts for 26 separate pieces of legislation. Some of these changes, such as provisions in relation to domestic violence offences, followed research and detailed consideration, consultation and debate. Many stemmed from ad hoc short-term consideration after individual cases attracting media attention. Among the most significant changes were those removing the presumption in favour of bail for offenders with a record of property offences such as break and enter (Brown et al 2011:177–91; Booth and Townsley 2009; Stubbs 2010; NSWLRC 2012:ch 3).

This is significant in terms of criminalisation as bail has ceased to be a mere procedural issue attached to the key concern of whether accused persons will attend court to answer the charges against them. It has become detached from this pre-trial location and function, and from the fundamental notions such as the 'presumption of innocence' and 'no punishment without a due process finding of guilt' supposedly governing them. Instead, it is now a free-floating forum for vague risk assessments of whether the accused is thought likely to commit further offences of any type if granted bail. (Brown, 2013) Further, these vague assessments are based not solely on the individual's criminal history, but in accordance with the Act, on inclusion in categories such as 'repeat property offenders'.

The precautionary principle and notions of 'community protection' have become vehicles for a massive pre-trial criminalisation and punishment of the yet-to-be-convicted, a process of de facto preventive detention, dwarfing in numbers the limited schemes for preventive detention of serious sex offenders now in operation across five states, which account for 166 community supervision or detentions orders in total (Baldry et al 2011).

### *The expanding scope of criminal law: Civil, administrative and contractual hybrids: Blending and blurring*

Criminal law is increasingly characterised by a move from the still-dominant image of common law general principles, the presumption of mens rea, and the burden of proof on the prosecution, to the actuality of an increasing swathe of statutory offences created by legislatures. These statutory offences found liability in strict terms, either minimising fault elements or restricting them to defences of honest and reasonable mistake of fact that must be made out at an evidentiary level by the defence. Traditional criminal legal doctrine constructs a free-willed, intentional, rational, choosing, responsible, individual subject: a subject morally suitable for punishment. Governmental power operates upon a subject constituted as a member of a designated and variable population requiring regulation, information and choice, whether as motorist, pedestrian, consumer, parent, student etc; a subject for whom the moral basis for penalty lies in the failure to comply with norms formulated for the efficient and safe functioning of various collective activities and enterprises. Sovereign power fabricates the free-willed individual as legal subject; neo-liberal governmental power fabricates members of a particular population in need of regulation in their own and society's interest, as subjects of governance.

It is not difficult to find examples of the vastly different sorts of regulation that nominally find a unity under the rubric of the criminal law, but more aptly illustrate the blurring of forms, agents, techniques, and results of regulation. For example, where there is alcohol-related violence in public settings, we find a wide range of responses. In terms of prosecutions, there is a mix of traditional criminal law prosecutions of patrons for assault, offensive behaviour, resisting arrest and malicious damage, and a much smaller number of prosecutions of operators of licensed premises for breaches of liquor laws. There is a regime of predominantly welfare-based 'detention' of 'intoxicated persons' rather than the former police arrest for drunkenness. Increasingly, at the forefront in the attempt to grapple with some of the damaging social effects of the deregulation of licensing hours is the introduction of 'responsible server programs', the monitoring of police reports of assaults in and around specific licenced venues by the New South Wales Bureau of Crime Statistics, and the publication of a list of the most problematic venues. Licensing authorities have acted on this information by restricting hours of opening and closing and requiring the withdrawal of glasses in favour of plastic cups. Sydney City Council has prepared a late-night Development Control Plan aimed at curtailing alcohol-related violence. Some licensed venues have introduced requirements for identity cards and, in some venues, forms of

telemetric identification of patrons, for proof of age and also to exclude known troublemakers. There has been a major expansion in private security guards operating not only inside and outside but also in the streets *around* licensed premises. Price regulation through increased taxation of certain types of drinks popular with young people (such as ‘alcopops’) has been introduced. Proposals have been made for increased availability of late night public transport from high-risk night-time economy areas. The above notes just some of the developments (for a case study on the varied reaction to a killing in the Kings Cross entertainment precinct, see Quilter 2013).

