Shaking the Foundations: Criminal Law as a Means of Critiquing the Assumptions of the Centrality of Doctrine in Law

ALEX STEEL

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UNSW Law
UNSW Sydney NSW 2052 Australia

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Alex Steel

Criminal law is a course that students generally take early in their degree and as such it is seen as a foundational, not only having the role of teaching criminal law, but also a range of more general legal skills. Because of this, students need a course with clear structure that produces a sense that they "understand" something. That structure tends to revolve around classes on general principles followed by classes on the core offences and how they apply the principles. This gives students the chance to learn how to break down offences into their elements and how to use judicial statements to interpret the scope of those elements. However, without a critical approach to the general principles, students can develop an overly simplified understanding of how criminal law is applied in practice, and an uncritical acceptance of claims of doctrinal clarity.

The structural separation of criminal law

This structure of 'general principles applied to core offences' is deeply embedded in the legal curriculum. It has a long history. As a result of the efforts of academic writers in the late 19th century to see law as a science (Simpson 1981), treatises on specific areas of law that described defined doctrinal areas became predominant, and influenced how courses evolved. For example, the development of separate texts on torts (eg Pollock on Torts) and on contract (eg Chitty on Contracts) paralleled the creation of separate courses in universities: a course on "civil obligations" blending contract and tort remains exotic.

Similarly criminal law has long been seen as a separate doctrinal area. Practitioner admitting bodies routinely require law schools to teach a separately defined area of law known as "criminal law".

This is not the case in the statute book. Although there is generally a *Crimes Act* or *Criminal Code*, there are often individual Acts dealing with subsets of criminal law (eg theft, public order offences, drugs), and there are whole statutory regimes that contain criminal sanctions (eg copyright, corporations law, traffic rules, land law) . Even though statutory regimes regularly contain both civil and criminal regulation, courses dealing with those regimes rarely give sufficient time to the criminal aspects. Courses in corporations law, intellectual property, etc tend to downplay the criminal elements of their doctrinal area because of this textbook/curriculum led separation. Rarely is the question of whether such regulatory offences are part of some overarching notion of criminal law principles considered. Criminal law courses too tend to gloss over connections to other areas of law (a point Ben Livings makes in chapter 12). This again because of the way the textbook writers have defined the core of criminal law.

The structuring role of the textbook

As noted in chapter 1, modern textbooks typically divide criminal law into a series of clear cut chapters arranged by doctrinal areas: General principles; Murder/Manslaughter; Assault/Sexual Assault; Theft/Fraud; Extensions of Liability; Defences. This is presented as an ahistorical, timeless and logical division. But that is misleading, as can be shown by a comparison with the past. William Blackstone's 1769 *Commentaries on the Laws of England*

(which emerged from Blackstone's Oxford lecture notes) order criminal law very differently. Blackstone's division of law into private and public led him to arrange his commentaries as follows:

> "I shall … proceed to distribute the several offenses, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or common wealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which community is deeply interested"(Blackstone 1979, 42)

After chapters on capacity and accessories the Commentaries thus has chapters on offences against: God and Religion (25pp); Law of Nations (8pp); Treason (20pp); Felonies injurious to the King's Prerogative (8pp); Praemunire (17pp); Misprision and Contempt (8pp); Public Justice (15pp); Public Peace (12pp); Public Trade (7pp); Public Health and the Economy (15pp); Homicide (29pp); the Person (15pp); Habitations (9pp); and Private Property (19pp). The length of treatment of each area reflects the extent to which Blackstone wished to make a political point: for example, the chapter on Praemunire is largely an extensive diatribe about the evils of Papery.

Significantly, Blackstone's arrangement was the first to attempt to systematise into an overall framework both common law crimes and the growing number of statutory offences. He rates crimes against the sovereign of most importance, then interference with the market and violence against individuals and finally interference with individual property interests. This also has an overtly political aim, to demonstrate the underlying genius of the common law, and critique the mass of badly drafted statutory offences.

