

International Journal for Crime, Justice and Social Democracy



Theorising Criminalisation through the Modalities Approach: A Critical Appreciation

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Introduction

New scholarly paradigms in the study of criminal law come along rather rarely. Despite extensive published work on this core topic in the educational curriculum and intellectual programme of the legal academy in most countries, the basic conceptual tools which inform its exposition and analysis in mainstream scholarship have remained relatively stable over the last half century. Moreover, they have not evolved in proportion to the development of the field at large. Valuable attention to rethinking the conceptual parameters of the field has come from contextual, historical, feminist or otherwise critical scholarship (Ashworth 1991; Farmer 2016; Fletcher 1978; Loughnan 2012; Naffine 2009; Norrie 2014; Wells and Quick 2010); and—as the contributors to this fine essay note—from site-specific areas of criminalisation. But, the conceptual basis for theorisation remains a pressing concern. This is particularly so given the recognition, in much of the most innovative recent scholarship, that the field of criminal law cannot be fully understood independent of the dynamics of criminalisation conceived as a broad social practice. This development is giving a new spin to the longstanding focus in theoretically informed criminal law scholarship on the question of responsibility (Ashworth forthcoming; Ashworth and Zedner 2014; Duff et al. 2010, 2011, 2013, 2014; Farmer 2016; Horder 1992; Lacey 2016; McSherry, Norrie and Bronitt 2009; Norrie 2016; Ramsay 2012).

This turn to criminalisation is to be welcomed, yet many of the interpretive arguments about criminal law which it has generated—including, I should make clear, my own—depend on assumptions about patterns of criminalisation which it is not clear we, as yet, have the conceptual tools or empirical data to fully substantiate. This really came home to me about a decade ago when I was commissioned to write a piece on criminalisation in historical perspective (Lacey 2009). When I asked myself about the detailed basis for even some of the most widely made claims in this area—for instance, that there had been an explosion of regulatory criminalisation in England in the nineteenth century; or that preventive offences are on the rise—the more thought I gave to the propositions, the more elusive they seemed. Even restricting ourselves to legislation, what counts as a single offence? How should we account for criminal offences which arise in other forms of regulatory regime (Lacey 2004)? And should we be focusing on, as it were, the law in the books, or the law as interpreted and enforced?

It is precisely these sorts of questions which McNamara, Quilter, Hogg, Douglas, Loughnan and Brown (this issue) have begun to tackle, and their effort is hugely welcome. In what follows, rather than summarising their account—which is very clearly and succinctly set out in their own essay—I will set out briefly the challenges here as I see them, distinguishing between different sorts of conceptual, interpretive and socio-legal question about criminalisation. I will then move

on to evaluate how effectively the modalities approach can resolve each of the identified questions, and how it might be extended, adapted or further developed to meet even more.

Criminalisation: The conceptual and empirical problems

McNamara and colleagues ('the modalities team') are absolutely right to identify a lacuna in the theoretical apparatus in criminal law scholarship, which increasingly asserts the importance of understanding patterns of criminalisation, yet tends to duck the question of how, empirically and/or conceptually, we can track those patterns. Important initial efforts here have been made, notably by Andrew Ashworth and Meredith Blake (1996) in a pioneering essay published 20 years ago, and more recently by James Chalmers and Fiona Leverick (Chalmers 2014; Chalmers and Leverick 2013). But, there is undoubtedly—as the authors of these honourable exceptions would doubtless attest—further progress to be made. The modalities team are also right to suggest that the accompanying lack of reflexivity in the field tends to lead to both a skewed view of the material to be theorised, and an over-emphasis on the headline issue of so-called 'over-criminalisation'. Powerful as the 'over-criminalisation' scholarship has been, in the hands of influential scholars like Doug Husak (2008; Duff et al. 2010, 2014), it is focused primarily on the normative arguments against excessive use of the state's criminalisation power, informed by a very particular sample of (certainly worrying) recent developments rather than by an assessment of the overall state of the criminal law, even in any one country.

