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INTRODUCTION

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This collection brings together significant contributions across the two major axes structuring criminal law scholarly thinking in the current era – criminalisation and criminal responsibility. The contributions to this collection canvas the law throughout the states and territories in Australia, and are offered by some of Australia’s leading criminal law and procedure scholars. As such, the collection provides a snapshot of key issues apparent across the Australian criminal justice landscape, and showcases up-to-date critical scholarly analysis of these issues.

The first of the two major axes structuring criminal law scholarship in the current era is criminalisation. Broadly, criminalisation refers to the scope of the criminal law. As Nicola Lacey and colleagues point out, criminalisation is an elastic object of study because a range of factors (such as historical, political, economic, psychiatric, moral, educational, familial, normative and labelling factors) influence and are woven into the way in which criminal law plays out on the ground.¹ As this suggests, criminalisation is of interest not only to criminal law scholars, but also to socio-legal scholars and criminologists. This collection includes examples of a range of studies which explore behaviours, some old and some more recent, especially brought about by the development of new technologies, that have been subject to criminal law. The chapters in Part 1 of the book seek to illuminate the criminalisation process and advance debate about when it is the appropriate for the state to use criminal law as a means of regulation.

By prohibiting behaviour with the threat of punishment for non-compliance criminal law is a tool of social control. As Andrew Ashworth and Jeremy Horder comment, it is the censoring

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1 See C Wells and O Quick, *Lacey, Wells and Quick Reconstructing Criminal Law: Text and Materials* (4th edn, Cambridge University Press, 2010) ch 1.

function of criminal law which marks out its ‘special social significance’ and the imposition of this censure and liability to subsequent punishment which ‘requires a clear social justification.’² Seeking a justification for why new offences are created may seem increasingly important given the rate at which new criminal offences are created,³ and amid claims that the criminal law is used too often and applied to too wide a range of behaviours. Studies of criminalisation therefore seek to identify the basis upon which decisions are made to regulate behaviour through the criminal law. This may involve an examination on a theoretical-normative level of the principles which should guide whether behaviour is made subject to criminal law. Another approach, arguably more prevalent in Australia,⁴ is to see criminal law as part of a larger picture of criminal justice and to look for explanations of how criminal law operates in order to discern its purpose and the appropriate scope of the criminal law in a liberal political democracy like Australia.

If criminalisation goes to the breadth of the criminal law, criminal responsibility might be said to relate to its depth. In broad terms, responsibility in criminal law refers to those to whom the criminal law ‘speaks’, or to those who may be properly called to account for their actions via the criminal processes (those who may be found guilty or culpable or held to be at fault). Thus, it concerns the reach of the criminal law measured not in terms of the types of conduct prohibited, but in terms of who is, or who should be, the subject of the law. Criminal responsibility practices may be understood as the dynamics of the processes of blaming and holding individuals accountable via the criminal law, processes which are built around the notion of individual responsibility for crime.⁵ As this suggests, criminal responsibility is of crucial significance in the criminal law. Indeed, individual responsibility for crime is the central organising principle of the criminal law in the current era.

There is now a rich tradition of scholarly research on criminal responsibility. Scholarship in the legal–philosophical tradition focuses on the minimal conditions of criminal responsibility, which are typically conceptualised as either a particular set of individual capacities or a set of opportunities – conditions that are generally held to ‘reside, in short, in fundamental aspects of human agency.’⁶ The idea at the heart of the scholarly work in this tradition is that the application of the ordinary principles of liability and punishment to an individual is an acknowledgment or affirmation of their subjectivity.⁷ Thus, the focus is on what Lindsay Farmer refers to as the ‘abstract

2 A Ashworth and J Horder, *Principles of Criminal Law* (7th edn, Oxford University Press, 2013) 1.

3 Chalmers and Leverick note, for example, that under English criminal law there are at least 10 000 offences and that almost a third of those were created from 1997 to 2006: see J Chalmers and F Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217; see also J Chalmers and F Leverick, ‘Tracking the Creation of Criminal Offences’ (2013) *Criminal Law Review* 543.