Thus in his introduction to Book IV he argues:

> In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge ; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government ; from giving a lasting efficacy to sanctions that were intended to be tempory, and made (as Lord Bacon expresses it) merely upon the spur of the occasion ; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence ; from, or from all, of these causes it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. (Blackstone 1979, 2–3)

As examples of this imperfection he notes:

> And surely equal precaution is necessary, when laws are to be established, which may affect the property, liberty, and perhaps even lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry tree in an orchard. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians. (Blackstone 1979, 4) (See also Stern 2013; Kennedy 1978; cf Watson 1988)

Little appears to have changed in the academic view of law and order politics since the 18th century, though textbook critiques have become more muted.

Blackstone's systemisation redrew the mass of pleas of the crown into a seemingly logical order, not apparent on the face of the various Acts and common law judgments. This effort to idealise the law into a rational system is the beginning of the structure of criminal law doctrine we have today.

That process was then continued by influential English writers including Jeremy Bentham, Edward Hyde East, James Fitzjames Stephens, William Russell, Glanville Williams and Andrew Ashworth. Each writer seeks to re-organise and further rationalise the corpus of criminal law. Some emphasise the rights of the individual, some individual property rights. Some downplay the significance of the role of defences to liability, some increase it. Over time the idea of mental elements and general principles becomes important. Significantly, each writer has an agenda.

Contemporaneously, Ashworth and Horder, in Chapters 2 and 3 of *Principles of Criminal Law* (Ashworth and Horder 2013) go so far as to formulate a comprehensive set of principles for criminal law. These chapters are remarkable for the way in which they encapsulate the liberal ideal of a criminal law, and how the chapters are largely devoid of any judicial or legislative authority for the principles. They are arguably the high-point of the academic project in textbooks to redefine criminal law as a logical and just legal regime.

Such sets of principles, being normative and based on philosophical positions are highly political and invite students to judge existing criminal law negatively against them. This indeed may be the purpose of higher education – to equip students with a set of tools of critique – and they are critical grist to the mill of academic commentary on the current state of the criminal law. But it is important to also make sure when we teach criminal law that students understand that few politicians and few judges in lower courts pay any heed to such normative positions when developing or applying the law. The principles will help you in an essay, but not representing a client. As academics we hope such principles will influence law making, and shore up principled law reform commission reports, but they are regularly trashed by politicians responding to community concerns about crime (cf Ashworth 2000; Brown 2013).

This normative approach in traditional textbooks also implies the boundaries to be placed around what is, and what is not, criminal law, and around what is important to study (cf Husak 2003). In practice, doctrinal niceties of voluntariness and intention are rarely in issue – the most pressing issues are identifying which charge is appropriate, what acts are required to be proved and whether there is evidence to convince a magistrate or judge. Yet textbooks

routinely take up significant numbers of pages on detailed analysis of higher court decisions about the general principles, and then rush over complex statutory offences that are often prosecuted – if they mention them at all. Blackstone's bias against statutory criminal law lives on in many texts.

The combination of a textbook concentration on 'core' offences and the analysis of those offences through emphasis of the underlying 'rules' acts to reinforce an academic, ahistorical view of criminal law. That view is an important one. It is the dominant way in which higher courts describe the criminal law, and it is an important heuristic learning scaffold for students. But any criminal law practitioner knows that such 'law in the books' cuts little ice with everyday legal practice when dealing with law enforcement or the lower courts.

That is not to say all criminal law textbooks are so arranged, nor that all writers are unaware of this abstracting doctrinal process. In the vanguard of the modern move away from such an approach are books such as *Criminal Laws: Materials and Commentary on Criminal Process and Procedure in New South Wales* (Brown et al. 2015) and *Reconstructing Criminal Law* (Wells and Quick 2010) both first published in 1990. More radically, Jeremy Gans' *Modern Criminal Law of Australia* dispenses entirely with the traditional general principles/serious offences approach. His book structures criminal law as: Words; Choices; Conduct; Results; Circumstances; Sentences; Standards; Groups; Failures; Exceptions; Victims; States (Gans 2011). The alien appearance of this categorisation underlines the strength of the way textbooks have tightly defined criminal law doctrine.

