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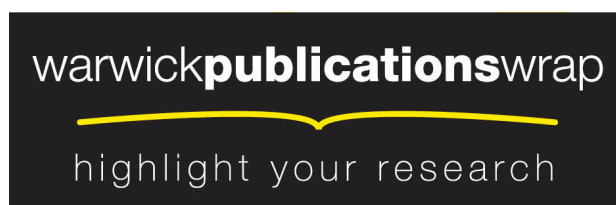
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BOOK REVIEW – The Boundaries of the Criminal Law¹

This book presents a welcome contribution to a much mentioned but not nearly well discussed and developed topic. While there has been a number of papers and contributions discussing issues related to criminalization, very few tried to tackle the topic from a broader, more holistic perspective. There was a gap in relation to how these debates really fit together, and what kind of general framework of criminal law they actually refer to. The Boundaries of the Criminal Law, the first of four paper collections coming out of a new research project solely dedicated to the issue of criminalization, addresses this gap head-on.

As the introduction to the collection says, the project started with the apparently simple question of ‘what should be criminalized’²; this somewhat simple question, though, can easily be stretched to cover such complex themes as what it means to criminalize, how criminalization by legal statutes interacts with the actual prosecution and prevention of crimes, and so on. A collection of essays is particularly useful in this sense, for it enables the book to address this complex problem from a myriad of perspectives instead of offering any particular model or framework. In short, a complex question demands a complex approach, and that is just what the book aims to offer.

One of the greatest merits of the book lies in its introduction, particularly illuminating for its general perspective on the theme of criminalization. It offers a summary not only of the book but of the programme of the four-year research project focussed on the topic. It starts with a broad reflection on what would constitute a theory of criminalization, setting the perspective of the endeavour through a discussion of its objectives, delimitations of its scope and complications that the group anticipates. Among the many orientations offered in the introduction, it is interesting to highlight that the projects sees the criminal law as at root a political matter, contingent on political theory, and thus affirming the importance that the notion of citizenship has for a normative understanding of the criminal law. In this sense, the project is concerned with ‘what aims for the criminal law could reflect or be consistent with a mutual recognition of fellow citizenship’³; it is clear then that the aim of the project is to establish not precisely what the boundaries of the criminal law *are*, but more importantly what these boundaries *should be*, according to the conditions of a contemporary liberal polity. So, even though ‘[a] normative theory of criminal law is a normative theory not of some abstract entity, but of a political institution’⁴ – that is, it must have the existing criminal law as its starting point –, the aim is to ‘generate a more or less radical critique of our existing institutions’⁵. The editors appropriately describe the ambitions of the project as ‘no easy task’⁶.

The introduction makes clear that the focus of the project is on practical philosophy, and that ‘the most that we should aim to do is to spell out and justify (and explicate the relationships between) the considerations that should guide decisions about criminalization.’⁷ This leads the editors to a discussion of whether it is possible to find some sort of ‘master principle’⁸ which would be able to offer such guidance. The book then offers an interesting discussion of how, particularly in common

¹ R A Duff, Lindsay Farmer, S E Marshall, Massimo Renzo, and Victor Tadros (2010).

² Ibid, 1.

³ Ibid, 8.

⁴ Ibid, 9.

⁵ Ibid.

⁶ Ibid, 14.

⁷ Ibid, 15.

⁸ Ibid, 22.

law jurisdictions, Mills' harm principle has long been used as the main guideline for proper limits to the criminal law, mainly contested by moralist ideas of wrongfulness. Insightfully, the editors point to the fact that a proper theory of criminalization has to find a perspective that not only finds the limits of the criminal law, but that can also justify the criminal law as an appropriate measure. The most salient aspect of the current debate on criminalization is the issue of overcriminalization – the common realization that 'our criminal law should be much narrower in scope than it now is'⁹.

But focussing on the problem of overregulation and exaggerated punishment may potentially make the discussion lose focus, and so the editors advert that 'if we are to justify criminal law at all, we must suppose not only that there are legitimate constraints on criminalization, ie reasons why we should *not* criminalize, but also that there are good, positive reasons in favour of criminalizing certain kinds of conduct. It is those reasons that must be central to a normative theory of criminalization'¹⁰. Other than the problem of overcriminalization, then, there are also matters of undercriminalization – matters that are treated by non-criminal procedures, where the protections inherent to the criminal process are unavailable – that ought to be addressed by such a theory. Finding appropriate principles and considerations for the creation of criminal offences, which can present alternatives to the ones usually offered and strike a better balance in the criminal law is the central focus of the different papers present in the book.

The first contribution is written by Carol Steiker, and is about the possibility of allowing greater discretion on the part of state officials to decline punishment on the grounds of prudential mercy. This way of avoiding overcriminalization would be interesting mainly due to failures in existing theories of punishment, and due to the fact that society's need for punishment is arguably more dependent on dispositional attributes than on situational factors. Steiker's description of these two mainly social factors relating to punishment are the greatest merits of her insightful paper, for they show not only how the criminal system is defective, but most importantly why is it unlikely to welcome any major structural change, which would demand an alternative way to cope with its deficiencies, like the bold suggestion she offers.

