

R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (editors), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press 2010), x + 267pp.

I was sceptical when I first heard about the substantial AHRC-funded project of which *The Boundaries of the Criminal Law* is the first official fruit. The organisers had promised to work towards ‘a normative theory of criminalization’ (p. 6). This struck me as an unrealistic objective. Although there are many subsidiary questions capable and worthy of theoretical reflection, surely the range of considerations relevant to the use of the criminal law is too large, and the range of authorities with a role in shaping its use too wide, for the subject-matter to be systematized in the way that talk of ‘a normative theory’ suggests? One might as well hope (I thought) for a normative theory of childrearing.

My doubts about the project turn out to have been misplaced – not because I was wrong to be sceptical of the advertised goal, but because I was wrong to imagine, even for a moment, that the advertised goal was going to be determinative of the intellectual ethos of the project. I should have realised that, under Antony Duff’s experienced and inspiring leadership, the true emphasis of the work would always be on refining the questions, challenging the familiar assumptions, and generally problematizing the terrain. And so it is. This initial collection of essays, to be joined in due course by three sequels, shows how profitable it can be to bring a deliberately eclectic range of brilliant minds together in pursuit of a common goal that all already know to be unattainable. Each of the nine essays (and indeed the editors’ introduction) has its own distinctive way of approaching the problem of keeping criminal law in its place. All of the approaches are fruitful even in isolation. Read together, however, they offer us a hugely improved conceptual map of our subject, casting light not only on the titular problem of criminal law’s boundaries (what is criminal, as opposed to non-criminal?)

but also the problem of its topography (what is paradigmatically, as opposed to more peripherally, criminal?)

I speak of a 'conceptual' map to emphasise that one cannot ask what should be criminalized (the normative question to which the AHRC project is ultimately directed) without first knowing what it is to criminalize something (a conceptual question which is a lot harder than it looks). It is natural that the first volume in the project series should be the one to foreground the conceptual question, and so it does. It does so in subtle ways, however, that always keep the reader's normative antennae twitching. In a nicely understated piece, for example, Andrew Ashworth and Lucia Zedner survey the range of circumstances in which English law now treats it as a crime to breach an order that was obtained in the civil courts at the instigation of a public official. New Labour's vanilla 'ASBO' (Anti-Social Behaviour Order) was only the start; this 'hybrid' confection now comes in a variety of ever more alarming flavours. Ashworth and Zedner advance two theses about these orders: first, that the proceedings to obtain them should be regarded as criminal proceedings; second, that these proceedings should be replaced with criminal proceedings. These two theses seem inconsistent, until one reads the Ashworth and Zedner proposal for reconciling them. The same proceedings, they say, may be non-criminal in 'form' and yet criminal in 'substance' (p. 86). Proceedings to obtain an ASBO, they think, fit this description, and that in itself makes them objectionable. They are a sham, a front, a mockery. Their form should be changed to match their substance, and meanwhile their substance should be exposed for what it is.

What makes proceedings to obtain an ASBO criminal in substance? Ashworth and Zedner propose this: that such proceedings, even if purely preventative in purpose, are punitive 'in effect' because of the severe consequences for the person placed under the ASBO (p. 77). This strikes me as the wrong criterion. Any policy that attaches disadvantageous consequences to what people do (e.g. taxing alcohol and tobacco purchases,

increasing motor insurance premiums for those with poor driving histories, awarding damages for torts or breaches of contract) is punitive in effect, but does a law that exacts these consequences thereby become criminal in substance, at least when the consequences become severe enough? I doubt it, so I doubt whether Ashworth and Zedner have pinpointed what is odious about the ASBO. Be that as it may, however, they have clearly identified a key conceptual question which any discussion of criminalization needs to tackle: What does it mean to criminalize something? Are the criteria all, as the editors put it in their introduction, 'formal' (p. 3)? If so, can't oppressive governments just work around the objections to criminalization, whatever they may be, by dispensing with the formalities?