4 See Chapter 2, Chapter 3, D Brown ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605.

5 See N Lacey, ‘Response to Norrie and Tadros’ (2007) 1(3) *Criminal Law and Philosophy* 267, 268.

6 N Lacey ‘Responsibility and Modernity in Criminal Law’ (2001) 9(3) *Journal of Political Philosophy* 249, 255.

7 See, eg, R A Duff, *Answering for Crime* (Oxford University Press, 2007); V Tadros, *Criminal Responsibility* (Oxford University Press, 2005).

structure of responsibility.⁸ Scholarship in the socio-historical tradition has developed in part in critical dialogue with legal–philosophical scholarly work. Work in the socio-historical scholarly tradition subjects legal principles and practices to analysis in light of the substantive social, political and institutional conditions under which intellectual ideas are given life.⁹ Thus, scholars working in this tradition chart the dynamic relationship between ideas about criminal responsibility and the development of the modern state,¹⁰ the changing coordination and legitimation requirements of criminal law into the current era,¹¹ the role of the police power,¹² and the influence of Enlightenment liberalism on the structures and operation of the criminal law.¹³ These accounts reveal the ways in which, via a process that has been neither straightforward nor linear, individual responsibility for crime has come to act as a lynchpin in criminal law in Australia and elsewhere.

Although criminal responsibility is fundamental to the criminal law, and the subject of much scholarly attention, it may not be immediately recognisable when criminal responsibility is in issue. The issue of who is or who should be subject to the law is sometimes examined in the negative (that is, non- or partial responsibility), such as in relation to a defendant who raises a mental illness defence or another kind of mental incapacity plea, like diminished responsibility.¹⁴ Indeed, in this collection, some of the chapters addressing the topic of criminal responsibility take this approach. As these chapters demonstrate, in some instances, defences to criminal charges go beyond the question of liability for crime, and to the deeper question of a defendant's responsibility (such as when a defendant raises what has been called 'battered woman's syndrome'). If, as H L A Hart argues, to assert that a person is responsible for his or her actions is to assert that a person has 'normal' capacities – those of 'understanding, reasoning and control of conduct'¹⁵ – then some defences (or a claim for exemption from the reach of the law, like insanity) go to this very issue.

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- 8 L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997) 181.
- 9 See further M D Dubber and L Farmer, 'Introduction: Regarding Criminal Law Historically' in M D Dubber and L Farmer (eds), *Modern Histories of Crime and Punishment* (Stanford University Press, 2007) 1; see also M D Dubber, 'Historical Analysis of Law' (1998) 16(1) *Law and History Review* 159.
- 10 L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997).
- 11 N Lacey (2001) 'Responsibility and Modernity in Criminal Law', above n 6; N Lacey (2001) 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory' 64(3) *The Modern Law Review* 350; (2007) 'Character, Capacity, Outcome: Towards a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English law' in M D Dubber and L Farmer (eds) *Modern Histories of Crime and Punishment: Critical Perspectives on Crime and Law* (Stanford University Press) 14–41.
- 12 M D Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2001) 91(4) *Journal of Criminal Law and Criminology* 829.
- 13 A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn, Butterworths, 2001).
- 14 See A Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012).
- 15 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, Oxford University Press, 2008) 227. See also R A Duff, *Answering for Crime* (Oxford University Press, 2007) 41; R A Duff, *Trials and Punishments* (Cambridge University Press, 1986); J Gardner, 'The Mark of Responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157, 166–168.

This collection opens with two wide-ranging chapters, by David Brown and Luke McNamara, which set the scene for the discussions that follow. Brown begins his chapter by noting that the study of criminalisation has been relatively absent in much Australian criminal law scholarship but has become increasingly difficult to ignore. He explains the tension between a normative approach to criminalisation, which attempts to set out the principles underpinning the creation of criminal laws, and the more Australian tradition of a ‘contextual’ or ‘criminological’ approach, which views ‘criminalisation as a fundamental requirement of criminal law scholarship, pedagogy and politics.’¹⁶ In light of this tension Brown aims to provide an empirical basis for a more general and theorised criminalisation debate by conducting a systematic and empirical case study of all criminal offences created by the New South Wales (‘NSW’) legislature in 2008. He examines how these offences are constructed and categorises them as either ‘criminal’ or ‘regulatory’ based on the way in which the physical and fault elements are constituted, the penalty structure, omission liability and reverse onus provisions. This study feeds back into debates about criminalisation by allowing an examination of how offence creation might be consistent, or not, with established principles of criminal law.

McNamara takes up the issue of the exponential growth of criminal offences over recent decades, and, specifically, the claim that this represents ‘over-criminalisation’ – put simply, that we have too much criminal law. In light of recent developments in normative criminal law theory, and influenced by Brown’s earlier work,¹⁷ McNamara also argues that Australian scholars should embrace a version of criminalisation scholarship that is ‘more firmly committed to empirical and historical analysis and which confronts the political context in which decisions about the shape of the criminal law are made.’¹⁸ For McNamara, before we can develop a normative critique of what might be too much criminal law, ‘we need to produce rich accounts of why, when and how the creation of a new offence, and/or the introduction of coercive police powers, are employed in response to an identified harm or risk, and with what effects.’¹⁹ As part of the creation of an agenda for conducting ‘contextualised criminalisation research’, McNamara sets out a series of research questions to study a range of sites of criminalisation, and applies them to the criminalisation of ‘risky’ behaviour in public spaces in the name of maintaining public order.