In trying to elaborate the problems to be faced here, it is useful to distinguish between two broad pairs of ways of thinking about criminalisation (Lacey 2009, 2016: Chapter 1). First, we can distinguish between what we might call 'formal criminalisation'—the full range of offences, whether created by statute or customary/common law, which are valid in a particular legal system at any moment in time—and 'substantive criminalisation'—the patterns of enforcement of those valid norms through the criminal process. Second, we can distinguish between criminalisation as a set of processes or practices, encompassing everything from legislation and judicial interpretation to prosecution and crime, recording and reporting decisions by officials and, indeed, by lay people; and criminalisation as an outcome, as not only the conviction rates which most vividly exemplify the impact of substantive criminalisation but also the full range of broader social, cultural, economic, emotional and political effects of those processes. No one project can, of course, hope to focus on each of these processes or practices at once; as the modalities team recognise, even within any one, over-generalisation is a key danger. But any project dealing with one half of either pair needs to be aware of both its potentially complex and indirect relation with the other half, and with the other pair (formal for substantive criminalisation, and vice versa; the upshot of processes of criminalisation for outcomes and, indeed, vice versa once again).

The modalities approach: Formal criminalisation ...

The modalities team set out to provide a more differentiated conceptual scheme which can illuminate the realities of criminalisation, which is, as they rightly argue, a necessary precursor to thinking clearly about how criminalisation should be used, normatively speaking. Their aspiration is 'to have a better understanding of why, when and how criminalisation has been and is the chosen policy response to an identified harm or risk, and with what effects' (McNamara et al. in this issue: 92). To this end, they differentiate four main modalities of criminalisation, distinguishing legislative provisions which expand, contract or rationalise the boundaries of criminalisation; or which criminalise, decriminalise or otherwise reshape criminalisation in pursuit of the interests of crime victims. Further, two of these four principal modalities are subdivided. The expanding criminalisation modality is divided into nine further sub-modalities which encompass not merely formal offence definition change but also adaptations in penalties, procedural safeguards, defences, and enforcement and pre- or post-correctional powers, as well as encompassing offences within regulatory regimes and civil/criminal hybrids. The contracting criminalisation divides into six sub-modalities covering matters such as modification of defences,

penalties, procedural safeguards and diversionary programmes. Note that particular statutes can include provisions which belong to more than one modality; nor, indeed, are classifications mutually exclusive (for example, a provision might be both expansive and victim-oriented).

In terms of the classification scheme sketched above, the modalities approach is accordingly concerned, at least primarily, not so much with substantive criminalisation and the outcomes of criminalisation processes, but with formal criminalisation and with the varied processes of formal criminalisation. And, in terms of its power to accurately track and illuminate this key aspect of criminalisation, the modalities framework is a very significant advance. For, notwithstanding its focus on legislative change, its scheme for tracking that change ensures that it is picking up on a range of formal changes—notably procedural and punitive, pre- and post-conviction—which are likely (though not certainly) to have material effects on substantive criminalisation, and which, hence, equip the field to coordinate research on formal and substantive criminalisation in a much more satisfactory way than has until now been possible. We might say that the modalities approach conceptualises criminalisation in a way which matches the aspirations of texts such as Bronitt and McSherry (2017), Brown et al. (2015) or Wells and Quick (2010)—or that is reflected in Ashworth's heroic work in producing over many years three texts covering the criminal process, criminal law and sentencing (Ashworth's single authored editions of each of these books appeared, respectively, in 1983, 1991 and 1994: see Ashworth 2015; Ashworth and Redmayne 2010; Horder 2016). It does so by recognising that even the formal boundaries of criminal law are set by legal norms beyond those of the substantive criminal law: norms within regulatory regimes; civil orders whose breach can invoke what are, in effect, criminal penalties; procedural rules; bail and sentencing provisions; and so on.

The modalities team's analytic scheme accordingly does much to assist the effort to displace what many scholars have long felt to be an unsatisfactory marginalisation of regulatory norms and procedural issues in criminal law scholarship. And the authors' own identification of a trend, in the large sample of Victoria, New South Wales and Queensland statutes which they analyse, towards a focus on the criminalisation of risk exemplifies the capacity of their conceptual scheme to underpin a substantive interpretation of the direction of criminalisation trends, and to do so on a more robust methodological basis than, for example, I was able to provide for my broadly similar interpretation of recent trends in England and Wales (Lacey 2016).

That said, some questions may be raised about the modalities scheme as it currently stands, taking it on its own terms as an analytic model of formal criminalisation.

