



Farmer, L. (2014) Criminal law as a security project. *Criminology and Criminal Justice*, 14 (4). pp. 399-404. ISSN 1748-8958

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Deposited on: 06 October 2014

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Title: Criminal Law as a Security Project

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Abstract: This paper asks how criminal might be understood as a security project. Following Valverde's lead, it does this not by trying to define the concept of security, but by looking at the operation of the temporal and spatial logics of the criminal law. It looks first at the basic logics of time and space in conceptions of criminal liability and jurisdiction, before reviewing some recent developments which challenge these practices and what these might mean for criminal law as a security project.

Key Words: Criminal law – security – time – space - jurisdiction

Criminal law scholarship can sometimes appear as though it is conducted in a vacuum. It tends to see itself as a branch of moral or political philosophy, and its language is often abstract, concerned with rights and wrongs, harms and goods, in a way which seems far removed from analyses of power or security apparatuses. It is true that it recognises a concern with security in various ways – in the claims, for example, that criminal law secures social order, or secures individual or social goods – but until recently there has been little reflection on the idea of security as such or its place in the criminal law. However, it is clear that the criminal law is nonetheless involved in the governance of crime and security, even if it does not see itself primarily in those terms. This is occasionally explicit. The prominence of terrorism offences in recent years has led to extensive discussion of the relation between security and law. Likewise, the use of ASBOs and other preventive measures has prompted much soul searching about the relation between such 'security measures' and criminal law traditionally conceived. Indeed, for some this has even been described as a 'preventive turn', describing a decisive shift away from legal values and towards the use of preventive measures, or indeed towards the use of the criminal law as a security measure (Ashworth et al., 2013; Sullivan & Dennis 2012). However the reaction in criminal law scholarship is usually defensive – these developments are seen to conflict with core legal values, such as the presumption of innocence or the need to prove individual guilt. Where liberty and security conflict, law must be on the side of the angels, the last line of defence against the security apparatus. By implication the logic of liberty embodied in the criminal law is seen to conflict with an alien logic of security.

While this is something of a caricature, there is a more serious point. The alignment of law with liberty against security has prevented more systematic investigation of the question of the extent to which criminal law can itself be conceived of as a security project or the extent to which law enables or buttresses a larger security project. This is not just a matter of detailing the specific references to security in the criminal law – for instance in recent anti-terrorism legislation – but of reconstructing in a more general sense how the criminal law has contributed, and has seen itself as contributing, to the securing of social order. It is often argued that law provides security – this indeed is one of the great founding myths of the modern law deriving from the work of Thomas Hobbes. But although this posits a foundational relationship between the modern law and security this is expressed only in the most general of terms. On this view security is seen as a baseline for social order – once secured it can conveniently be forgotten about except in cases of exception or emergency. The nature of the ongoing relationship between criminal law and security is not addressed.

Questions remain over the kind of security that is provided through law, whether this changes over time, whether law merely secures other social goods or whether security is an end in itself, and of how law interacts with other security mechanisms in society. This is potentially a rich field for investigation. However, following Valverde's lead, rather than addressing the concept of security directly it is better to begin by looking at the question of the spatial and temporal logics in criminal law.

There are certain basic conceptions of time and space underlying both the practice and the self-understanding of criminal law (see more generally Farmer 2010). We can see these if we analyse the elements of the normal process of the attribution of criminal liability. First, in its most basic terms, in order to establish criminal liability, the law must establish that the conduct was criminal under the law of the place where the action occurred, that it took place within the jurisdiction of that legal system – normally within the territory of the sovereign state – and that the accused person is a proper subject of the criminal law (Duff 1998). Only once this has been established can the courts begin to consider the more familiar elements of criminal liability: what an action is; when an incident begins and ends; what a relevant outcome is in terms of injury to, say, a particular person or thing; what it means to bring a criminal end about; and the state of mind of the accused. This process, then, posits not only a legally regulated space (jurisdiction), but also that conduct and outcome take place in a unified field of action. This is normally straightforward: A and B are in the same physical location and A does something to B which produces an immediate outcome in terms of injury. But it can be more complex, as for example when A mails a package to B in different location and B passes the contents of the package to C who consumes them at a later date and subsequently suffers injury. The criminal law has developed rules for dealing with these kinds of situations which link act and outcome for the purposes of attributing liability – though these are normally articulated in terms of concepts such as causation or *mens rea*, rather than time or space.