What we tend to see is a mishmash, a blurring of forms, agents, subjects and modes of regulation and power. The blurring of criminal, civil and administrative in the regulatory area is highlighted by the Australian Law Reform Commission (‘ALRC’), where it noted that:

The traditional dichotomy between criminal and non-criminal procedures and penalties no longer accurately describes the modern position, if it ever did. The functions and purposes of civil, administrative and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable (ALRC 2002:2.91).

In a project for this paper, Acts containing criminal offences judged by the use of criminal penalties, passed by the New South Wales Parliament over a three-year period from 2008–10 were collected. In 2008, there were 46 separate New South Wales Acts creating criminal offences (new and amended); in 2009 there were 40 Acts; in 2010 there were 42 Acts; a total of 128 pieces of legislation over the three years 2008–10. In 2008, 10 out of the 46 separate Acts covered what might be called ‘traditional’ criminal conduct — roughly 22 per cent. The other three-quarters covered a wide range of fields running the regulatory alphabet, from adoption to workers’ compensation. Many of these offences (72 per cent) provide for punishment by penalty units (fines); some provide terms of imprisonment (28 per cent). Only around one-quarter of the individual Acts concern traditional criminal law subject matter. The vast majority involve criminal penalties imposed in a wide range of regulatory activities.

### *‘Pre-emption’, ‘pre-crime’ and precaution*

A traditional doctrinal question relating to the limits of criminal law has been about how far a person has to go along the path to committing what will ultimately be a completed criminal offence before society is entitled to intervene on the basis that he or she has attempted to commit the offence. Traditionally, the position has been that an attempt should in itself be a criminal offence, but this has been mediated by the principle that mere acts of preparation fall short of an attempt, and lie outside the limits of criminal law. The *Criminal Code* (Cth) s 11.1(2) provides that, for the person to be guilty of attempt, his or her ‘conduct must be more than merely preparatory to the commission of the offence’. A significant rationale for this is that those considering embarking on criminal activity should have an opportunity to repent before things go too far. This principled distinction between non-criminal acts of preparation and criminal attempts, while formally intact, has been undermined increasingly by Parliamentary activity (see generally Brown et al 2011:985–1074). To give one example, in New South Wales those who agree to supply drugs or offer to supply them are guilty of actually supplying them, even if they have never had any in their possession nor indeed any intention of ultimately supplying a drug (*Drug Misuse and Trafficking Act 1985* (NSW) s 3(1)).

Lucia Zedner has charted a ‘pre-emptive turn’, the shift to a ‘pre-crime society’ (Zedner 2007:261), where association is criminalised without a requirement to prove that a specific criminal offence has been committed or is even planned. While pre-emptive criminalisation has a long history in the form of consorting laws (*Crimes Act 1900* (NSW) s 546A) and offences such as possessing implements of housebreaking/safebreaking (*Crimes Act 1900* (NSW) s 114(1)(b)), and being found in a public place with intent to commit an indictable offence, having been previously convicted (*Crimes Act 1900* (NSW) s 546b(1)), it has intensified with the scale of threats such as terrorism as

precaution, the basis of the legal principle designed to frame administrative decision-making in other fields (notably environmental catastrophes and industrial disasters), has become so dominant a mentality for public officials that it has seeped into spheres well beyond those for which it was originally intended (Zedner 2009:57–8).

Under s 101.6(1) of the *Criminal Code* (Cth), it is an offence carrying a penalty for life imprisonment to do ‘any act in preparation for, or planning, a terrorist act’, an offence that extends criminal liability further back along the time dimension than the traditional attempt formulation, which does not apply to preparatory acts. Further counterterrorism offences in *Criminal Code* (Cth) pt 5.3 div 102 effectively criminalise the very existence of organisations on the basis of conduct in which they may engage in the future, extending criminal liability beyond that of conspiracy. No specific agreement to commit a specific crime is required (McDonald and Williams 2007; and see generally McCulloch and Pickering 2009; Hocking 2003).

