Reconstructing Criminal Law Revisited

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Progressive legal scholarship in recent decades has often been expressed in terms of an aspiration to construct, deconstruct, and/or reconstruct particular areas of law. Mark Kelman, an influential voice in the critical legal studies movement, wrote in the early 1980s of the need for "Interpretive Construction of the Substantive Criminal Law," deconstructing key criminal law doctrines so as to reveal their underlying assumptions and the vectors of power implicated in their operation.[1] In 1990, Celia Wells, Dirk Meure, and I framed our critical text as a project of *Reconstructing Criminal Law*,[2] and in explicitly interdisciplinary terms.[3] In an effort to supplement an internal, deconstructive critique of legal doctrine with a socio-legal analysis, we set criminal law firmly within its historical, political, social, and institutional context, and sought to re-read criminal law's significance by approaching law through a social lens, and by giving a central place to areas and aspects of criminalization—public order laws, so-called regulatory offenses, the criminal process, for example—typically marginalized within conventional texts.[4]

But what does it mean to reconstruct criminal law today? On the one hand, we have a burgeoning, far more methodologically diverse, and ever more cross-jurisdictional academic conversation than we did fifty years ago. On the other, systems of criminal law in

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[1] Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981); Markus Dirk Dubber & Mark G. Kelman, American Criminal Law: Cases, Statutes and Comments (1st ed. 2005, 2d ed. 2009); see more generally Neil MacCormick, Reconstruction After Deconstruction: A Response to CLS, 10 Legal Stud. 539 (1990).

[2] Nicola Lacey, Celia Wells & Dirk Meure, Reconstructing Criminal Law (1990); Nicola Lacey & Celia Wells, Reconstructing the Criminal Law (2d ed. 1998); Celia Wells & Oliver Quick, Reconstructing the Criminal Law (3d ed. 2003). For discussion, see Kate Leader, Nicola Lacey, Celia Wells & Dirk Meure, *Reconstructing Criminal Law*, in Leading Works in Criminal Law 173 (Chloë Kennedy & Lindsay Farmer eds., 2024).

[3] See also Alan Norrie, Crime, Reason and History (1st ed. 1993, 3d ed. 2014); Simon Bronitt & Bernadette McSherry, Principles of Criminal Law (1st ed. 2001, 4th ed. 2017). The field of interdisciplinary criminal law scholarship has grown steadily. See, e.g., Nicola Lacey, On the Subject of Sexing the Subject . . . , in Sexing the Subject of Law 65 (Ngaire Naffine & Rosemary J. Owens eds., 1997); Alan Norrie, Punishment, Responsibility and Justice (2000); Peter Ramsay, The Insecurity State (2012); Lindsay Farmer, Making the Modern Criminal Law (2016); Nicola Lacey, In Search of Criminal Responsibility (2016); Markus D. Dubber, The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective (2018); Ngaire Naffine, Criminal Law and the Man Problem (2020); Arlie Loughnan, Self, Others and the State (2020); Henrique Carvalho & Anastasia Chamberlen, Questioning Punishment (2024); Chloë Kennedy, Inducing Intimacy: Deception, Consent and the Law (2024); Alan Norrie, Criminal Justice and Moral Psychology: From Violation to Abolition (forthcoming).

[4] Lacey, Wells & Meure, supra note 2, preface & ch. 1.

many parts of the world face increasingly complex challenges of authority, legitimacy, and effectiveness, against a backcloth of political instability and, in many countries, gross and persistent forms of inequality which call the possibility of "doing criminal justice" into question.[5] Amid intractable structural injustices, and a resurgence of interest in abolitionism, is there still space for a scholarship focused on critique oriented to reconstruction rather than abolition? If projects of reconstruction still have potential, and a moral urgency given the real costs of crime for both victims and society more generally, what are the conditions of existence of such reconstructive projects across both different areas of criminal law and practice and different jurisdictions?

