

REGULATION AND CRIMINAL JUSTICE

While regulatory institutions and strategies have been the subject of increasing academic attention, there has been limited application of regulatory theories to criminal justice scholarship. This collection of essays from a range of outstanding international scholars adopts a critical, interdisciplinary approach, providing an innovative application of regulatory theory to the practice of criminal justice and offering suggestions for further research. Part I explores the aims and values of criminal justice and other regulatory networks and the synergies and tensions between these fields; Part II examines criminal justice as a regulatory force to control 'deviant' and antisocial behaviour; and Part III examines the regulation and oversight of criminal justice through the operation of prison inspectorates, and explores notions of responsive justice.

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REGULATION AND CRIMINAL JUSTICE

Innovations in Policy and Research

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CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
 978-0-521-19070-1 — Regulation and Criminal Justice
 Edited by Hannah Quirk, Toby Seddon, Graham Smith
 Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India
 103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.
 It furthers the University's mission by disseminating knowledge in the pursuit of
 education, learning and research at the highest international levels of excellence.

www.cambridge.org
 Information on this title: www.cambridge.org/9780521190701

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First published 2010
 First paperback edition 2014

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data
 Regulation and Criminal Justice : Innovations in Policy and
 Research / [edited by] Hannah Quirk, Toby Seddon, Graham Smith.
 p. cm

Includes bibliographical references and index.

ISBN 978-0-521-19070-1 (hardback)

1. Criminal justice, Administration of. 2. Punishment. 3. Sanctions,
 Administrative. 4. Administrative procedure. 5. Law enforcement.
- I. Quirk, Hannah, 1973– II. Seddon, Toby, 1970– III. Smith, Graham, 1957–
 K5001.R44 2010
 364–dc22
 2010045704

ISBN 978-0-521-19070-1 Hardback
 ISBN 978-1-107-41700-7 Paperback

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FOREWORD

John Braithwaite

Whatever the upshot of enquiries into the legality of the invasion of Iraq in 2003, we can feel confident that criminal justice journals will not be full of articles that argue ‘if it was right to convict Prime Minister Tojo and his cabinet for crimes of aggression, should not western cabinet ministers hear the clang of the jailhouse door over Iraq?’ We might excuse US journals for not being engaged with such a debate because the US does not acknowledge the jurisdiction of international criminal law over its leaders. We know this will not happen anywhere for Iraq because journals concerned with crime have never engaged in any major way with such debates when past leaders were Anglo-Saxon, or friends of the dominant western powers. We can have a debate over whether President Saddam Hussein should hang for crimes against the Kurds once he is a pariah in the west, but it is not a question worth discussing among criminologists when he is an ally during the period when he actually commits the crimes. Criminology can have a debate over whether Pol Pot and his communist Cambodian leadership should have been convicted, but not over whether President Suharto should have been convicted for the slaughter of half a million Indonesian communists, or for the invasion of West Papua or the invasion of East Timor. Suharto was also arguably the most successful white-collar criminal of the twentieth century, in terms of the scale of his crimes. Even though many western criminologists were victims of Suharto family embezzlement from joint ventures between his Indonesian government and western firms in which we have pension funds invested, this is unlikely to cross the minds of criminologists as a central question for discussion in our journals.

The sheer duplicity and arbitrariness that some criminologists, inspired by Edwin Sutherland (1949/1983), saw in the way that the crimes of the powerful are exempted from criminological scrutiny is the beginning of the journey that leads to a book as interesting as *Regulation and Criminal Justice*. Those of us who made crimes of the powerful our

intellectual passion took different courses, however. Some like Frank Pearce and Steve Tombs (1990) pushed for balancing the books by locking up powerful criminals wherever possible. Others like myself looked at a big case like the crimes of Suharto in killing over 100,000 Timorese and saw the important thing when Suharto was deposed and replaced by his Vice President as persuading the new cabinet to repair the harm and to surround itself with new checks and balances that would make the crimes of the past more difficult in the future. Repairing the harm in East Timor meant doing exactly what the post-Suharto cabinet did – giving the people of East Timor a referendum in which they could vote to separate from Indonesia. Rightly or wrongly, scholars of this persuasion gave priority to regulatory and restorative means that might prevent ongoing suffering. They give this priority over punitive equality in the criminal law. It would have been desirable to have prosecuted some members of the post-Suharto cabinets as well as Suharto himself, and in some cases it is still not too late to do so, but it was more important to secure peace and democracy in East Timor.

