

CRIMINALIZATION
The Political Morality of the
Criminal Law

Edited by

R A Duff, L Farmer, SE Marshall, M
Renzo and V Tadros

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Criminalization

This most interesting law book published by Oxford University Press consists of eleven chapters contributed by

R A Duff

L Farmer

S E Marshall

M Renzo

V Tadros
J Chalmers
F Leverick
J Horder
P Pettit
S Dimock
MS Moore
D Husack
A Bottoms
L Wacquant

All contributors are academics based in the United Kingdom apart from Susan Dimock (Canada); Philip Pettit (Australia); Douglas Husak, Michael S Moore and Loic Wacquant (United States).

Criminal law worldwide is a very emotive subject in itself and this book is an academic, philosophical criminal law, its components and direction, will surely stimulate more discussion and thought as to criminal law's direction. It is not for undergraduates but postgraduates who are learning to critically analyse their subject matter.

It is said that criminal offences now number some several thousands and there is one group of believers who think that this represents overcriminalization, which now covers a vast proportion of commercial matters, rather than the common law crimes as were known. The result is a need for more and more guidelines to black letter law, which in themselves are not the law.

Mala prohibita

Chapter 6 by Susan Dimock deals with *mala prohibita* offences and compares them to *mala in se* offences. She states that criminal law theory concerns what justifies the use of *mala prohibita* offences and queries whether there is a meaningful distinction to be drawn at all, although most criminal law theorists continue to employ the distinction.¹

“Blacks and crime”

¹ This chapter discusses the ‘Contractarian theory’, the theory of exchange which rests on an implicit assumption that property rights exist and are enforced without cost. See Goran Skogh and Charles Stuart, (1982) ‘The Contractarian Theory of Property Rights and Crime’, *Scandinavian Journal of Economics*, 84 (1), pp 27-40.

Chapter 10 by Wacquant is titled ‘Marginality, ethnicity and penalty: a Bourdieusian perspective of criminalisation’, a topic which most people in the UK are familiar with, when clothed in the basic terms of police treatment of youths of ethnic minority who experience police stop and search orders more than anyone else in Britain, for example and police in the United States (“US”) more ready to shoot at black youths than at others,² and some criminal theorists argues that argument that the pervasive sense of cultural resistance in the African American community must be considered by criminal theorists as, at least, a partial explanation of ‘criminality’ within the African American community, because, woven into the fabric of African American culture is a vital oppositional element.

Dr Trevor Gardner stated that *‘popular conceptions of deviance often fall prey to very basic ideas of immorality, failing to realize that deviance—by strict definition—describes a separation between the separation between the labeled deviant and the mainstream American culture’*. His theory was that crime committed by black youth was *‘part of a greater cultural and political struggle between African Americans and mainstream culture, and consequently a subject of the “deviance” label’*. He discussed the matter on the basis that neither the word crime nor the word deviance would take on their popular connotation, and maintained that *‘in the context of political struggle, viewpoints as to the legitimacy of crime depend heavily on perspective’*.

Trevor Gardner was a legal theorist like the contributors to this book. In his paper, he rejected the legal theorist Eleanor Brown’s article *‘Oppositional Culture’* in the *New York University Law Review*.

Eleanor Brown wrote that youth oppositional culture must be counteracted. Her primary weapon wielded in this cultural battle was Afrocentric education. She constructed her proposal around the writings of Supreme Court Justice Clarence Thomas in the caselaw *Missouri v Jenkins* in which Justice Thomas stated that integration was the most effective method of securing educational equity in America. Trevor Gardner criticized Eleanor Brown in much the same way as chapter 10 does.

² Gardner, T. (1999), ‘Delinquent: Crime, deviance, and resistance in black America’, Social Sciences Research Network- paper from *Harvard University Black Letter Law Journal*. Trevor Gardner, University of Michigan, Ann Arbor, 1999; J.D., was also a Harvard Law School graduate (2003).

Wacquant stated in chapter 10 at page 271, which he wrote that his chapter aims to do:

'...to activate communication among three clusters of researchers who usually do not encounter one another and therefore do not talk to each other or do so too rarely and from a distance. In the first corner we have people who study 'class fragmentation in the city' in the wake of the crumbling of the traditional working class which issued from the Fordist and Keynesian era under the press of reindustrialization, the rise of mass unemployment, and the diffusion of labour precarity, under the 'erosion of the wage-earning society'.... and the 'unfinished genesis of the post-industrial precariat'...the second group are studying the foundations, forms and implications of ethnic cleavages...in the third corner is...a group of criminologists and assorted specialists in criminal justice issues. They burrow away with zeal the closed perimeter nod the 'crime and punishment' duet, which is historically constitutive of their discipline and continually reinforced by political and bureaucratic demand'.

Finally Chapter 11 by S.E.Marshall, concentrates on the victims of crime, where all theories seem unimportant in the face of what criminal acts do to victims and where out instinctive reaction is for punishment, but thankfully not through trial by ordeal in ancient times.³ The crucial point to remember is that over 90% of offences relate to compliance, regulation and corporations in general and te days r gone when trial by ordeal could even be considered. Today offences, for example, fraud offences are prosecuted against companies in the main. Fraud is a socio-legal concept of much complexity. There is no such thing as fraud in a very abstract philosophical notion, but pragmatically there are frauds and there are

³ The test the test was one of life or death and the proof of innocence was survival. In some cases, the accused was considered innocent if they escaped injury or if their injuries healed. In medieval Europe, like trial by combat, trial by ordeal was considered a *judicium Dei* or procedure based on the premise that God would help the innocent by performing a miracle on their behalf. Priestly cooperation in trials by fire and water was forbidden by Pope Innocent III at the Fourth Lateran Council of 1215 and replaced by compurgation, later by inquisition. Trials by ordeal became rare over the Late Middle Ages, but the practice was not discontinued until the 16th century.

fraudsters. There is no such cause of fraud as such, only different types of fraud committed by disparate fraudsters. Fraud, like all crime, is a result of a combination of psychological and sociological factors.⁴ There has been no follow-up study of fraudsters whether after psychiatric or medical treatment or after release into society.

That society exists is *Sui generis*.⁵ It is built up of a number of parts, which together interweave to create solid social structures. These structures are our institutions,

Crime lends itself to much debate, now more than ever because of the ease of cross-border passages and transactions. Sir Norwood East, in his book *Society and the Criminal*⁶ (pg 320) puts weight to this argument when he stated:

“One of the most important causes of persistent criminality is habit, the stereotyped form of response to environmental circumstances and subjective conditions acquired by repetition. Habits enable many persons to face difficulties and conserve energy, but they may impose upon a tough-minded person action which takes the line of least resistance and a vicious circle may result: a particular situation arises, the consequential difficulty is repeatedly avoided and a crime is repeatedly committed.”

⁴ In 1949, Elliot in her book “Crime and Modern Society” stated (pg 137) “Professional crime is a business, a means of making money while engaged in activities specifically forbidden by law.”

⁵ This term basically means that something has very special characteristics. They are so special, that the thing cannot really be compared to anything else. It is used in various contexts. The term was invented by philosophers. What they originally wanted to say was that an idea is so specific as to be unique, that it cannot really be part of a broader concept.

⁶ Sir Norwood East (1960) *Society and the Criminal*, London: HMSO.

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