

## International Journal for Crime, Justice and Social Democracy



### Thinking about (Hidden) Criminalisation

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#### Introduction

Criminalisation is now seen as one of the central issues in criminal law theory. However, in spite of the (rather belated) recognition of the importance of the topic, a number of fundamental questions remain unaddressed (Duff et al. 2014) and, in many cases, not even openly acknowledged. I discuss three such questions here, prompted by the articles in this excellent special issue on 'Hidden Criminalisation' and, in doing so, I raise a fourth and broader issue about the possible limits of criminalisation theory.

The first of these questions concerns the scope of criminalisation. This is the question of what we mean when we talk about criminalisation—and this in turn raises crucial questions about how we should track, and theorise, criminalisation (Farmer 2016). In other words, what is a theory of criminalisation? The second question is related to this, and concerns the national and cultural dimensions of criminalisation. It is not only a matter of producing a 'general' or ideal theory, but also understanding the history and cultural specificity of particular practices of criminalisation, and reflecting on how these should be understood and approached from a theoretical (and normative perspective). The third question concerns the normative dimension of a theory of criminalisation. The focus of work on criminalisation is often on the phenomenon of 'over-criminalisation'—too many criminal laws or too much punishment—and is arguing for the need to reduce or limit the criminal law. Alternatively, to focus—as many other theorists do—on the 'proper' scope of the criminal law is to suggest that there is a gauge against which we can measure the contemporary criminal law in terms of the 'right' amount or proper function of the law, often in terms of legal moralism or retributive accounts of punishment. The issue, though, is whether these standards are the best or most appropriate ones for analysing—and criticising—the complex phenomenon that is criminalisation. I shall say more about each of these questions in turn, prompted by the sophisticated and thoughtful way that these have been raised by the articles in this special issue. And I shall finish by raising a fourth question, which concerns the limits of criminalisation theory. The current centrality of criminalisation to criminal law theory brings a temptation to analyse everything that is a direct or indirect effect, or consequence of, criminalisation decisions in terms of criminalisation. The question here is, when does it stop being useful to analyse something as criminalisation? Or, putting it slightly differently, is there a point at which criminalisation ceases to be useful as an analytical category?

#### Scope

In an influential formulation, Lacey (2009) pointed to the distinction between formal and substantive criminalisation: broadly speaking, the difference between laws on the books and the patterns of enforcement of those norms in the criminal justice process. She then went on to point out that criminal law theory has tended to focus on the former, what might be described as the

legislative moment, and has largely neglected the study of substantive or empirical patterns of criminalisation. To this we might now add, as **Lacey** has pointed out in her commentary in this issue, the further distinction between criminalisation as processes or practices, and criminalisation as an outcome; that is to say, 'the full range of broader social, cultural, economic, emotional and political effects of these processes'. Indeed, it is this sense of the outcomes of criminalisation that is raised in a particularly vivid way by the question of 'hidden' criminalisation.

As **Quilter and Hogg's** paper on the use of the fine makes clear, criminalisation can be 'hidden' in a range of different ways. This might be because of a lack of academic attention: they point to the soaring use of the fine as an alternative to prosecution, where little is known about the full range of agencies operating these powers, how they use them or how their role in the criminal justice system is changing. And, perhaps more importantly, they point out that little is known about the human impact of fines, in particular the use of fixed penalty regimes which take no account of the circumstances of the offender. This raises questions of the relationship between administrative systems and criminal justice—and, of course, of the outcome of criminalisation in the sense of its impact on particular individuals, groups or communities. Similar issues about the outcomes of criminalisation are raised in **Douglas and Fitzgerald's** paper, which shows how the system of domestic violence protection orders is leading to the disproportionate imprisonment of members of the Aboriginal and Torres Strait Islander (ATSI) communities. The key part of their account is the demonstration that a measure that was originally established as a means of protecting the victims of domestic violence—by diverting from the processes of mainstream criminal justice—ends up 'enmeshing' ATSI people (and particularly women) within the criminal justice system, thereby reinforcing established patterns of racial and ethnic discrimination and oppression. **Methven** then draws attention to a further 'hidden' dimension of criminalisation in her exploration of the means by which swearing at, or in the presence of, a police officer can be constructed as a particular type of disrespect for order or authority. Criminalisation, she shows, is more than simply a matter of legislation plus enforcement (or non-enforcement); it crucially depends on a range of other (in this case linguistic) processes which frame and construct certain forms of conduct as a threat to the community.