Yet because equality was a value that led so many scholars of white-collar crime to be troubled over impunity for crimes of the *powerful* in the first place, we also became interested in regulatory and restorative solutions to preventing future harm from crimes of the *powerless*. It follows that scholars of this persuasion think what the University of Manchester has attempted in the workshops that led to this book is an endeavour of great merit. I will not delve into the definition of regulation in this Foreword, as the editors have provided an excellent discussion of that matter in their introductory essay.

The criminal law was a modern invention of European legal systems. All the rule breaking it came to regulate – murder, assault, theft, usury, arson, sexual misconduct, tax evasion, kidnap – was regulated by other means for millennia before the invention of the criminal law. The European state system and its state legal systems almost completely globalized in the nineteenth and twentieth centuries, exceptions being fewer than ten states that clung to Islamic or Hindu–Buddhist national legal systems. At the same time, administrative systems of western criminal law – paramilitary police specializing in crime, prisons, western training in the discipline of law – also globalized. But nowhere, for no form of crime, did the criminal law completely take over from other forms of regulation. Even for the most quintessentially criminalized form of rule breaking, homicide, when it is homicide by chief executives of corporations against their workers or by prime ministers against the people of nations they

invade illegally, the criminal law applies in theory but not in practice. For other very common forms of serious crime, such as assaults of children on one of their parents, tax cheating that most Australians indulge in most years of their working life, regulation remains almost totally in the care of instruments other than the criminal law. The form of tax cheating that involves the largest frauds – profit shifting (e.g. into tax havens) by multinational corporations – in Australia, as in most nations, is never criminally prosecuted. Ironically, as this book documents, non-criminal forms of inspection and improvement orders, rather than the criminal law itself, remain the tools of choice for regulating the institutions of the criminal law itself when prisoners are treated unconscionably. When judges abuse the human rights of those who appear in their courts, their abuse is often regulated by reversing their decisions on appeal, by counselling from peers or other forms of legal professional self-regulation, not by imprisonment. Imprisonment is often inflicted on defendants or witnesses who rudely abuse a judge, never when it is the judge who inappropriately abuses them.

For the rural majority of the bulk of the world's population who live in developing countries, offences that are criminal according to their nation's law are rarely reported to the police. Rather, these are resolved by customary law normally led by legally untrained elders. For still a surprisingly large though uncertain proportion of the world's population, this continues to be true even for murder.

This reality makes it a difficult project for the criminal law paradigm to become even more imperially ambitious by aspiring to proportionate application to all the human rights abuses of greatest culpability. One problem is that costs of criminal enforcement are particularly high where the stakes are high. We see this with even middling war crimes trials. We also see it with the huge costs borne by the only national tax authority I know that regularly runs criminal prosecutions against fraudulent profit shifting into lower tax jurisdictions by large multinational corporations, the US Internal Revenue Service. And we see the opportunity cost when we consider the evidence of how effective non-criminal responsive regulatory enforcement innovations have been in Australia – returning more than a billion dollars to the taxpayer for every million spent on the responsive regulation programme (Braithwaite 2005: 89–97).

That said, the criminal law is a great European invention that, used prudently, can enhance the effectiveness of other forms of regulation. Some of this power comes from the intensity of the productive normative

debates modern societies experience over what should be and should not be a crime. An upshot is that once a form of misconduct is accepted in the society as criminal conduct, it becomes much more possible to educate and persuade the community to the shamefulness of the conduct. Australian society has seen in my lifetime the criminal law constitute the shamefulness of drink driving and domestic violence that they did not have when I was young. The deepening of the normative furrows of the criminal law in my society has saved lives as a result. With domestic violence, my hypothesis is that the criminal law does less of its good work directly through deterrence, more of it indirectly through deepening the legitimacy of the change feminism as a social movement has wrought in thinking across the society. With drink driving, there is some Australian evidence to suggest that criminal enforcement has contributed less to saving lives via deterrence–rehabilitation–incapacitation, more by signalling a cultural change in drinking behaviour, strengthening the hand of friends who insist, ‘You should not drive, I will get you home’ (Homel 1988). The criminal law is a great institution because it has productive synergies with other forms of regulation more powerful than itself. That is not to deny that deterrence, rehabilitation and incapacitation can also do much more good than harm when deployed with wisdom.