In this Special Issue, a diverse range of authors confront questions about whether, and how, we can reconstruct criminal law (as well as its associated institutional forms, including the trial, sentencing, and the criminal and penal processes) in meaningful ways. Their contributions coalesce around three main themes: first, a careful examination of what reconstructing criminal law might mean today, and of how it relates to other projects of reform or abolition; second, an examination of the conditions under which criminal law develops and of the ways in which these affect the possibilities of and limits on reconstruction; third, a consideration from different perspectives and in different contexts of the possibilities for reconstruction, as well as, conversely, of its limits. Taken together, the essays provide rich resources for thinking about the relationship between reconstruction and abolition in different parts of the world and different areas of criminal law, as well as revealing the scope for hybrids which reconfigure the opposition between reform and abolition. They accordingly hold out the hope for constructive engagement with legal change without ignoring the important concerns underlying the abolitionist challenge.

In the opening essay, "What Does It Mean to Reconstruct Criminal Law?," Lindsay Farmer goes to the core of the first theme. Focusing on Hermann Mannheim's *Criminal Justice and Social Reconstruction* (1946), Farmer reminds us that the aspiration to reconstruct criminal law from a contextual point of view focused on the broader development of the social order is of long standing. Indeed, Farmer points out that most forms of legal scholarship (not to mention treatises, commentaries, model codes, and reform proposals) are reconstructive in the sense that they seek to rethink or reshape particular aspects of criminal law.[6] But the story of the reception, and gradual disappearance from view, of both Mannheim's book—written under the very particular conditions of post-war hope for reconstructive social policy—and its broad ambition to reconstruct criminal law from the point of view of its place and purpose in the social world, also tells a fascinating story of the conditions under which particular understandings of criminal law gain a purchase. Why, Farmer asks, did criminal law scholarship not develop more seamlessly in the direction

[5] Nicola Lacey, Criminal Justice and Social (In)Justice, in Structural Injustice and the Law 168 (Virginia Mantouvalou & Jonathan Wolff eds., 2024).

[6] Lindsay Farmer, Of Treatises and Textbooks: The Literature of the Criminal Law in Nineteenth-Century Britain, in Law Books in Action: Essays on the Anglo-American Legal Treatise 145 (Angela Fernandez & Markus D. Dubber eds., 2012).

charted by Mannheim, retreating instead into a more law-centered mode? Much is to be gained, he suggests, by reminding ourselves of the rich history of contextual, critical yet constructive criminal law scholarship focused on the potential for criminal law to further important social goods. This point resonates with the powerful case studies of "non-reformist reform" and of reconstruction beyond the conventional boundaries and modes of criminal justice canvassed in the essays by Willis, Rossner et al., and Taylor, and with Manikis's rethinking of the respective responsibilities of state and citizen. Each of these essays realizes in fresh forms Mannheim's ambitious conception.

Arlie Loughnan's "Hyper-Knowledge and the Legitimation of Criminal Law" brings us to our second theme: that of the conditions under which criminal law operates and projects of reconstruction go forward. While Farmer's essay evokes the optimism and ameliorative ambition of the immediate post-war era in Britain, Loughnan focuses on a constantly evolving phenomenon: that of the forms of knowledge on which criminal legal processes must draw in making decisions and in coordinating and legitimating their operations. This problem, of course, has troubled criminal lawyers throughout history: think for example of the controversy about medical testimony in the 19th century and the continuing perplexities about the evaluation of expert evidence throughout the 20th and into the 21st centuries.[7] But, as Loughnan shows, this problem has acquired a new urgency and complexity in the rapidly diversifying knowledge context of the digital age, posing ever more intractable challenges of legitimation and coordination for systems of criminal law. Any project of reconstructive criminal legal scholarship today must, she argues, be prepared to address the need for criminal law to find ways of managing the increasing complexity and dynamism of criminal-law relevant knowledges. Moreover, this task is complicated by reduced trust in expertise amid the proliferation of "alternative truths" in the echo chambers of social media. Conversely, the increasing complexity of the knowledge environment in which criminal law operates itself gives us urgent reason to engage in reconstructive projects. While Loughnan's essay focuses primarily on the epistemic challenges facing criminal law today, her discussion of diminished trust and structural inequities also jibes with the political challenges to state (and hence criminal law) legitimation pondered in different ways in the essays by Chehtman, Lorca, Rossner et al., and Willis.