The second Part of the collection contains more detailed case studies on the topic of criminalisation. It opens with a chapter on the development of the summary jurisdiction in Australia in the colonial period and the criminalisation of Indigenous people. Tanya Mitchell contrasts two stories of the deployment of the summary criminal jurisdiction against Aboriginal people in colonial Australia – NSW and Western Australia (‘WA’) – to reveal how it began to develop as a ‘technology’ of criminalisation, with ‘technology’ understood in the Foucauldian sense of a ‘craft’ or ‘device’.²⁰ Mitchell argues that, although summary criminal jurisdiction had

16 Chapter 2, p 14.

17 D Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Justice* 605.

18 Chapter 3, p 34.

19 Chapter 3, p 34.

20 See for discussion S Dorsett and S McVeigh, *Jurisdiction* (Routledge, 2012) 55.

no answers to the difficulties that ‘Aboriginal difference’ presented to the criminal law,²¹ in circumventing many of the impediments to securing convictions in the higher courts, it proved a useful, albeit imperfect, means of beginning to bring Aboriginal people within the developing polity.

The following chapter by Melanie Schwartz deals with a much debated aspect of criminalisation: the criminal laws on illicit drugs. With consideration given to the global context of the ‘war on drugs’, Schwartz chronicles recent developments in the criminal law and public policy on illicit drugs in Australia, and focuses on the inchoate moves away from the criminalisation of cannabis (including the regulation of cannabis for medical use). Schwartz canvasses all sides of the debate about the decriminalisation of cannabis, and makes a case for some clarifying principles to underpin any move away from criminalisation, include strengthening support for populations at greater risk of harm from cannabis use, such as Aboriginal and Torres Strait Islander people, the mentally ill and the homeless.

Another cutting edge criminalisation issue is comprehensively critiqued by Julia Quilter in her chapter on the creation of a discrete homicide offence to address deaths that are caused in the context of a ‘one-punch’ assault. As Quilter notes, until recently it was assumed that the category of assault-based killings for which a person should be held criminally responsible was covered by the various forms of murder and manslaughter existing in all Australian states and territories. Recently, following a spate of high-profile assaults causing death in several major cities, a number of so-called ‘one-punch’ offences have been drafted and enacted. Quilter provides an overview of the circumstances in which this significant development in Australian criminal law has occurred, identifies the distinctive features of this new form of homicide, and compares the models that have been adopted in WA, the Northern Territory (‘NT’), NSW, Queensland and Victoria. Quilter argues that we have good reasons to be troubled by the way in which criminalisation in the form of ‘assault causing death’ offences have developed.

The following chapters in this Part explore the clash of criminal law and new technology. Thomas Crofts explores the phenomenon of sexting by young people and debate surrounding whether and how it should be criminalised. He shows that most discourse surrounding the criminalisation of sexting has centred on the appropriateness of applying child pornography offences to young people. His chapter therefore examines the development of child pornography offences, why they can be applied to young people who engage in sexting and whether it is appropriate that young people can be prosecuted under laws designed to protect them from exploitation. Crofts finds that sexting can encompass a vast array of behaviours, ranging from consensual sharing of images to malicious distribution of images, and argues that this calls for a varied range of legal and non-legal responses, including the development of a defence to child pornography offences, the development of a new ‘sexting’ offence and appropriate education programs.

Staying with the theme of regulating the use of new and emerging technologies, Alex Steel’s chapter provides a fascinating case study of the problems of criminalising mobile phone use in vehicles. In the period since the initial criminalisation of the use of mobile phones while driving in

21 Chapter 4, p 57.

1999, there has been a rapid shift in the use of mobile phones from oral communication to GPS navigation and other apps. Steel traces the legislative history of these offences and analyses the underlying justification for criminalising the use of phones. This discussion is followed by the presentation of research into the extent to which the use of mobile phones actually distracts drivers and is responsible for accidents, and community attitudes to phone use while driving. These foci provide an empirical basis upon which Steel considers whether the current criminal law prohibition on the use of mobile phones while driving is appropriate. The empirical evidence discussed provides an opportunity to go beyond philosophical or moral justifications in considering the case for criminalisation.

