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Criminal Law and the Society of Legal Scholars

Hannah Quirk and Natalie Wortley*

This special issue was born from the Society of Legal Scholars (SLS) Annual Conference 2016.¹ As joint convenors of the Criminal Justice section, we initially planned this collection would showcase some of the interesting work that was presented there. Developments in politics and policy making, however, suggested that this was an opportune moment for broader reflection about some of the issues that are of topical interest and we are grateful to the editors of the *Journal of Criminal Law* for giving us a forum to develop some of these ideas.

Between 1993 and 2010, crime and criminal justice policy was one of the most potent electoral issues; in 2015 and 2017, it barely featured. The first period arguably began² with the announcement of Michael Howard's 27-point crackdown on crime to the Conservative Party Conference 1993, including his infamous claim that 'prison works'. His Labour Shadow Home Secretary, Tony Blair, with a similar talent for a soundbite, promised to be 'tough on crime and tough on the causes of crime'³ and the Labour Party duly abstained from voting on the momentous Criminal Justice and Public Order Act 1994 ('CJPOA'). This controversial Act attracted protests against provisions that curtailed the right of silence and criminalised both protesting against fox hunts, and attending unlicensed raves (music 'characterised by the emission of a succession of repetitive beats'⁴). Defying straightforward categorisation, the Act also reduced the age of consent for homosexuals, banned simulated child pornography and extended the definition of rape to include anal rape. The CJPOA illustrates many of the complexities involved in reforming the criminal law: the countervailing political forces; its vulnerability to hastily drafted measures that either never come into force or require amendment; the need to respond to new harms; and the need to remove offences that have become obsolete. Despite the reality of falling crime rates, public perception of the problem – largely whipped up by politicians - meant that legislation followed the CJPOA at a bewildering rate. Significant developments include: sexual offences being reformed and largely brought together in one Act;⁵ the expansion of 'hate crimes';⁶ the criminalisation of new behaviours, in particular in relation to internet-enabled crime;⁷ and the repeal of a smaller number of crimes.⁸ The increasing number of unwieldy statutes makes it a struggle for legal academics to keep up – never mind the police, prosecutors, lawyers or of course, members of the public.

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¹ University of Oxford 6-9 September 2016.

² S Chakrabarti, 'A Thinning Blue Line? Police Independence and the Rule of Law' (2008) 2 *Policing* 367, 369.

³ Nick Clarke, Interview with Tony Blair, 'The World this Weekend' (BBC Radio 4, 10 January 1993).

⁴ Criminal Justice and Public Order Act 1994, s.63(1)(b).

⁵ Sexual Offences Act 2003

⁶ Crime and Disorder Act 1998, ss.28-33; Anti-Terrorism, Crime and Security Act 2001, s.39; Criminal Justice Act 2003, s.145-146, Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.65.

⁷ See, for example: Fraud Act 2006, s.2(5); Communications Act 2003, s.127; Criminal Justice and Courts Act 2015, s.33.

⁸ See James Chalmers, 'Frenzied Law Making: Overcriminalization by Numbers' (2014) 67(1) *Current Legal Problems* 483-502.

This frenetic pace notwithstanding, significant areas are still untouched. The Offences Against the Person Act 1865 remains largely Victorian in form, the homicide offences are mostly unreformed and, in the absence of Parliamentary action, individuals are reliant upon guidance from the Director of Public Prosecutions and continued attempts seeking judicial approval for assisted dying.⁹ Despite the decriminalisation of marijuana use in some states of the United States of America, Portugal and the Netherlands, drug laws in this jurisdiction have only extended their reach – most recently and with apparently unpromising consequences through what must now presumably be called ‘illegal highs’.¹⁰

The United Kingdom’s planned exit from the European Union will consume most of the energies of the Civil Service and much of Parliament’s attention for the foreseeable future. Criminal law is one of the areas that is least affected by European law. This lacuna thus offers an opportune moment for academics to reflect on areas that need attention.

Programmes or ideas for reform are often first explored by the Law Commission, an independent body established to keep the law of England and Wales under review, to conduct research and consultations, and to recommend any necessary reforms. The Commission aims to ensure that the law is ‘as fair, modern, simple and as cost-effective as possible’ and to codify the law, reducing the number of separate statutes. The Commission works closely with academics; two of the four commissioners are academics. At the SLS Conference last year, a plenary address was given by Bean LJ and Professor David Ormerod from the Law Commission, during which they encouraged academics to engage more often, and more fully, with the Law Commission, both by suggesting potential projects, responding to consultations and throughout every project the Commission takes forward.¹¹

In recent years, the Law Commission has adjusted its approach to focusing only on areas that it thinks are likely to find a receptive audience in Whitehall.¹² It explains this as a pragmatic response to its need to reduce expenditure. It was clearly frustrating that after its highly regarded enquiries into reforming the homicide offences, only limited, piecemeal reform was undertaken.¹³ As academics we too face increasing pressures to produce scholarship that has practical effect. At the time of writing, the details of the next Research Excellence Framework remain unclear but most assume that some measure of ‘impact’ will be included again. Research Councils often want to see potential for impact in funding applications and/or a dissemination strategy that involves policymakers. Nevertheless, it is at the heart of our role that academics retain the freedom to rail against legislative proposals, parliamentary inaction or common law developments. There is still an important place for the esoteric - or even eccentric – analysis of the law in the academy.