These questions of scope and outcome, and the associated methodological issues of how to study criminalisation, come into particular focus in the 'modalities' approach set out in **McNamara et al.** The authors are to be congratulated on engaging with neglected methodological issues, to develop a genuinely innovative approach to criminalisation, one which seeks to recognise fully the complexities of the topic. They do this by seeking to identify more systematically the different modes and outcomes of criminalisation. This approach thus includes not only direct (legislative) criminalisation but also indirect modes of criminalisation—such as the reduction of procedural safeguards, the downgrading of the classification of offences, or the expansion of post-correctional powers—and then seeks to link this to the outcomes of criminalisation. This then enables the authors to classify particular statutes across a range of Australian jurisdictions in terms of specific forms (or modes) of criminalisation. The resultant picture, even at this admittedly early stage in their research, is significant both because it shows the shortcomings of a narrow focus on 'over-criminalisation' as merely the creation of new offences, and, more significantly, because it begins to reveal a much richer picture of the workings of the contemporary 'penal' state, making visible the hidden processes of criminalisation.

This is thus an approach which promises rich insights in building up a new kind of empirical picture of criminalisation. I would, though, endorse **Lacey's** sympathetic comments about areas in which the approach needs to be developed, and perhaps add that this approach, which retains a central link to the legislative moment may be unable to capture all the penal outcomes of 'hidden' criminalisation.

### Cultural specificity

Many of these issues arising from hidden criminalisation are general. **Quilter and Hogg**, for example, point to the rise in the use of the fine as a penalty in modern high-income societies, and offer case studies of Australian jurisdictions as illustrations of these more general developments. Likewise, **Sentas and Grewcock** see changes in the form of police power in New South Wales as a means of exploring the relationship between police power and criminal law more broadly. In both of these examples, while there are specificities related to the particular legislative history of a measure, the developments seem to be capable of being fitted within a broader narrative about monetary penalties or police power. However, in some cases—notably in **Douglas and Fitzgerald's** analysis—the outcomes of criminalisation take a form which is specific to Australia, linked to its colonial past and to the patterns of expropriation, deprivation and discrimination that are its legacy. The question that this raises for the study of criminalisation is that of the relationship between general patterns and particular developments: whether we should work with a general framework of analysis and see particular developments as 'local' variations; or whether it is, rather, the culturally specific that should be privileged for the insight that this gives into broader historical developments. Likewise, the authors (**McNamara et al.**) of the modalities approach locate it within a distinctive Australian tradition that has placed greater emphasis on interdisciplinarity and contextual studies of criminalisation (see also Brown 2013; Crofts and Loughnan 2015). However, it is also presented as a general approach—a toolkit—that might be adopted for the study of criminalisation practices more broadly, but arguably such a move would also require some further reflection on the distinctiveness of the Australian approach, and whether this can, or should, be generalised.

This dilemma is, of course, also played out at the level of normative theory, and the question of how we should frame normative categories. As Cane (2002: 7) has pointed out, to talk of (or in the language of) 'Anglo-American jurisprudence', as is common in much contemporary legal theory, is to elide the processes by which the English common law—and now American variants—have been imposed across the globe, and arguably also to neglect the ways in which the use of certain normative categories or linguistic forms is subtly to reproduce systems of legal domination. The language of legal theory, in whose terms criminalisation is normally discussed, is one which continually falls back on categories (wrong, harm) whose very appeal lies in their apparent universality (conduct which is 'wrong in itself' or 'pre-legally' wrong) (Farmer 2010). But this form of legal theory rarely reflects on the processes by which it has achieved its own institutional dominance, or the ways that its own categories and concepts are themselves inflected with cultural norms which are, in turn, linked to a history of colonialism. The problem, therefore, is not simply one of understanding local (cultural) variations in terms of general (universal) patterns, but also requires that we subject the 'general' to the same kind of critical and reflexive examination.