The final chapter in this Part is also devoted to the interplay between new technologies and criminalisation – the law of complicity in cyberspace. As is well known, the law of complicity – comprising aiding and abetting, counselling or procuring, acting in concert, joint criminal enterprise, innocent agency, incitement and conspiracy – is a particularly complex part of the criminal law. But it is particularly germane to the issue of criminalisation as it extends the reach of the criminal law beyond the principal perpetrators of crimes. Against the background of the relevant Commonwealth *Criminal Code Act 1995* ('*Criminal Code*') provisions, Gregor Urbas analyses the adequacy and applicability of rules on complicity and jurisdiction to group offending in cyberspace. Urbas argues for a reconsideration of some doctrines of complicity as they apply in cyberspace, on the basis that while some modes of accessorial or group liability (such as incitement and conspiracy) translate easily to the online environment, others (such as aiding and abetting or acting in company) are not such a neat fit. For Urbas, it is the 'coercive effect of the group' in online involvement that is crucial, rather than physical presence, and thus he suggests that a form of 'virtual' or 'constructive presence' should suffice for criminal liability to attach.²²

The third Part of the collection contains chapters on criminal responsibility. This Part begins with a chapter by Arlie Loughnan on the 'state of play' in the criminal law in NSW at the turn of the twentieth century. The chapter focuses on the *Criminal Law Amendment Act 1883* (NSW), which formed the basis of the more well-known *Crimes Act 1900* (NSW). Loughnan argues that the 1883 Act should be understood as part of a systematising and rationalising tradition that encompassed consolidation as well as the distinctive practice of codification. She suggests that, to the extent that it may be understood as modern criminal justice, the 'modernity' of the Act is marked by its founding on extensive if not exhaustive legislation, and by an idea of progress deriving from form and process. For Loughnan, this interpretation of modern notions of justice accounts for the importance of the criminal trial process, and associated rules of procedure and evidence, in the Act, while principles of criminal responsibility were largely restated rather than developed.

In her chapter on criminal responsibility and family violence, Heather Douglas takes up the issue of the role of battered woman syndrome ('BWS') in the attribution of criminal responsibility. Through a study of the recognition of BWS in Australian case law, and its gradual rejection in favour of social framework evidence, Douglas reflects on the relationship between (feminist) academic critique and judicial decision-making. Douglas argues that, following initial

22 Chapter 9.

recognition of BWS as important to an understanding of criminal responsibility in Australian cases where abused women offend, evidence about the relevance of family violence for criminal responsibility is now more likely to be admitted as social framework evidence. Such evidence can explain the dynamics and effects of abuse, rather than determine whether a battered person is abnormal or unreasonable or whether she was suffering from a medicalised syndrome at the time of offending. As Douglas demonstrates, this change over time reveals the reflexive relationship between academic critique and judicial decision-making, and the relevance of this relationship for legal change.

Following the theme of criminal responsibility, Stella Tarrant uses the frameworks of feminist methodology and codification theory to argue for national consistency in the laws of self-defence. Tarrant explores the feminist claim that women have been unfairly excluded from self-defence because of its traditional formulation around stereotypically male responses to violence, and the amendments that have been made in light of such concerns. Tarrant finds that the result is a complex patchwork of provisions across Australian jurisdictions, which she argues is itself an obstacle to justice for women. Tarrant's chapter therefore makes a case for national uniformity (rather than mere consistency) in the formulation of the objective fault requirements of the defence as formulated in the *Model Criminal Code* (and now enacted by the Commonwealth, NSW, the NT and the Australian Capital Territory).

Examining criminal responsibility through the contemporary interface between law and popular culture, Penny Crofts offers an assessment of 'the models of culpability in contemporary legal doctrine through the prism of medieval law' and the horror television series *The Walking Dead*.²³ For Crofts, *The Walking Dead* provides an opportunity to reflect on what she labels the 'narrowness' of the current law of self-defence,²⁴ which focuses on whether the accused (reasonably) felt afraid. Crofts argues that a key moral difference in the slayings that feature in *The Walking Dead* is that the slayer desires to kill, as well as that he or she commits the slaying in fear. Crofts uses the idea that excused or justified killing might be accompanied by a sadness of heart to reflect on what she suggests might be submerged or repressed in debates about the use of the law of self-defence in home invasions and the specific laws on excessive self-defence.