These approaches have since been extended to other forms of association such as motorcycle clubs or ‘bikie gangs’ in both New South Wales and South Australia (Lynch 2009). In New South Wales, the *Crimes (Criminal Organisations Control) Act 2009* (NSW) was passed two weeks after the bashing death of a Hells Angel’s member at Sydney airport. Both the New South Wales and South Australian legislation have been subject to constitutional challenge, in both cases successfully (*South Australia v Totani*; *Wainohu v New South Wales*). Among the significant aspects of these decisions is that the categories of incompatibility and repugnancy originally outlined in *Kable*, where the High Court struck down a New South Wales Act providing for the continued post-sentence detention of one man, are open to further development in relation to specific legislation, and are linked to procedural fairness (see also *Lane and Morrison*; *Kirk v IRC*).

## Implications for a normative theory of the criminal law

What implications, if any, do these features of recent criminalisation practice in New South Wales, some of them commonplace, suggest for the project of developing a ‘normative theory of criminal law’? The first feature was the absence of concern for legal principle in much political, media and legislative criminalisation activity, and the second the conduct of that activity under the banner of the politics of law and order and the frame of penal populism. From a philosophical or jurisprudential perspective this is a cause for regret, but primarily illustrates the importance of the task of constituting a set of normative principles against which the current political practice can be contrasted. For those working within a criminological or socio-legal tradition, the absence of reference to principles in relation to both the limits of criminal law and its formulation and content, and the overriding political impetus of law and order populism, become key conditions of existence that need to be analysed. The aim is to shift them as much as is possible as part of a strategy of attempting to develop a more principled approach to criminalisation around a set of principles (such as

those promoted by Andrew Ashworth) that might attract some broader political and legal support. Hence the importance of discussion such as that entered into by Nicola Lacey in *The Prisoner's Dilemma*, addressing the conditions under which the 'strategic capacity for co-ordination necessary to resolve the collective action problem posed by the politicisation of criminal justice is lacking' (Lacey 2008). Among Lacey's suggestions here, for example, are promoting bipartisan political approaches and attempting to revalorise expert opinion (Lacey 2008:190–6). Other contributions include Ian Loader's work on the diminishing influence of 'expertise' (Loader 2006) and Loader and Richard Sparks on the various modes of criminological engagement in their *Public Criminology?* (Loader and Sparks 2011). Another is Russell Hogg's call for a decoupling of populism and punitiveness and a discussion of how to de-pathologise populism and treat it as normal dimension of politics (Hogg 2012).

In relation to the third feature, process changes — particularly in areas such as the extension of police powers and the emergence of bail as a realm of unacknowledged preventive detention, a back-door criminalisation on the basis of risk of future offending, conducted prior to trial, the due process and fair trial-oriented principles (embodied, for example, in international conventions or in local human rights legislation such as the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) or in implied constitutional rights or common law principles (see, for example, *R v Benbrika*) — provide a basis for critique, opposition and redress. As does the recent NSWLRC *Report on Bail* (2012), which places the whole debate over bail on the foundational principles of the right to personal liberty; the presumption of innocence; no detention without legal cause; no punishment without conviction by due process; a fair trial; individualised justice and consistency in decision-making; and special provision for young people (NSWLRC 2012:ch 2). The attempt is to return bail to its rightful place as a mechanism for ensuring the integrity of the criminal trial process, rather than a free-floating forum for crime prevention and 'community protection'. The New South Wales government has not adopted the key NSWLRC recommendation of a return to a presumption in favour of bail for all offences, preferring instead a 'unacceptable risk' test. However, the Bill requires that 'a regard ... be had to the presumption of innocence and the general right to be at liberty' (Bail Bill 2013 (NSW) s 3) and adopts other recommendations intended to reduce the denial of bail and the rise in bail revocations brought about through excessive use of bail conditions and increased police monitoring.