On a similar note, Andrew Ashworth and Lucia Zedner look at the other side of the spectrum of criminalization, point to the often overlooked problem of *undercriminalization*. Their contribution focuses on preventive orders, a phenomenon which also deeply relates to the current social and political state of affairs, the need to manage risk and to provide an image of security. But measures such as preventive order end up interfering with individual liberty as much as proper criminal offences, but without possessing any of the protections and safeguards which are inherent to the criminal process. Along with Steiker's contribution, these two chapters provide a very insightful perspective in which to delineate the framework for the entire project of criminalization.

Antony Duff's paper will basically conjoin the two previous chapters under a common, more philosophical and less socio-theoretical, perspective under the label of possible 'perversions' and 'subversions' of the criminal law. He basically poses problems such as over and undercriminalization as theoretical challenges for a normative theory of criminal law, asking whether these problems can be efficiently addressed by an ideal theory, or whether they constitute practical problems which theory should rather accommodate. By posing this important question, Duff opens up the entire project of a normative theory of criminalization to critique, discussing not only the boundaries of the criminal law, but also the boundaries of any theoretical conception of it as well.

⁹ Ibid, 8.

¹⁰ Ibid, 22.

Mireille Hildebrandt takes Duff's metacritical approach one step further in order to discuss not only the risks posed by current developments in criminal law, but also the possibilities suggested by them. In her article 'Proactive Forensic Profiling: Proactive Criminalization?', Hildebrandt investigates the potential of new profiling technologies which are increasingly affecting the way in which criminal tendencies and behaviour are identified in society, compromising current theoretical conceptions of criminal responsibility. The edge of her contribution lies on a critique not of the technologies themselves, but of the way they are used; the last section of the chapter discusses the ways in which, if used properly, these new technologies may enhance rather than hinder our notions of subjectivity and personhood.

One chapter that deviates from the tendency towards generalization which runs throughout the book is John Stanton-Ife's essay on horrific crime. This perspectival shift is quite refreshing, however, for it provides a clear example of how a general normative framework could influence a much more specific discussion of a type of criminal offence. In this sense, Stanton-Ife points to the fact that there are many concepts within criminal theory which remain unexamined, and looking and one of such concepts can reflexively clarify some issues that general theories dabble with, such as the harm principle, and how accommodating general principles to specific cases can prove much less satisfying than a general outlook would suggest.

The last four chapters of the book focus on a comparative approach in order to best determine the limits of criminalization. Victor Tadros offers an interestingly polemic comparison between criminal punishments and civil penalties, highlighting the fact that by focusing on the deterring aspect of criminalization, it follows that punishment ends up harming some people in order to protect others. He then proposes that criminal law should accept this unhappy conclusion and articulate punishment in a way which would make the best use of it with the lowest cost to individuals. This 'compromise' solution tackles with many interesting pragmatic issues which are often neglected by more idealistic theories.

Markus Dubber and Lindsay Farmer, by their turn, offer a comparative historical approach in their contributions. Dubber looks at the origins of the public and private legal domains in Roman law, examining criminal law's definition as a particular, specialized strand of public law. He then follows the historical progression of this distinction, using it in order to provide a critique of the definition of crimes as 'public' wrongs. Particularly relevant in this chapter is another distinction on which Dubber draws, which is the distinction between law and police. This distinction, which runs alongside the more legal discussion, is particularly illuminating of some of the tensions which plague the issue of criminalization.

Focusing on the concept of wrong, Farmer first examines different contemporary approaches to criminal wrongs before putting them in historical perspective. Adding a critical edge to the account, he highlights the socio-historical contingency of ideas of criminalization and wrongfulness, something which is usually not account for by normative theory. Offering perhaps the most meta-critical of all the essays in the volume, Farmer illuminates how legal wrongs are actually dependent on transformations on the social, political and legal orders.

Closing the volume is Kimmo Nuotio's comparative chapter on 'Theories of Criminalization and the Limits of the Criminal Law: A Legal Cultural Approach'. Coming from the perspective that theories of criminal law are shaped and limited by their legitimacy conditions, Nuotio calls for a cultural, ethical-normative approach to criminalization. This chapter's main contribution to the book

is that it includes a study on continental theories of criminalization, broadening the scope of the present volume into what would otherwise be a significant omission.

If there is anything that could be said that this rich and relevant collection lacks it would be a slightly broader perspective, less dependent on a strongly liberal framework. Indeed, if the intention was to ‘generate a more or less radical critique of our existing institutions’¹¹, the project should have taken a more critical approach to the many principles and institutions it so expertly explored, questioning as well as exposing their bases for legitimation. If the criminal law and its construction of criminal offences are indeed a political matter, such an attempt to elaborate a practical philosophical theory of their workings could have gone deeper into the socio-political biases which are inherent to liberal societies. Hildebrandt’s and Farmer’s contributions arguably represent the most ‘radically critical’ approaches in the volume, exposing philosophical and socio-political biases endemic to the criminal law, but most of the book resembles more of an attempt at a ‘rational reconstruction’¹² of the institution than a radical critique of it.

Nevertheless, *The Boundaries of the Criminal Law* is a much needed discussion into probably the most relevant topic in contemporary criminal legal theory. All the chapters make important contributions to the debate, and it generates high expectations for the future volumes of the Criminalization series. Finally, like the editors themselves anticipated, it is probably a book that produces more questions than answers; but in an area as theoretically and practically relevant as the limits of criminalization, in much need of critical awareness, maybe more questions is exactly what it needs.

¹¹ Ibid, 9.

¹² R A Duff, *Answering for Crime* (2009), 5.