A more extreme test case for the same questions is at the centre of Mireille Hildebrandt's essay. She explores the logical and empirical possibility of 'proactive criminalization' as portrayed in Philip K. Dick's story 'The Minority Report' (and Steven Spielberg's film adaptation). As Hildebrandt reminds us, the technological and cultural building blocks of the portrayed system are already with us. Offender profiling forms an established part of the investigative process, and already crosses the line from offences already committed to offences yet to be committed. Moreover, the criminal law itself has already become heavy with what might be called prophylactic offences, which attempt to deal with the prospect of offending at earlier and earlier stages. Preparation offences, endangerment offences, and facilitation offences already proliferate and their *actus reus* and *mens rea* elements become ever more negligible. Hildebrandt argues that as these trends converge we are drawn closer and closer to the point at which we dispense with the need for *actus reus* and *mens rea* altogether. Not only our practices but also our concepts – crime, criminal, punishment, proof, trial, and so on – are coming under pressure in the process, in much the way that 'The Minority Report' foretells. Hildebrandt's Foucauldian way of narrating these pressures makes it hard to tell where she stands

on their desirability. She associates our existing apparatus of criminal law, and our affection for it, with contingencies of human history in a way that suggests that, in her view, those of us who cling onto the old ways are insufficiently adaptable to 'socio-technical' change (p. 129). Yet she argues that 'proactive punishment would be based on a serious misunderstanding of the nature of profiling technologies' (p. 133), and she suggests strategies for resisting the drift of 'proactive forensic profiling' towards the even more sinister 'proactive criminalization'.

I personally found Hildebrandt's advice to focus our strategies of resistance on the unreliability (or more generally the limitations) of profiling too quiescent. Contrary to her view, the case for requiring proof of *actus reus* and *mens rea* in court *ex post* has nothing much to do with 'the distantiation, delay, and hesitation afforded by writing, compared with orality' (p. 136). It has everything to do with preventing the abuse of executive power, a more or less timeless objective and one that is even more urgent today as we face the new technologies of oppression that are detailed in Hildebrandt's essay. Meeting our oppressors with complaints about their overconfidence in their techniques of oppression leaves too many hostages to fortune for my tastes. But I should say that, unreconstructed 1960s liberal that I am, I had similar reactions to several other essays in the book. For example, I felt that Ashworth and Zedner were in general too relaxed, or maybe too resigned, about the rise of ASBOs and their ilk. Where they objected mainly to the shortage of procedural protections for those against whom the orders are sought, I object to the whole idea of judges issuing orders to forbid actions that are not otherwise illegal (except for interim orders, including refusals of bail, issued in order to preserve the position in pending proceedings). And I felt similarly ill at ease with Victor Tadros's virtuoso contribution to the book, in which he moots a system of 'civil regulation' involving 'penalties' – not the same, he says, as punishments – for wrongs that are no longer classed as crimes, somewhat akin to the German regime of

Ordnungswidrigkeiten. (Tadros also goes on to ask, in a way that reassured me somewhat, whether the task of ‘civil regulation’ might better be left to private law, and hence kept largely out of the hands of petty officials in peaked caps.)

Tadros reminds us that in determining what view to take of any policy or practice, or indeed any action, we should assess it against the alternatives. But this unobjectionable proposition conceals a lot of potential dispute about which alternatives should be considered eligible for the comparison. Should I favour *Ordnungswidrigkeiten*, for example, because without them what I am actually going to get from politicians is more incontinent criminalization, or more ASBO-style ‘preventative orders’, or more pre-emptive incapacitation *à la* Minority-Report? Isn’t it possible already to have concluded, on other grounds, that none of these is acceptable, so that none is eligible for comparison? If not, how do we prevent critical reflection on policy developments from descending into raw politics, in which all that we have to choose from are third-rate proposals favoured by spin-doctors? These questions are not addressed specifically to Tadros. They plague all political theorists. But they are raised pregnantly by Tadros’s essay, which made me uneasy in its focus on finding ‘the best option given the unpalatable options that we face’ (p. 190). Am I alone, I wondered, in clinging to the belief that the choice facing any official with a penalizing urge (the parking attendant, the ticket inspector, the health and safety officer, the financial services regulator) should be limited to: prove your case in a criminal court or b***ger off?