On the fourth feature, the use of criminal penalties in regulatory fields, the expansion of civil, administrative and contractual hybrids and blending and blurring, one response might be an attempt to sharpen the processes of boundary definition by arguing, as Husak does, for a radical confinement of the criminal sanction to serious harms that are wrongful, and for which punishment is deserved, which involve a specified, legitimate and substantial state interest that has some prospect of being achieved, and is no more extensive than necessary to achieve its aims (Husak 2008). For the sceptics who think this is unlikely to happen, especially given that, on the figures for 2008 in New South Wales, regulatory Acts featuring criminal penalties outnumbered conventional criminal law subject matter three to one, the task might be more one of following the twists and turns in the regulatory trail or 'sweeping across the disciplines', as Braithwaite puts it (2000:63), testing the justifications for choosing particular forms of regulation and the specific processes, techniques and effects, against a more open, flexible and eclectic set of criteria or principles that might differ in different fields, while retaining a strong commitment to procedural justice and a watchful eye on its abrogation under whatever label or hybrid.

Attempts to grapple with the proliferation of statutory, regulatory and hybrid offences and the blending and blurring tendencies are not assisted by what Leader-Elliott calls the 'concentric' structure of criminal law (evident in Duff's *Answering for Crime* (2007) and central to most normative theory), where intentional offences against a person, such as homicide and rape, lie at the core of criminal law, exercising a 'gravitational pull' over the lesser offences founded in recklessness and negligence, most of which are statutory (an approach that mirrors the traditional 'general' and 'specific' division of criminal law). Leader-Elliott argues, similarly to the challenge earlier in this paper to conceiving criminal law as a unitary object or field, that 'the criminal law is polycentric, rather than concentric: a loose federation rather than a unitary state' (Leader-Elliott 2010:55). The implication of this for normative theory is, he suggests, that the 'discovery and development of a principled set of legislative limits or constraints requires careful consideration of the history and conventions of legislative practice over a broad and representative range of statutory criminal offences' (Leader-Elliott 2010:65).

As for the increasing emphasis on pre-emption, pre-crime and precaution, resistance can be mobilised on various bases. One is to defend existing common law conceptions of the legitimate limits of inchoate or preparatory crimes, requiring traditional notions of proximity to a completed offence in order to allow for changes of mind or to prevent capturing people who had other non-criminal purposes in mind. Another traditional common law principle that can be invoked is to insist on the requirement of intent to bring about, or subjective recklessness as to, consequences; that is, actual intent to cause, or awareness of, the consequences of actions.

A more focused normative argument is that of Bronnitt and Gani, who argue more generally that ch 2 of the *Criminal Code* (Cth), containing the principles of criminal responsibility:

should be given a real constitutional role in the criminal law by incorporating clear statements of the priority and significance attached to the fundamental principles of criminal responsibility. Under the current framework, the fundamental principles upon which our criminal law has developed can be derogated from in the interests of law and order, with the attendant danger that illiberal exceptions of strict and absolute liability will become the general rule. Rather than prospectively enabling such derogations, Ch 2 should provide a set of normative parameters for criminalisation which, when exceeded, trigger judicial competence to review the fairness of imposing particular forms of criminal liability in particular contexts (Bronnitt and Gani 2009:259).

A further defence is constitutional challenge on grounds such as proved successful in *Totani* and *Wainohu*: that there are constitutional limits to the processes, procedures and decisions in which criminal legislation can require courts exercising judicial power under the rule of law to engage. However, the limits of such reliance can be seen in the very prompt passage of an only slightly redrafted Act (*Crimes (Criminal Organisation Control) Act 2012* (NSW)).

## Conclusion

While the argument in this article has been mounted from within a criminologically influenced criminal law scholarship, critical of the context-free and abstract arguments of some legal philosophy, hopefully enough has been said to demonstrate the potential for a more criminologically and empirically informed legal philosophy and a more philosophically aware and normatively attuned criminological legal scholarship to edge

closer together, particularly given the emphasis of leading legal philosophers, like Anthony Duff, on the need for a 'practical philosophy' that rejects:

attempts to derive the content of the criminal law from a single master principle ... [and] accept[s] that debates about its scope will be more piecemeal, gradual affairs, more focussed on particular offences (actual or suggested), and informed by a range of values, presumptions and considerations (Duff 2007:142–3; see also Sandel (2009) for an approach to moral philosophy as 'practical wisdom').