Criminal Laws (of which I am now a co-author) grew out of the criminal law courses taught at the University of New South Wales since the 1980s. It places the doctrinal reification of criminal law into its broader cultural and political environment to demonstrate that there is in fact not one criminal law, but as the book's title suggests, " a collection of diverse 'criminal laws'" (Brown et al. 2015, p1) and that these are open to critique. As the introductory chapter to *Criminal Laws* notes:

> Under the traditional approach to the study of criminal law, the object of inquiry is not seen to be problematic. Everybody is assumed to know and accept what criminal law "is". The prophecy is a self-fulfilling one. The result is a considerable degree of consensus about what it is appropriate to cover, but this consensus is taken for granted and has rarely been the subject of reflection. [By concentrating on common law offences with long histories] …[t]he resulting picture is of a criminal law which possesses a sense of inevitability; its effective limits are not seen to be in issue.
>
> It is a picture which is based on unspoken assumptions about some perceived essence of Criminal Law, one which conceals crucial questions about what criminal law is – its potential and limits …It is a legal insider's view of criminal law; the task in hand is seen as being, at most, one of law reform requiring the expertise of criminal lawyers, rather than social policy-making necessitating contributions from a much broader range of experts and community representatives.(Brown et al. 2015, p2)

Alan Norrie has argued that there is a link between this abstracted sense of general principles and the agenda of 18th century text writers and reformers, who were determined to build a legal system which could support the middle class market economy. These reformers ignored the social origins of crime and very real conflicts over the role of markets and the law. Instead they created an abstracted ideal of 'economic man' or 'juridical man': "abstractions from real people emphasising one side of human life – the ability to reason and calculate – at

the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways" (Norrie 2014, 26–7)

Consequently, in teaching criminal law we need to be aware of the way appeal court decisions use general principle to abstract away from the real lives of offenders and victims. We need to find ways to bring back into the classroom the political dimension of much of criminal law. Partly this is achieved by emphasising the broader context within which criminal law is taught (Steel 2013), the real life facts of the parties (Mertz 2007), and the competing visions of how behaviour should be recognised and regulated. Others chapters explore the importance of context: see Loughnan, Quince and Tolmie (Chapters 13-15); Melanie Schwartz and I have also discussed this elsewhere (Steel and Schwartz 2013)

Putting This Into Effect

What follows is an account of how a course can be structured so as to de-centre the 'core offences' in favour of a more realistic approach to the way criminal law is encountered. The UNSW criminal law courses (Crime and the Criminal Process and Criminal Laws) allow students to study the general principles within a broader critical environment and with a series of juxtapositions. The order in which offences and issues are dealt with, is designed to counter the abstracting tendency.

Process, police and principles

Crime and the Criminal Process begins with classes on criminalisation and penality (theoretical, historical and colonial, with emphasis on indigenous over-imprisonment) and then takes students through pre-trial and trial process. Emphasis is placed on the extent of summary justice and on-the-spot fine notices, and its contrast to the elaborated forms of indictable justice found in the appeal judgments. The rhetoric of the presumption of innocence, the right to a fair trial, and no punishment without trial are contrasted with the ubiquity of prosecutorial discretion, the recent highly political interventions into bail, legal aid and the role of the jury. NSW bail law in particular has been amended frequently and increasingly punitively (Brown and Quilter 2014; Steel 2009) – demonstrating highly political and erratic, but speedy and dramatic, changes to criminal law.

Attention then turns to the role of the police, in particular the high degrees of practically unreviewable discretion and the variability of policing on different populations – especially indigenous populations. The importance of foregrounding police discretion is to demonstrate their gatekeeper role in defining crime (Dixon 1997), definitions that can be at odds with parliamentary and court understandings. Changes to legislation in this area can also demonstrate the significant political control police exert over their discretion (Sentas and McMahon 2013). Students also often have had their own dealings with police and having students consider the practical ability they have to question police behaviour can be engaging. Students also spend three days observing criminal courts where they see the justice system in action and can contextualise their understanding of the role of the key actors.