Not quite alone, as it turns out. Those of us who have failed to move with the ‘socio-technical’ times receive a morale boost in the form of Antony Duff’s own contribution to the volume. Although he shares my anxieties about how to reconcile ‘normative theory’ with ‘actual practice and the way in which it changes’ (p. 105), Duff also shares my resistance to defeatism in the face of political and social consensus. He persists with a powerful critique of *Ordnungswidrigkeiten* as well as ASBOs,

regarding the criminal law as ‘subverted’ by both. The twin themes of his essay (echoed by Ashworth and Zedner under the clever labels ‘undercriminalization’ and ‘overcriminalization’) are ‘subversion’ and ‘perversion’ of the criminal law, both of which Duff finds aplenty in recent Whitehall policy initiatives.

Duff associates these policy initiatives with a ‘fairly simple consequentialist approach’ in which the question is ‘what kinds of measure might be most economically effective in dealing with terrorism, with anti-social behaviour’ and so on (p. 111). But many of the initiatives can also be reconciled, as Tadros’s essay proves, with a rather more sophisticated view in which the supposed function of the relevant areas of policy is harm-management, where this has both harm-minimization and harm-distribution aspects. We may think that the more sophisticated view is in several ways an improvement on the simpler. Nevertheless, says Duff, it should not be allowed to monopolize the debate. The criminal law, for him, is first and foremost ‘an institution which defines a range of public wrongs and provides for those who commit such wrongs to answer for them’ (p. 112). Some unminimized and ill-distributed harm is the price we pay for keeping that institution unperturbed by the criminalization of wrongs that are not public in the relevant sense, as well as unsubverted by the creation of alternative regimes in which the accused does not enjoy, or face, full accountability in court. Duff and I disagree about some details here. But his is, in my view, the right kind of reaction to the question-begging contemporary emphasis on ‘what works’ (works at what?) in dealing with people who come to the attention of the authorities.

Tadros and Duff both give us valuable proposals for distinguishing the criminal law from some of its near neighbours (including those that Duff would call ‘subversions’). They both distinguish (although in different ways) between punishments and penalties, and both associate criminalization with liability to punishment, thereby distinguishing it from a regime of *Ordnungswidrigkeiten* conjoined with mere penalties. In this way

their essays, although rich with well-crafted moral arguments, also contribute a great deal to the collection's role in mapping the conceptual territory of criminalization. They stand out as much for their careful explanations of what it means to criminalize as for their ideas about when criminalizing is called for.

The same can be said of the other contributions. Sadly, space does not permit me to give them all the extensive attention they deserve. So just a short checklist: John Stanton-Ife uses a disagreement with some of my own views to explore and develop a certain paradigm of crime, which he calls 'horrific crime'. With his usual eye for telling historical examples Lindsay Farmer problematizes the relationship between crimes and wrongs, raising particular worries about Duff's classification of wrongs into public and non-public types. Relatedly, Markus Dubber attempts the notoriously tricky task of locating criminal law in, or beyond, the familiar distinction between private and public law. Essays by Carol Steiker on prudential mercy and by Kimmo Nuotio on prevailing theories of criminalization, especially in continental Europe, top and tail the handsome collection. The editors' introduction helps to bind the book together, and could usefully be relied upon for a more detailed overview, but as I hope I have already made clear, there is plenty in the individual essays that binds it all together already.

There will be no 'normative theory of criminalization' at the conclusion of this multi-volume project, but if the later volumes maintain the high quality of the first, there will be a well-mapped topic with a much-improved philosophical literature that in turn points to new research directions in the theory of criminal law and the theory of official power more generally. The work so far amply vindicates the AHRC's decision to fund the project, as well as OUP's decision to publish the resulting volumes (a task which they have performed to their usual high standards).