The remaining essays in the collection engage primarily with the third theme: that of the possibilities for, and limitations of, the aspiration to reconstruct criminal law. They present and analyze a range of reconstructive projects sitting on the spectrum from reform through to abolition, each of them in its own way illustrating both the scope for and the constraints on reconstruction, and expanding our sense of what might be possible, and why. Towards the reform end of the spectrum, Gabrielle Watson's "A Respect Standard for Sentencing" makes the case for the incorporation within sentencing law and practice of a general commitment to respect. Drawing on conceptual analysis, a reading of case law and legislation, and the statements of the Sentencing Council for England and Wales, Watson

[7] Roger Smith, Trial by Medicine (1981); Mike Redmayne, Expert Evidence and Criminal Justice (2001); Nicola Lacey, Women, Crime, and Character (2008).

shows how the reconstruction of sentencing in the light of a commitment to respect might move us in the direction of greater justice. Watson's essay might also be seen as a key example of an emerging interest in the reconstruction of particular areas of law in terms of evaluative ideas—respect, forgiveness, hope, dignity—which have their primary reference point in interpersonal life.[8] It also raises the question, touched upon in several of the essays, notably those of Chehtman and Lorca, of the role of human rights in the reconstruction of criminal law.

In her essay, "Excusing Unjustified Punishment," Rocío Lorca goes to the heart of perhaps the most obvious conundrum for reconstructive projects: how to do criminal justice in unjust societies. Confronting this challenge head on, Lorca acknowledges the intractable dilemma while resisting the abolitionist conclusion. Rather, in an imaginative blend of philosophical analysis and socio-legal and historical interpretation of the upshot of structural injustice for both perpetrators and victims of crime, Lorca crafts a hybrid approach, arguing that punishment may, under certain conditions, be both unjustified yet excusable as a necessity. Even where individual responsibility is undermined by structural injustice, she argues, it may be nonetheless reasonable for the state to punish where circumstances are such that a failure to do so would have grave consequences for either the stability of the legal order or the interests of victims/potential victims, or both. A key advantage of this mode of analysis, Lorca argues, is that it leaves intact the recognition that an injustice is being done to the offender.

Lorca's essay also gives us a vivid sense of the pressures and constraints which real-world contexts—notably that of the political instability which has afflicted many Latin American countries in the wake of colonialism—impose. This is also true of Alejandro Chehtman's "Re-Constructing Criminal Accountability for Human Rights Abuses: Argentina 1990-2024." In a finely textured and wide-ranging analysis, Chehtman tells the story of the struggle to reconstruct criminal law so as effectively to hold the state to account for its abduction and murder of many thousands of people during the dictatorship of 1976-83. Several important lessons flow from his analysis. First, the key role of civil society institutions in the struggle for justice in Argentina reminds us that the reconstruction of criminal law depends not only on states and state institutions, but also on the actions and attitudes of non-state actors: the subjects of criminal law. Second, the horror of extensive state violence evoked in the essay, and the eloquent depiction of the urgency with which those affected acted to seek justice by campaigning, securing evidence, testifying, and so on, provides an important balance to some of the abolitionist and human-rights-skeptical argument

[8] Nicola Lacey, Institutionalising Interpersonal Ideas in Law, 88 Mod. L. Rev. (forthcoming 2025); Gabrielle Watson, Respect and Criminal Justice (2019); Jeremy Waldron, Dignity, Rank, and Rights (2012); Sarah Trotter, Hope's Relations: A Theory of the "Right to Hope" in European Rights Law (2022); Kimberley Brownlee, Punishment and Precious Emotions: A Hope Standard for Punishment, 41 Oxford J. Legal Stud. 589 (2021); Molly Corlett, The Right to Hope and the Humanity of People in Prison, University of York/Howard League for Penal Reform (2022) (https://perma.cc/PM7L-QTSN); Lionel Smith, The Law of Loyalty (2023); Nicola Lacey & Hanna Pickard, To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice, 35 Oxford J. Legal Stud. 665 (2015).

in the Global North. While the dangers of human rights being prayed in aid of expanding criminalization and state over-reach is a real one,[9] the Argentinian case is a stark reminder of the power of the impulse to demand justice, and to insist on the need for reconstruction of criminal law more effectively to deliver it (or, as Lorca might argue, something as close to justice as is humanly possible).