At this point the components of criminal law said to be generally applicable are introduced – capacity and liability; actus reus and what amounts to an act; mens rea and how states of mind are separated from circumstances; onus of proof and the 'golden thread'. The common law concepts are also examined in light of courts' attempts to create principled approaches to implying mens rea into statutory offences, and the widespread use of strict liability (*Sweet v*

Parsley [1970] AC 132; *He Kaw Teh* (1985) 157 CLR 523 and *B v DPP* [2000] 2 AC 428). Placing this discussion after process and court visits means that when students come to these principles, they already have a nuanced understanding of the reality of criminal justice and can assess the extent to which the principles structure or fail to structure everyday justice. They can judge the abstracted ideals against the gritty reality (cf Norrie 2014).

Applying the principles to offences

Traditionally, discussion of the components of criminal law is then demonstrated by a detailed analysis of homicide. This reinforces the centrality of those principles. But homicide is largely atypical (Brown et al. 2015, 744): key concepts are common-law based, there is an extensive history of philosophically-based judicial development of the approach to liability, and there are a number of defences not available to other offences.

Accordingly, Crime and the Criminal Process instead first examines two statutory criminal regimes, the NSW *Drug Misuse and Trafficking Act* 1985 and the *Summary Offences Act 1988*. Both Acts are obviously controversial and political, account for a significant amount prosecutions in local courts, and criminalise behaviours that are within the experience of most students. There is emphasis in the surrounding commentary on the health and social impacts of the laws and their enforcement (cf Steel and Schwartz 2013). But the Acts themselves are also highly useful tools for demonstrating the limited reach of the general principles.

The *Drug Act* is a complex statutory regime containing a range of offences from summary to indictable offences with life imprisonment. It represents an excellent opportunity to ask students to read an Act as a whole and to experience some of their first criminal laws as statutory rather than common law based, given the absence of any corresponding common law history. Most importantly, the approach of deeming certain weights of drugs to be evidence of an intention to deal in them represents a deliberate choice by the Parliament to create offences that are as serious as any other offence in the criminal calendar but which fail to adhere to the fundamental general principles of judgments such as *He Kaw Teh* and *Woolmington* [1935] AC 462. The extension of liability to those 'taking part' or possessing precursors also demonstrates the alacrity with which parliaments are willing to criminalise highly inchoate behaviours that predate the actus reus of the main offences. This underlines the precarious position of the general principles in the face of strong political desire for convictions.

The *Summary Offences Act* is also a statutory regime students can be asked to read as a whole. By contrast to drug offences, these offences have very long histories as police discretionary offences. Discussion of these offences in light of the previous discussion of police powers can demonstrate the ease with which they can be abused and used against particular populations – often indigenous.

Public order offences represent a very clear example of the inconsistent application of the 'general principles'. The physical elements of the offences are often highly subjective and based on community reaction. The decided cases allow students to see, for example, the way in which courts inconsistently can assume what the community considers 'offensive'. Further, despite High Court statements as to presumptions of mens rea, there is little law on the mental elements of these offences or their scope (cf *Coleman v Power* [2004] 220 CLR 1; *Morse* [2011] NZSC 45). This allows students to debate what the appropriate mental elements of the offences should be. It also highlights the inconsistent attention courts give to

supposedly serious and non-serious offences. Analysing summary offences in the same way that serious indictable offences are analysed can be a provocative and interesting exercise (see eg Quilter and McNamara 2013; McNamara and Quilter 2015).

Approaches to violence

In the second UNSW course, Criminal Laws, the 'core offences' are dealt with, but with a strong emphasis on how politically constructed they are. Continuing the de-centring of homicide as the stereotypical crime, as of 2016 common assault is examined first. The elements of assault are examined through the prism of male violence, and the exceptions for consent to sporting violence (cf Standen 2009) but not for sado-masochistic violence by considering *Brown* [1994] 1 AC 212 with its strong suggestions of homophobia (Bibbings and Alldridge 1993).