⁹ *R (on the application of Pretty) v DPP* [2001] UKHL 61; *R (on the application of Purdy) v DPP* [2009] UKHL 45; *R (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38; *R (Conway) v Secretary of State for Justice* [2017] EWHC 640 (Admin)

¹⁰ Psychoactive Substances Act 2016

¹¹ <<https://www.youtube.com/watch?v=gqndBJDWT7Q>> accessed 28 June 2017.

¹² Law Commission Act 2009 and *Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission* (Law Com No. 321, 2010)

¹³ See *Murder, Manslaughter and Infanticide* (Law Com No. 304, 2006). Reforms to the law of voluntary manslaughter were introduced in isolation by the Coroners and Justice Act 2009.

Immediately after our Annual Conference, the 'Criminal Law Reform Now' (CLRN) Conference took place at the newly launched Crime Research Centre at the University of Sussex. John Child and Jonathan Roger's article 'Criminal Law Reform Now: A New Reform Network', gives details of this venture, which seeks to provide an important conduit between universities and law reformers. They also explain CLRN Network Projects as an innovative means of drawing together experts in a particular field to create their own reform recommendations. The conference involved presentations of proposals for law reform in response to the Law Commission's public call for suggestions for its thirteenth round of reports. The SLS has a long history of assisting with such consultations – both circulating details amongst interested members and responding as a Society.¹⁴ It can be difficult for policy makers to know who to contact on a particular topic – and Whitehall can seem labyrinthine to academics – so we look forward to engaging with both the Law Commission and the Criminal Law Reform Now Network to facilitate this important work.

An example of this type of reforming work is explored in Catarina Sjölin and Helen Edwards' article 'When Misconduct in Public Office is Really a Sexual Offence.' They discuss their work with the Law Commission about their proposal to put this common law offence on a statutory basis. This offence covers a multitude of criminal activities and has led to some anomalies. Using the example of sexual misconduct, they examine how the narrow definition of 'public servant' applied by the courts can mean that the conduct of two individuals in similar positions will be treated differently depending on the status of their employer. The offence fills a gap where, for example, a public servant obtains sexual favours as a result of (usually) his status – behaviour that would not be captured by the Sexual Offences Act 2003. It can also be used to avoid the difficulties of charging a more serious sexual offence. Whilst effective, this creates the 'Al Capone problem'¹⁵ whereby a punishment is inflicted, but for a far less serious crime than the behaviour merits. In this case there is the added problem that future criminal records will not show the true sexual nature of the offending. The authors argue that such conduct is properly labelled as a sexual wrong. They propose the creation of a new sexual offence, which could be charged when a person abuses a position of power to gain a sexual advantage.

Stephanie Roberts' article, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' provides an important corrective in the debate about criminal law which is, understandably, often focused on punishing wrongdoers. Her article examines the ongoing criticisms of the Court of Appeal (Criminal Division) that it is inadequate at identifying and correcting miscarriages of justice in relation to the factually (as distinct from the legally) innocent. These criticisms stem from the Court's perceived difficulties in relation to appeals based on factual error. The main ground of appeal for errors of fact is fresh evidence and these appeals are particularly problematic because they require the Court to trespass on the fact-finding role of the jury in assessing new evidence on appeal against the evidence at trial in order to determine whether a conviction is unsafe. Roberts uses a mixed methods approach to analyse the Court's attitude to fresh evidence appeals. She concludes that the Court continues to take a restrictive approach to such cases and considers whether it is the law, or the interpretation of the law by the judiciary, that

¹⁴ Past consultation responses on behalf of the Society can be found on their website, <<http://www.legalscholars.ac.uk/position-papers-consultation-responses/>> accessed 28 June 2017.

¹⁵ The Chicago gangster was famously convicted for not paying tax when the FBI realised that a prosecution for his murderous activities would fail due to nobody being willing to testify against him.

is to blame. She also proposes reforms designed to make it easier for the Court to rectify miscarriages of justice.

Tony Ward's article, 'Improperly Obtained Evidence and the Epistemic Conception of the Trial' reminds us that law reform debates can raise important normative questions. He writes about a topic that has been of critical importance in several high profile miscarriage of justice cases, namely the admissibility of improperly obtained evidence. Arguing that we need to consider the purpose of the criminal trial in order to understand the principles governing the exclusion of such evidence, he favours an epistemic conception; the principal concern of the criminal trial is the accuracy of the verdict. His 'vindication principle' ensures that the moral and political rights of both victims and defendants can be upheld when decisions on the exclusion of evidence are taken.

These four, very different, papers speak to the liveliness of the academic debate in this area; a debate that we hope will continue through the SLS, the CLRN Network, Law Commission consultations and the work of this journal.