Second, it is a precondition of any normative judgement in practice that there be some sort of spatial and temporal relation – something which can allow communication – between the addressor and addressee of that norm. In basic terms, if a person is to be called to account for their actions before a court of law they should be members of the same legal or 'political' community broadly conceived, and this has implications not only for the application of the law in particular instances but also for the justification and legitimation of the criminal law in general (Duff et al., 2007). Once again, this process is normally straightforward and implicit, but may become more complex if the accused person claims to be following the norms of a different legal order, as with the so-called 'cultural defence' (Renteln, 2004), or where a person is charged with having committed 'historical wrongs', where the legal order, and norms relating to particular conduct, has changed (e.g. Christodoulidis & Veitch, 2001). Once again, the fact that legal systems have developed technical rules for dealing with these situations should not obscure the fact that such rules have a temporal and spatial dimension. In the modern law these kinds of issues are framed as questions of the institutional relation between state and subject or citizen, but this claim points more generally to the kind of 'political' space in which the criminal law operates.

It is possible to make two more general points about the temporal and spatial logics of the criminal law. First, it is usually argued that criminal law is backward looking, concerned with punishment for past conduct. The criminal trial is based on the reconstruction of past events. Punishment, it is argued, can only be justified where it is for something that has taken place in past; the infliction of punishment on the basis that a person poses some sort of future or potential risk is, at least in principle, regarded as unjustifiable. This is so whether the justification for punishment is seen in terms of retribution or deterrence, as even on a deterrent logic punishment is not regarded as authorised unless for some prior criminal

conduct. Thus it has been argued that the logic of the criminal law is incommensurable with the logic of risk (or security) which is concerned with the probable incidence of future events. Second, criminal law operates with a kind of 'methodological nationalism'. The political space of the criminal law, and hence questions of sovereignty or legitimacy, is conceived of at the level of the nation state. The state is seen as the ultimate source of law and as the body responsible for enforcing the law – holding the monopoly of legitimate force – even if this increasingly appears to be at odds with political realities. Equally criminal jurisdiction is largely conceived of in national terms, such that new forms of jurisdiction such as extra-territoriality, whether at the sub- or supra-national level, are understood in terms of national rules. Overall, then these logics would suggest that the role of criminal law should be understood primarily in terms of securing or restoring a pre-existing sovereign political order. It can respond to threats to that order, or to individual goods secured by that order, only after these have manifested in a completed criminal act or where conduct has taken place towards the completion of such an act.

This kind of self-understanding of the criminal law is challenged by recent developments, and in the remainder of this response I will explore the nature of these challenges and what they mean for understanding the criminal law as a security project.

One recent trend has been the developments in the areas of transnational and international criminal law – the former referring to processes of co-operation between individual nation-states (such as the European Union), and the latter referring to the development of courts, tribunals and substantive laws under the auspices of the United Nations – with the recognition of new substantive offences, criminal procedures, courts and jurisdictional spaces. Domestic criminal law has not remained untouched by these globalising trends. New criminal offences claim an ever-extended extra-territorial range, and many new crimes are enacted as a direct consequence of international treaty obligations. One recent example of this is UK anti-terrorism legislation which was passed to comply with the provisions of UN Resolution No.1373, and which criminalises terrorist acts which take place outside the UK and which might be directed at the government of any other country (Terrorism Act, 2000, s.1(4); Scheppele, 2010). This is not a unique example, however, as other legislation has also seen the assertion of extraterritorial jurisdiction in relation to a range of 'cross-frontier' crimes from so-called 'sex tourism', to financial crimes, computer crimes and so on (See Hirst, 2003: 6-9). These developments potentially signal a shift in both the bases of jurisdiction and in the position of the state as author of its own criminal law.