The emphasis on avoiding unnecessary convictions by broader consent exceptions and an emphasis on mens rea is then contrasted with sexual assault. The struggle for appropriate laws to recognise sexual violence, and the tension between feminist and traditional liberal notions of proof and consent is highlighted. The classes are used to demonstrate the artificiality of any notion of general principles of liability, and instead the need to recognise that approaches to liability are very much a product of the form of behaviour prohibited. Julia Tolmie discusses these issues in more detail (Chapter 15).

Homicide is then examined, followed by defences, theft and fraud and complicity.

Problematising homicide

While homicide is often taught as the fulcrum of the general principles of criminal law, there is much which is problematic. Despite the historic case law development of a requirement of full intentional mens rea for serious offences, homicide remains deeply compromised by the statutory preservation of felony (or constructive) murder and modern interventions such as the Australian one-punch killing laws (Quilter 2015). Highly gendered histories behind concepts of reasonable people for manslaughter and murder specific defences also expose the highly political backgrounds to ostensibly abstract doctrines. The way in which the law seeks to define responsibility for omissions is also instructive. In *Stone and Dobinson* [1977] 1 QB 354, the emphasis on the duty of care of the defendants masks the broader scandal of a failure of welfare services. How liability for drug-related deaths is constructed suggests moral underpinnings to doctrine (cf *Evans* [2009] 1 WLR 1999 and *Burns* [2012] 246 CLR 334). Contrasting the approach to killings by individuals with those by corporations also highlights policy considerations in determining liability.

Defences – political limits of exculpation

The limitations of claims of non-political general principles are possibly at their most obvious in criminal defences. First, it is arguable that the mental defences are only available to indictable rather than summary offences (NSWLRC 2013, 43) – an availability based on form not substance. Secondly, the defences are inconsistent in where the onus of proof lies. Some defences are only available for a subset of offences or only for murder. The defences are deeply implicated by out-dated views of the mind (see Arlie Loughnan, Chapter 13) and sexist, gendered attitudes (Crofts and Loughnan 2013). Yet despite the alacrity with which Parliaments create new offences and remove assumed requirements of proof, there has been

an extraordinary reluctance to modernise and re-consider defences. It can be argued that this is because defences are a direct challenge to the abstracted 'juridical man' of the 18th century reformers.

Theft and fraud – protecting property interests

Property offences are deeply political and the caselaw demonstrates strongly held judicial beliefs as to the role of the law. Theft laws were deeply implicated in the reforming role of the 18th century with George Fletcher famously highlighting the way larceny moved from an offence of public order to one protecting property interests (Fletcher 2000). The complexity of the offence of larceny highlights the long struggle of the courts to continue to extend protection to property owners across increasingly complex social arrangements (Steel 2008). The English *Theft Act*'s redrawing of those boundaries and the enthusiasm of the courts to uphold dubiously-framed prosecutions (eg *Hinks* [2001] 2 AC 241) – even at the expense of destroying liberal principles of criminal law – is also a strong example of the variability with which principle is applied in criminal law.

The increasingly generally-drawn fraud and dishonesty offences also demonstrate the modern move to reliance on apparent mental states for liability, and provide a segue to complicity.

Complicity – politics and fear

Finally, ending the course on an analysis of conspiracy and other forms of complicity is a powerful way of demonstrating the tension between notions of liberal core principles and the political drive to protect the community against the perceived risk of criminal groups (McNamara 2014), and to accept that risk of future wrongdoing can justify association-based offences. Links can be drawn through the historical development of consorting offences to terrorism offences (McSherry 2004).

Conclusion

Because of the early position of criminal law in the curriculum, structure is important for students, and the idea of general principles remains a key way of providing that structure. Students need a pre-determined logical framework to help them make sense of the mass of laws. This process of abstraction and re-categorisation is a fundamental element of critical thinking, a key graduate attribute. And the statutory offences, while often antithetical to the general principles are drafted and interpreted in light of them. But it is possible, while providing that framework, to do so in a critical manner and to problematise the abstracting tendencies of criminal law principle.

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