In a more recent formulation, Duff refers to the search for 'a single master principle, or set of principles, that provides substantive general criteria by which we can identify the types of conduct that are in principle criminalizable' as 'doomed to failure' (Duff 2012:16). Such formulations potentially bring the two traditions closer together, particularly if the 'considerations' include empirical studies derived from criminological and socio-legal work, rather than considerations solely internal to moral or legal philosophy. However, there is still a substantial gap between the two traditions, which cannot be glossed over. According to Duff:

The processes of criminalization are those processes through which conduct comes to be or to be treated as criminal. My concern here is not with how those processes actually operate (that would be a complicated, messy, often depressing story, based on historical, sociological, psychological and political evidence), but with how they *should* operate: with what considerations should guide people in deliberating over whether to criminalize or not; and in particular, how — at what stages, in what ways — considerations about the moral wrongfulness of potentially criminalizable types of conduct should figure in such deliberations. More precisely still, my concern is with the logic rather than with the chronology of criminalization processes: not with the ways in which or times at which such considerations are actually adverted to in deliberations about criminalization, but in the proper logical structure of the deliberations that could justify criminalization (2012:7).

The very things that Duff is decidedly not concerned with in that article, and that are largely avoided in the whole normative project — those 'complicated, messy, often depressing' stories, based on 'historical, sociological, psychological and political evidence' — are at the heart of the contextual project. They cannot be bracketed out in order to create a clean and tidy realm where logic can roam untainted, except in the course of some purely philosophical exercise. For logic only takes us so far, particularly in a field as expressive as criminal law. While the 'should' focus is seductive, enlightening — even inspirational — it must ultimately be related in some way to the 'what is' and 'why', not least so that some routes can be charted towards the 'should'. Those routes need to start from somewhere approximating where we are, as best we can divine, and confront the 'messy' terrain mapped out by the 'contextual' approach to criminalisation and criminal law scholarship.

Criminal law is unavoidably normative in character in the sense that it is a major site of moral politics and moral enterprise in which the contest over values and symbolism is frequently more important than instrumental considerations, such as: Does it deter? Thus, for example, arguments about crime reduction, the criminogenic effects of penal excess, and so on, rarely trump symbolic and expressive appeals. Normative debates and contestation are thus central to 'context', and this is perhaps something that needs to be taken more seriously.

On the other hand, the normative arguments in question do not refer to a body of abstract principles or theory. This implies, as Michael Sandel (2009) argues, that moral philosophy needs to be brought down from its Olympian heights and reconceived as an outgrowth and refinement of civic debate if it is to play a meaningful role in the politics of criminal law.



The implication of this is that a normative theory of criminal law as a stand-alone entity is likely to have limited purchase where criminal law is integral to wider moral and cultural politics.

While there has been a tendency throughout this article to run together the separate considerations of the appropriate justifications for criminalisation, or the limits of criminal law, on the one hand, and the appropriate principles governing the formulation of particular criminal offences, on the other, there has been one thread common to both considerations and to both criminological and philosophical approaches, which might usefully be placed to the fore. It is the emphasis on procedural justice principles: due process, the right to a fair trial, the presumption of innocence, and on traditional legal notions of the separation of powers, judicial independence and the rule of law. Of course, such notions beg numerous questions as to their exact content and application and invite scepticism that they are more honoured in discourse than in practice, celebrated in abstract while being denied applicability in the individual instance. Due process can tend to devote too much attention to form rather than substance (see, for example, Stuntz 2011). Nevertheless, such notions are sufficiently recognised, at least in formulation, to be embodied in many international conventions and many domestic legal frameworks. They have a currency, a purchase in legal, political and popular discourse, that sophisticated discussions of the ‘harm principle’ or other supposedly ‘foundational’ principles do not. And, as has been argued here, procedural justice principles are not ‘merely’ procedural; rather, they are intimately linked to and partly constitutive of substantive criminal law, both as it is formulated and as it is enforced and practised.

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