

R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo, and Victor Tadros, eds.

The Boundaries of the Criminal Law.

Oxford: Oxford University Press 2010.

328 pages

US\$100.00 (cloth ISBN 978-0-19-960055-7)

The Boundaries of the Criminal Law is a collection of nine original essays by leading criminal law theorists examining the scope and boundaries of the criminal law. The simple question at the core of the project is this: what are the proper contours of conduct subject to the criminal sanction? The answer requires the development of a normative theory of criminalization that addresses, among other things, the principles and goals that should guide the decision to criminalize, the classification and differentiation of criminal wrongs, and how officials should apply the law on the books.

Even to someone outside the bastions of criminal law theory and the law school, the task of asking after the basis of the criminal sanction will be familiar. The renewed interest in this question is fueled by a contemporary growth of criminalization and punishment. Not only is the criminal law being used to combat a new and ever-increasing range of offences relating to terrorism, pornography, and certain types of sexual exploitation, but some liberal democracies are also witnessing a dramatic explosion of punishment. Nowhere is this more staggering than in the United States, where approximately 750 of every 100,000 persons are in prison or jail and more than twice that number are under some form of intensive supervision.

The ambitious task of developing a theory of criminalization is merely begun in the *Boundaries of the Criminal Law*, the first book in a series dedicated to this purpose. It is supported by a grant for a four-year project on criminalization ('Criminalization Project') that will eventually produce three further collections of papers from the project's workshops and conferences, along with three monographs by members of the project. Nevertheless, *Boundaries* offers a fresh and eclectic set of essays that enriches the conversation on the subject of criminalization both within and at the margins of the traditional debate.

As the editors explain in an informative and wide-ranging introductory chapter, the modern Anglo-American philosophical debate about criminalization has been dominated by discussion of the harm principle, which appeared in John Stuart Mill's *On Liberty* in 1859. Positively, the harm principle permits the use of the criminal law to prohibit behavior harmful to people other than the actor or those who do not consent to it. Negatively, it forbids the use of the criminal law to prohibit behavior that is just offensive or immoral or behavior that harms only the actor. More recently, the harm principle has forfeited its dominant position in the theoretical debate in part due to the

rise of legal moralism (also sometimes referred to as ‘retributivism’), the view that the point of criminalizing conduct is to punish its moral wrongfulness.

Broader issues about whether the harm principle, an unvarnished legal moralism, or another master principle can provide the basis for a normative theory of criminalization loom large behind the individual contributions in *Boundaries*, though the essays themselves tend to offer more modest, specific and local sites for reflection on the proper scope of the criminal law. The editors suggest dividing the collection in two categories: those four essays which concern how the boundaries of the criminal law are in fact being pushed by developments both from *within* the criminal law itself as well as from the *outside* by other non-criminal or quasi criminal policies, and those five essays that are directed at the more traditional project of excavating the principles that ought to set the boundaries of the criminal law.

The empirical character of the first category of essays makes for particularly engaging reading. In the book’s first chapter, Carol Steiker offers a lucid and thought-provoking essay on the relationship between mercy and overcriminalization, arguing that the dominant discourse between retributivist and social welfare theory ineluctably tends towards overpunishment. In order to compensate for this tendency, Steiker proposes promoting greater discretion to decline punishment on the part of institutional actors throughout the criminal justice process.

Steiker’s original focus on the role of discretion in the overcriminalization debate is followed by a subtle piece by Andrew Ashworth and Lucia Zedner, who argue that the contemporary debate on criminalization tends to emphasize the problem of *overcriminalization* while ignoring the less evident but by no means less significant problem of *undercriminalization*. Undercriminalization refers to governmental recourse to new non-criminal (or quasi-criminal) policies, such as civil preventive measures, that exclude appropriate procedural safeguards and other protection for the individual, which would be available if these measures were classified as criminal. Insofar as they lead to intrusions upon individual liberty in the name of prevention without due procedural safeguards, instances of undercriminalization pose no less threat to individual liberty than instances of overcriminalization.

In the collection’s most enjoyable read, Mireille Hildebrandt considers the impact of new technologies on the criminal law by examining how new profiling technologies can permit law enforcement officials to statistically predict which categories of citizen are prone to involvement in what types of criminal behavior. Revealing the conflict between these new technologies and criminal law theory, she argues that profiling technologies would seem to create a criminal justice system that holds citizens responsible not for what they do, but simply for displaying criminal characteristics that correlate with criminal profiles. Hildebrandt suggests that such developments could be expected to produce new notions of responsibility that justify a kind of pre-crime ‘punishment’ of

the kind dramatized in the dystopian sci-fi short story ‘Minority Report’, from which she draws a chilling epigraph.

Anthony Duff contributes the last of the essays in the first category, and he offers a rich and challenging discussion of recent developments that are in tension with the proper role of the criminal law, understood as defining and providing an appropriate formal response to a range of public wrongs. Two of these developments—the emergence of overbroad criminal offences which capture conduct that is not wrongful, and legal instruments that attach criminal sanctions to the breach of civil orders—amount to what Duff calls ‘perversions of criminal law’, because the purposes of the criminal law are being undermined by sanctions that they cannot support. The third development, the use of non-criminal law and penalties to control criminal conduct, is a ‘subversion of criminal law’, a situation in which the criminal law is unjustifiably displaced by other mechanisms of control.

The second category of essays embraces work by John Stanton-Ife, Victor Tadros, Markus Dubber, Lindsay Farmer and Kimmo Nuotio. Stanton-Ife’s essay in particular is an ambitious and engaging meditation on the philosophical grounds for the creation of a category of so-called ‘horrific crimes’, like murder and rape. He argues that neither the harm principle nor the Kantian maxim proscribing treatment of others as mere means provides an adequate basis for the existence of this category of crime. He concludes that this distinct category of crimes is rooted in the fact that such crimes violate persons themselves rather than simply the rights of persons.

Victor Tadros also delves into the philosophical basis for a legal distinction, this time between punishment and penalties. He argues that retributivist theories cannot adequately explain this distinction, and he offers a license-based theory of punishment, which holds that punishment is imposed on people as a way to prevent further wrongdoing by others, while penalties are imposed on conduct as a limit to circumstances in which a person can be treated as a means. He finds that punishment involves the intention that the wrongdoer suffer harm, while penalties are aimed at fairness in the distribution of resources.

The editors of *Boundaries* make a point of stressing that the book is an ‘interdisciplinary’ collection. Though unfortunately this claim is sometimes undercut by a heavy focus on practical philosophy and the Anglo-American criminalization debate, the last few essays do provide more varied perspectives. Dubber and Farmer’s contributions both deal with the problems of criminalization from a historical perspective, the former highlighting the public nature of criminality by reconstructing its historical developments while the latter stresses the historical contingency of the notion of ‘wrongfulness’. And Nuotio adds a sketch of the continental debate, with particular emphasis on the German *Rechtsgut* and Nordic approaches.

The ultimate assessment of the success of the Criminalization Project will only become possible once the project is complete, and it would be unfair to burden this first installment with the expectations properly applied to an entire body of work. In fact, these essays are best read against the background of existing literature in the field, such as Doug Husak's *Overcriminalization* (Oxford University Press 2007), which is frequently cited in *Boundaries*. However, one can and should expect a fresh and committed piece of scholarship both to kindle the interest of the reader in the subject matter and to stoke the larger project at hand. On this score, *The Boundaries of the Criminal Law* delivers.

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