The second important historical accomplishment of the globalization of the criminal law tradition is the way it imposed limits on the circumstances where the most onerous sanctions – deprivation of liberty through imprisonment, capital punishment, corporal punishment and torture could be used. The criminal law does the profound service to human rights of defining upper limits on the severity of such impositions even in circumstances where the nature of the wrongdoing permits their use. It also is a tradition that protects against excess by blocking any access to it unless a ‘beyond reasonable doubt standard’ and other evidentiary tests are passed (that need not be passed for non-criminal sanctions). The war on terror, as this book shows, has set back this momentum of the criminal law as a regulator of state violence. While the exposure of Abu Ghraib halted some of the worst torture, the debate that ensued has in some ways strengthened the impregnability to criminal law procedural regulation of practices like sleep deprivation during interrogation.

Notwithstanding the virtues of the criminal law paradigm discussed in this book and in my previous paragraph, one of its vices is that criminal law professionalism promotes a myopic tendency to see a right outcome

to criminal wrongdoing as proportionate criminal punishment. This renders the criminal law vulnerable to capture by retributivist excess and by law and order auctions in politics. There is a case for depoliticization of criminal law to guard against such capture (Lacey 2008). But because punitive myopias internal to criminal law professionalism are also a danger, and because law and order politics will never go away, there is also a need for countervailing social movement politics against the excesses of criminal law globalization. The social movement for rehabilitation and reintegration of criminals, the human rights movement (particularly its prisoners' rights and its children's rights arms that in India has completely prohibited the criminalization of children) and the social movement for criminal law professionalism were in a sense each productively checking the excesses of the other for more than a century of declining punitiveness in most western societies until the late 1970s. Then the movement for rehabilitation of criminals was discredited, partly by an unfair reading of the state of the evidence on the effectiveness of rehabilitation. Movements for indigenous justice and legal pluralism have similarly suffered setbacks at the hands of criminal law fundamentalisms in western societies with large ethnic minorities since the 1970s. The social movement for restorative justice has sought in a new way to regulate the excesses of criminal law myopia. But it has little hope of substantially reducing that excess unless the movements for rehabilitation, customary law and prisoners' rights are also rejuvenated and become respectable again.

Regulatory studies also has an important intellectual contribution to make in tempering tendencies to simplify thinking about wrongdoing into crime and non-crime. This is not to say that a regulatory lens implies any kind of unified value position or unified epistemology. Indeed diversity is on display in the consistently fine essays in this collection. Whether regulatory approaches crush freedom more or less than criminal law approaches depends on the methods and values that frame each of them (Sanders 2010). Which approach is more effective in solving the problem is also contingent. This is a volume full of insights into how research might specify the contingencies where regulatory approaches might be more effective and decent than standard criminal justice responses to crime, and vice versa. It gives us by far the most fertile assembly of fine thinkers in the literature on the virtues and vices of looking at crime through a regulatory lens. My congratulations to Hannah Quirk, Toby Seddon and Graham Smith, and to all their authors, for their vision and for the quality of the research it has spawned.

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ACKNOWLEDGEMENTS

This book is based on a selection of papers presented to an Economic and Social Research Council-funded international seminar series entitled 'Regulation and Criminal Justice: Developing a New Framework for Research and Policy Development' (ESRC reference no. RES-451-26-0342). The series was organized by the Regulation, Security and Justice Research Centre based at the School of Law, University of Manchester. Four seminars were held at the University in November 2007, April and September 2008 and February 2009. The editors wish to express their gratitude to all of the participants who made the project so enjoyable and worthwhile. They are: Carolyn Abbot, Daniele Alge, Kevin Brown, Elizabeth Burney, Alex Carlile, Adam Crawford, Phil Edwards, John Flint, Richard Garside, Tom Gibbons, Joanna Gilmore, Peter Grabosky, Danielle Griffiths, Kate Hammond, Paddy Hillyard, Barbara Hudson, Caroline Hunter, Imogen Jones, Tammy Krause, Charles Loft, Gary Lynch-Wood, Nigel Meadows, Gabe Mythen, Anthony Ogus, Anne Owers, Andrew Sanders, Clifford Shearing, Frank Stephen, Lindsay Stirton, Clive Walker, Dave Whyte, Dave Williamson and Sarah Wilson.