### Normative dimensions

This leads us, then, to a further set of questions relating to normative understandings of criminalisation: if, as **McNamara et al.** point out in this issue, the purpose of the modalities approach is to provide a clear empirical foundation for normative theory building, we must still ask what kind of normative theory is appropriate.

In looking at this, there are some specific questions raised by the focus on 'hidden' criminalisation, particularly as this relates to outcomes (rather than processes). One of the points that comes over very strongly from the articles in this special issue concerns the 'hidden' consequences of criminalisation: that those who bear the brunt of penal measures are very often not those at whom the measure was ostensibly directed, and that the consequences of a conviction routinely exceed the headline sentence. Now it is certainly the case that it is recognised that penal measures have had further, and unintended, consequences: imprisonment or fines impact upon the families of the prisoner in economic and emotional terms; a conviction may have an impact on the future

ability of an offender to get a job or housing or credit, and so on.<sup>1</sup> These impacts, moreover, are often not necessarily directly imposed by criminal justice institutions, but might be the consequences of other individuals, organisation or institutions imposing restrictions because of the criminal record of the offender. These can then combine to have a devastating effect on the lives of those affected. And this is only to discuss this in terms of its impacts on individuals. While the sentencing of an individual (and possibly even certain 'hidden' consequences of a conviction) might be seen as 'justified' in terms of that person's conduct or criminal record, understanding sentencing patterns against the backdrop of social and economic deprivation, or patterns of racial and ethnic discrimination, raises a further set of issues about the justice of criminal justice institutions.

How can these kinds of consequence be captured by normative theory? One approach might be to focus on the sentencer, and what the court is justified in taking (or not taking) into account when imposing a sentence. One problem here is that the sentencer may simply have inadequate information—or indeed that the social consequences of a conviction may not become apparent until some later time. It is not clear that courts, even if they were in possession of this information, either could or should be in a position to make this kind of complex decision, pointing to the limits of an approach focused on the justifiability of punishment. And, when we move to the social or aggregate level, the questions may concern the justifiability of individual punishment less than the role of the criminal justice (and social and economic) system as a way of allocating social costs and benefits across a population (Chiao 2017). The justifiability of punishment (and of criminalisation), in other words, is not merely a matter of individual transactions, but depends on questions of social and political justice. However, at this point, although we are still concerned with the outcomes of criminalisation, it is reasonable to ask whether these kinds of outcome can, or should, be addressed in terms of a theory of criminalisation.

### **Limits**

What comes across strongly in the articles in this special issue is the sense in which, when one focuses on the form, substance, and outcomes of criminalisation (or its modalities), criminalisation is a capacious concept—always allowing us to identify further consequences, or apparently non-punitive measures, that none the less have a penal impact on certain communities. The focus on criminalisation is powerful precisely because it allows us to make visible the hidden consequences and to trace the linkages from legislative enactments, through selective enforcement, to social injustices. And this in turn raises powerful questions about the scope of the criminal law. However, as I suggested at the beginning, it might also be important to ask about the limits of criminalisation theory. This might have two dimensions. First, we might ask whether seeing the consequences of criminalisation everywhere might dilute the impact or explanatory power of criminalisation theory. That is to say, just because it is possible to see something as a consequence of criminalisation does not necessarily mean that it is best understood in terms of criminalisation. Second, and related to this point, it is also necessary to think about the relationship of criminalisation to other disciplines or other theoretical traditions, notably to criminology, and also potentially to analyses of the state and law in social and political theory. One of the exciting promises of the modalities approach is precisely that it seeks to draw on these existing traditions of thought—and perhaps to anchor the study of criminalisation to acts of legislation. However, as this approach develops, it will also remain important to retain a focus on questions of its own theoretical limits.

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Please cite this item as:

Farmer L (2018) Thinking about (hidden) criminalisation. *International Journal for Crime, Justice and Social Democracy* 7(3): 4-8. DOI: 10.5204/ijcjsd.v7i3.556.



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<sup>1</sup> For discussion of 'collateral consequences' of conviction in the United States; see, <https://niccc.csgjusticecenter.org/>.

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