The final Part of the collection contains chapters on criminal justice practices and criminal justice institutions. These chapters focus on the practical institutional, evidentiary and processorial context in which development and change in criminalisation and criminal responsibility is enacted. Like the first two Parts, this Part opens with a historical chapter. Stephen Gray considers whether nineteenth- and early twentieth-century practices of collection, dissection or exhibition of Aboriginal human remains were legal under the criminal law of the time. Gray argues that these practices took place because of a well-understood, if rarely articulated, gap between what the law said was illegal and what was permitted in fact. According to Gray, in most important respects the criminal law's attitude towards Aboriginal bodies was no different to its attitude towards the non-Aboriginal poor, who were equally vulnerable to 'body-snatching' practices. However, crucially, 'anthropology' was available as an expert discourse to excuse those who collected or dissected

23 Chapter 13, p 209.

24 Chapter 13, p 210.

Aboriginal human remains, taking outside the practical purview of the criminal law what might have been illegal if performed on non-Aboriginal remains.

In the following chapter, David Hamer explores changes in judicial attitudes towards the evidence necessary to establish sexual assault. Rather than focus on the process of criminalisation as such, Hamer explores how laws of evidence may hinder or facilitate the enforcement of existing criminal laws in relation to child sexual abuse. He begins by noting that, despite recent media and public attention surrounding trials of high profile public entertainers, there continues to be a high level of under-reporting of child sexual abuse and weak enforcement of laws. Hamer therefore considers the need for reforms to allow a defendant's sexual abuse of other children to be admitted as evidence demonstrating a tendency for such conduct on the part of the defendant. He explores recent case law on the probative value and admissibility of other misconduct evidence in child sexual offence cases, and tests it against empirical findings on recidivism and prevalence. Hamer finds that recidivism studies indicate that the fact that the defendant has committed other sexual assaults can be highly probative as to whether he (or, in the minority, she) committed the charged sexual assault, and more probative than courts often appreciate.

In a chapter entitled 'Pre-Crime Control Measures: Anti-association Laws', Andrew Dyer examines the criminal organisations legislative schemes that have been introduced in most Australian states and territories to disrupt the activities of 'outlaw motorcycle gangs' and protect the public from violence associated with them. In particular, he analyses the criminalisation of acts of association between individuals. Such conduct is harmless in itself, but is criminalised for preventative reasons; that is, because it is considered to carry a risk of leading to future harmful acts by third parties and/or by the defendant him- or herself. Dyer enumerates the principles that criminal law theorists have identified as being relevant to the permissibility of criminalising remote harms, and applies those principles to the anti-association offences. He finds that these offences are insupportable. According to Dyer, the various Acts that he considers provide for the criminalisation of some conduct that creates no risk of leading to future harmful acts by third parties and other conduct that does create such a risk, but where the defendant has not allied him- or herself with that wrongdoing. Moreover, a person may be held liable for any of the anti-association offences even though he or she has neither embarked on the ultimate offence nor formed an intention to commit it. As a result, Dyer argues that we should be concerned about this preventive 'forward creep' of the criminal law.

The following chapter directs attention to the relationship between criminal law and immigration law. Here Louise Boon-Kuo explores the concept of citizenship, and how this relates to understandings of the scope of criminal law and its application. She notes that some immigration crimes are never or only rarely prosecuted as criminal offences, but are rather dealt with through administrative procedures. The convergence of criminal and migration procedure at the pre-charge stage calls into question whether criminal law standards should apply to the enforcement of immigration laws. Boon-Kuo compares the legal regulation of searches conducted in immigration raids and those undertaken in a criminal justice context, to consider the varying levels of policing accountability offered in these different domains and the effect of this on the scope of criminal law. This chapter concludes with reflections on whether the differential regulation of criminal and migration investigation in fact creates a special criminal procedure for non-citizens.

The final chapter of the book looks to the international future of criminal justice. In this chapter Mark Findlay examines the challenges facing the delivery of international criminal justice. He notes that the future of international criminal justice is tied to the future of the International Criminal Court (ICC), and goes on to set out the issues which pose a threat to the future legitimacy of the ICC. Drawing on case studies from various nations, Findlay examines three themes to discover how the legitimacy and thus the future of international justice can be assured. First, he argues that greater inclusivity by involving super powers (for example, China) into the ICC is essential to improve representation and address cultural exclusion. Second, tackling concerns relating to self-referral of cases is necessary to remove the perception that nation states use this as a tool to advance domestic political agendas. Third, the practice of ‘witness proofing’ (that is, preparing the witness for the trial and reviewing the witness’s evidence) should be fostered to improve the reliability of trials before the ICC. Findlay argues that, taken together, such measures would improve both the independence and accountability of the ICC and strengthen its legitimacy.