First, it is not clear that the four principal modalities are all conceptualised in comparable ways. The first two have to do with the boundaries of criminalisation: the third and fourth with distinctive motivations for shifting those boundaries. In the team's terms, then, the first two have to do with the 'how' and 'when' of criminalisation, the third and fourth have more to do with the 'why'. This does not necessarily matter but it should perhaps be noted more explicitly than it is in the team's exposition so far. One obvious question which this raises is: if we have two modalities which are motivated by broad policy or ethical concerns, might there not be other, comparable motivations, ones which systematically drive the deployment of criminalising power, equally calling to be tracked? Can we necessarily distinguish victim-orientation, for example, from substantive aims such as dealing with a perceived threat of terrorism or other distinctive forms of public disorder? Again, this is not necessarily a problem but we need to be clear-sighted about the fact that the third and fourth modalities—and in particular the fourth—are interpretive and historically contingent in a way which is not the case for the first and second.

Second, while the range of sub-modalities and the practice of allowing a single statute to be counted in more than one modality and sub-modality is a huge advance in terms of capturing the details of trends in a conceptually manageable, indeed, elegant way, this method cannot, inevitably, give us much sense of scale. A provision which reintroduced the death penalty for

murder, for example, would count as an instance of sub-modality Ic, just as would a provision to increase the maximum penalty for theft from five years to six years or to increase a maximum fine for a traffic violation from \$100 to \$150. Also note that the counting system inevitably reflects legislative drafting style in a way which may further distort our perception of scale; for example, a statute like the English *Theft Act (1968)*, which enunciates one broad offence of theft, will imply a lesser score, including in relation to subsequent amendments, than a legislative scheme which differentiates many different offences within a particular area, the *Misuse of Drugs Act (1971)* being a good example in England and Wales. And sometimes it can be hard even to decide what counts as a single offence as, for example, where aggravated forms or alternative modalities of a single offence are created.

Third, even as a measure of formal criminalisation, the modalities approach is arguably not complete. This is because it excludes judicial decisions, which are not only forms of substantive criminalisation but may also, in Australian jurisdictions as in England and Wales, shift the formal boundaries of criminalisation.

Notwithstanding these quibbles—and doubtless others will see different points to take up and elaborate—the modalities team are to be congratulated on having made a decisive contribution to criminal law scholarship, taking our capacity to track the overall—as well as the site-specific—boundaries of criminalisation in particular systems to a new level of sophistication.

... and beyond formal criminalisation?

I have already mentioned that the modalities approach explicitly engages with legislation and, hence, with the formal boundaries of criminalisation and its processes, albeit conceptualised in a distinctively and helpfully broad and differentiated way. But, in light of the key relevance of substantive criminalisation and of criminalisation as a social outcome, to socio-legal studies and criminology in particular and to the social sciences more generally, it seems fair to ask what contribution the modalities approach might make to this broader scholarly agenda. Indeed such an evaluation is invited by the team's aspiration to understand not only the 'why, when and how' of criminalisation but also its effects. (Of course, formal criminalisation is itself an effect: but my reading of the team's opening claim, quoted above, is that their ambition is broader than this.)

Here I think we must hope that the current elaboration of the modalities approach is the first, substantial step in—as well as the cornerstone of—a broader project which articulates the current iteration. Let us call it 'Modalities 1', with a 'Modalities 2' framework which draws on socio-legal theory and on currently available interpretive accounts to build a broader model for understanding not only the social effects of criminalisation but also the reasons for which it is invoked: the 'why' of which they currently capture only victim-orientation and the aspiration to rationalise. Admittedly, it will not be possible to do this in the analytically elegant manner which they have achieved in 'Modalities 1'. But, it seems to me that one of the exciting challenges here would be, indeed, to build a 'Modalities 2' which would bring 'Modalities 1' into dialogue with the existing literature which advances general theses about the why and the with what effect: whether these be claims about the move to risk prevention, a resurgence of character-based criminalisation, an 'insecurity state', 'governing through crime', or a return to the 'punishable subject' (Ashworth and Zedner 2014; Farmer 2016; Lacey 2016; Ramsay 2012; Simon 2007). This could offer a more nuanced frame for assessing the scale, speed and importance of the developments which other scholars have identified with site-specific studies. Indeed, in their engagement with the 'new penology' (Feeley and Simon 1992, 1994), the modalities team have already taken their first steps in this direction. I will surely not be the only scholar watching with great interest, and high expectations, as they develop their valuable and ambitious project.

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Please cite this item as:

Lacey N (2018) Theorising criminalisation through the modalities approach: A critical appreciation. *International Journal for Crime, Justice and Social Democracy* 7(3): 122-127. DOI: 10.5204/ijcjsd.v7i3.557.

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