If Chehtman's essay is a reminder of the possibility of egregious state wrongdoing, Marie Manikis focuses on the ubiquitous problem of state fallibility. In a world in which many of the social injustices which undermine the pursuit of criminal justice are themselves created by the state—or exacerbated by state failures of one form or another—any reconstructive project, Manikis argues in "Citizens, State Fallibilities, and Responsibility in Criminal Law," must confront the problem of state fallibility. Instead of sweeping it under the carpet of an unrealistically individualistic model of criminal responsibility, we must craft legal and institutional mechanisms which enable a recognition of the state's own responsibility, reconstructing the received structure of the relationship between offender, victim, and state. Chiming with Lorca's implicit refusal of a binary analysis, Manikis seeks to reconstruct responsibility as relational and as sitting on a continuum; and to find ways to make space in the legal process both to register state responsibility and to hear the (all too often silenced) voices of those harmed by it. Manikis's argument also resonates with Chehtman's in its recognition of the importance of citizens' role in identifying and challenging state fallibilities and wrongdoing.

State violence and state fallibility also sit at the heart of the two remaining essays in the collection, which ponder radically reconstructive projects towards the abolitionist end of the reform/abolition spectrum. In "Should We Abolish Hate Crime Law or Is There a Case for Its Reconstruction?," Roxana Willis teases out the lessons to be learned from what is often cited as a key instance of progressive legal reform: the enactment in England/Wales and many other jurisdictions of hate crime laws in the late 20th century. Writing in the wake of riots across the U.K. which were motivated by inaccurate and racist claims in news and social media, Willis reflects on the baleful fact that hate crime laws have so often been invoked in relation to the conduct of the minorities which they claimed to protect. She sets this fact against the backdrop of the history and present—the Windrush scandal and government plans to send asylum seekers to Rwanda, to name just two recent examples—of racial violence, including that of the state, in the U.K.[10] Drawing also on ethnographic work on the upshot of hate crime laws in postcolonial India,[11] Willis reflects thoughtfully on the abolitionist challenge: if the state legal system is itself a source of structural injustice, apt to

[9] Mattia Pinto, Coercive Human Rights and the Forgotten History of the Council of Europe's Report on Decriminalisation, 86 Mod. L. Rev. 1108 (2023).

[10] Amelia Gentleman, The Windrush Betrayal: Exposing the Hostile Environment (2019); see more generally Paul Gilmore, There Ain't No Black in the Union Jack (2002).

[11] Sandhya Irina Fuchs, Symbiotic Justice: Hate Crimes, Police Humiliation, and Layered Legal Consciousness in Dalit Human Rights, Soc. & Legal Stud. (2024) (https://doi.org/10.1177/09646639241236924).

be used to the ends of racial violence and injustice, reform holds no transformative potential. But can there nonetheless, she asks, be "non-reformist" forms of change through the reform of civil law—for example tax law or employment law—to improve socio-economic inequality? Even criminal law, she suggests, holds out some, albeit limited, prospects for achieving justice or ameliorating social injustice: resonating with Manikis's focus on the state's own responsibility, Willis canvasses the possibility of reconstructing hate crime as a state crime.

Last but not least, in "Finding Common Ground: Reconstructing Criminology with Epistemic Justice," Meredith Rossner, Elfie Shiosaki, and Helen Taylor reach beyond both the criminal justice system and legal scholarship to propose new ways of reconstructing criminology. They do so by reframing our responses to crime in terms shaped by Indigenous knowledges marginalized in the development of state criminal law. They emphasize the importance of a sensitivity to the epistemic injustices which have not only afflicted the implementation of criminal law but also limited the development of reconstructive criminal law scholarship (not excluding *Reconstructing Criminal Law*). Writing from the settler-colonial context of Australia, the essay makes a powerful argument for the reconstruction of criminological assumptions in the light of Indigenous knowledges and ways of reconstructing the framework of social governance by drawing on relationships so as to achieve non-domination. Taking the example of the Yoorrook Justice Commission's truth-telling inquiry into injustices experienced by First Peoples in Victoria, their essay significantly expands our view of the possibilities for reconstruction beyond the boundaries of the criminal justice systems as we have received them in a form shaped by histories of domination, not least that of colonial oppression and expropriation which was itself accomplished through legal means.

Forty years on from Kelman's foundational article, the essays in this collection testify to the richness of, and continuing innovation in, the broad field of scholarship oriented to reconstructing criminal law. As we celebrate the creation of the *Modern Criminal Law Review*, a new outlet for imaginative work on criminal law, our hope is that they will inspire further developments in a field whose scholarly interest sits alongside its moral and political urgency.