A second major trend has been the rise of preventive offences. Prevention has been an aim of the modern criminal law at least since the creation of the modern police in the early nineteenth century, but it has been argued that there has been a decisive shift in the range and scope of preventive offences over the last twenty years (Ashworth & Zedner, 2010 identifying ten different 'families' of preventive offences). The 'preventive turn' is normally understood in terms of a shift to technologies of risk, moving from the individual to the aggregate, but it is also a change in temporal logic, from reacting to the past to an orientation to the future. What is striking about this area is that developments go beyond issues of policing or enforcement – areas which might have safely been regarded as the proper subject for criminology and thus not a threat to the self-perception of the law – to changes in the substantive law itself. One example here is the rise of so-called 'pre-inchoate offences'. While the existence of inchoate offences – liability for attempted or incomplete crimes – has been justified on the basis of the immediate social danger posed by such conduct, pre-inchoate offences extend liability. Thus we have seen the creation of new offences which criminalise preparing to commit certain conduct, or possessing information which might be used in the commission of a crime, or sexual grooming of children (consisting in communication with a child and travelling to meet them in any part of the world) (See, e.g.,

Terrorism Act, 2000, s.12 (support for a prescribed organisation), s.57 (possession of article for terrorist purposes), s.58 (possession of information); Terrorism Act, 2006 s.1 (encouragement of terrorism), s.5 (preparation of terrorist acts). Sexual Offences Act 2003 s.15 (meeting a child following sexual grooming)). Overall these are measures which seek to prevent possible, rather than probable, criminal conduct and thereby reduce the sense of threat. The central issue here is that of the control or management of uncertainty – and thus of the relationship between criminal law and security (Ramsay, 2012: ch.10).

These developments might be characterised as specific instances of a more general space-time compression that characterises late modernity, opening up the possibilities of new kinds of social relation while simultaneously posing new kinds of threats to social order (Giddens, 1990). The formal boundaries that were the basis of the order of modernity, and which have structured legal categories – between public and private, past and future, one jurisdiction and another – are collapsing to become more permeable, less permanent. While this has been celebrated as enabling new forms of sociality and new kinds of social network, it also gives rise to new kinds of anxieties and forms of control aimed at forms of association and the policing of boundaries as points of movement and incursion. There are, for example, new kinds of ‘public-private’ space (the internet, shopping malls etc.) which give rise to new issues in policing; ‘actuarial justice’ deploys concepts of risk to de-individualise law enforcement and identify dangerous communities and areas; and forms of computer crime do not rely on the sort of face-to-face social interaction which has been the basis of traditional criminal offences (McGuire, 2007). While the work of criminal law theory has often been directed at the shoring up of traditional boundaries, the real challenge that it faces is that of responding to this new environment.

The final point that I want to make concerns the ‘political space’ of the criminal law for this raises questions about the values of criminal law as a security project. The model of space in liberal political theory is that of the nation-state, the space which emerged with the foundation of the modern criminal law in the penal reforms of the early nineteenth-century. In this model ‘citizens’ are understood as in part pre-political moral subjects standing before the law, and in part legal subjects in a political relationship to the state. The criminal law was central to the establishment of these modern institutions both because it helped to secure social order and because it provided a legitimate framework for the exercise of state power. This endured in the face of social inequalities because it was able to sustain its social and political legitimacy. The forced recognition of a range of social spaces, and of different temporal forms of control, presents an enormous challenge to this model which, as it articulates the problem of citizenship and legitimation from the perspective of the state, struggles to accommodate these new forms. A key question here is that of the values of the criminal law and their potential to constrain state action. While the criminal law is deeply involved in the governance of crime and security, it is also important to recognise that resort to criminal law brings with it a commitment to certain institutional characteristics which differentiate it from other kinds of security instruments – even if these are often only imperfectly applied. These include a respect for the rights of citizens and what might be termed ‘rule of law’ values, such as a commitment to legality, fair trial and so on. Law is not just the object which is secured, it is also the means by which the object is secured, and in this sense has a potential to civilise security (Loader & Walker, 2007).

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