Article

Of Cubist paintings and legal story-telling: historicising criminal responsibility

by Arlie Loughnan

Criminal responsibility is now the focus of a sizeable body of socio-historical scholarship. Like other work fitting within this broad scholarly tradition, socio-historical approaches to criminal responsibility take legal principles and concepts as objects of study, and examine them in light of the substantive social, political and institutional conditions under which intellectual ideas are given life (see Dubber and Farmer 2007; Dubber 1998). This approach has generated (and continues to generate) deep insights into criminal responsibility norms and practices. Scholars working in the socio-historical tradition chart the dynamic relationship between ideas about criminal responsibility and the development of the modern state (Farmer 1997), the changing coordination and legitimation requirements of criminal law into the current era (Lacey 2001a; 2001b; 2011), the rise of the police power (Dubber 2001), and the influence of Enlightenment liberalism on the structures and operation of the criminal law (Norrie 2001). 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 the late modern era.

To date, the socio-historical scholarship on criminal responsibility has been primarily concerned with developments up to and including the end of the nineteenth century. The combination of three factors has meant that the twentieth century has been the subject of somewhat less attention from socio-historical scholars of criminal responsibility than other periods. The first of these is the structure and periodization of the socio-historical narrative. In brief, and at some risk of over-simplification, the story is told in broad, epochal shifts, implicating legal doctrine and evidentiary and procedural practices, with the twentieth century depicted as a period in which these large-scale developments were bedded down or consolidated, or perhaps altered in curious but not fundamental ways. This risks a view of the twentieth century (and the twenty first century) as the post-script in a drama that had played out much earlier.

The second factor contributing to the relative neglect of the twentieth century is the dominance of a legal-philosophical approach to criminal law theory. In relation to this, current period, the criminal responsibility storytellers are more likely to be legal-philosophical scholars, with the story told in a normative register. The third factor has meant that the twentieth century has been the subject of somewhat less attention from socio-historical scholars of criminal responsibility than other periods is the changing nature of the subject matter of the story. The pluralisation of knowledges about responsibility, and the associated politicisation of responsibility – according to which an array of social knowledges, like criminology, have been harnessed to projects of the state – associated with "late" modernity (Giddens 1990) or "reflexive" modernity (Beck 2002) means that the subject matter of a socio-historical study of criminal responsibility has become harder to grasp.

But, as I discuss in this paper, for a socio-historical scholar of criminal responsibility, there are reasons to examine the twentieth century on its own terms. In this short paper, I outline an approach that focuses on twentieth (and twenty first) century developments in criminal responsibility norms, with legal developments set against broader extra-legal changes in responsibility practices. This approach is structured along three axes: "social individuality", liability in/of collectives and "attenuated" or impaired responsibility. Taking seriously the developments in criminal principles and practices over the twentieth century allows us to extend the critical lens of socio-historical approaches to this hitherto now somewhat marginalised period.

At this point, it is useful to include a definitional note. I approach criminal responsibility broadly, thinking about it as a set of practices that must be understood in the institutional context in which the practices take place. This approach to legal responsibility has been adopted by others (see Cane 2002; see also Veitch 2007). As such, in this paper, I am interested in conceptions of criminal responsibility, but also the wider

processes, including practices of evidence and proof, related to finding individuals responsible or non-responsible in criminal law. As this suggests, my approach stretches across the general part/special part divide, and trespasses on the terrain typically examined under the label criminalisation. It is on the basis of this broad approach to criminal responsibility that my discussion proceeds.

WHAT ABOUT THE TWENTIETH CENTURY?

The twenty and twenty-first centuries have seen seismic social and political changes the enormity of which belie any cataloguing that might be offered here. Urbanisation, democratisation, moral pluralism and the rise of national and international human rights schemas each denote large-scale structural changes in the law and society of Western liberal systems. In relation to criminal justice, developments include the diversification of penal sanctions and the advent of new state agencies (such as the probation service and juvenile courts), which combined to decentre the prison in the penal system (Garland 2001), and the rise of international criminal justice and the appearance of specialist courts (such as drug courts). In relation to criminal law, the twentieth century is marked by the proliferation of criminal offences, and, continuing from the nineteenth century, statutory strict liability offences have been created in significant numbers (Farmer 2014).

Given this complex picture, developing a socio-historical account of criminal responsibility, set against extra-legal responsibility norms, in the twentieth century is a challenging task. In outlining my own approach here, I do not intend to suggest that there is any "right" way to approach this period. On the contrary, I would suggest that a study of criminal responsibility norms in the twentieth century could be constructed in a range of different ways. My own approach is just one approach, intended to capture what appear to me to be salient aspects of developments in criminal law and in social norms relating to responsibility.

In terms of substantive law, this part of the project examines select relevant twentieth century developments in the criminal law of the Australian jurisdictions. The following sections function as a roadmap for further study, and should be read with that disclaimer in mind.

(a) "Re-embedded" responsibility

This part of my study examines the ways in which contemporary forms of sociality/social relations make themselves felt in criminal responsibility norms and practices. Here, I am appropriating a notion is utilised by Antony Giddens to capture the ways in which, under conditions of modernity, while time and space have moved further apart ("disembedding"), those same conditions throw up novel opportunities for "re-embedding" (Giddens 1990). According to this idea, "disembedding mechanisms life social relations and the exchange of information out of specific time-space contexts, but at the same provide new opportunities for their reinsertion" (Giddens 1990: 141). In this axis of my study, I explore the influence of contemporary notions of sociality have on criminal responsibility in terms of the idea of the legal subject in relation to others.

One potential case study of "re-embedded responsibility" is parents' liability for the criminal acts of their children. This operates as a form of secondary party liability (and it exists over and above civil liability) in cases in which the parent contributed to the child's offending. The practice of holding parents responsible for the actions of their children dates from the end of the nineteenth century, but, over the last decades of the twentieth century, reflecting amplified concerns about offending by young people, it has taken on an enhanced legal and social profile (see eg Greenwood 1997). This issue is typically examined by doctrinal scholars, in connection with youth crime and juvenile justice, and as a problem of enforcement, or by legal theorists, as an issue of criminalisation, rather than expressly in relation to norms of criminal responsibility. Yet, for a responsibility scholar, it seems to provide a potentially fruitful way of studying contemporary approaches to criminal responsibility, to see the ways in which they map onto (or not) social responsibility norms.

(b) Liability in/of collectives

Under this axis of my study, I examine criminal responsibility vis-a-vis groups or collectives. I explore the way in which the ontological structure of groups impacts on criminal responsibility norms and practices. In the late modern era, as political theorists and sociologists have suggested, group identity has come to the fore – as a basis for political activism and social organisation (see Beck 2002; Fraser 1997; Brown 1995). The changing social dynamics around collectives – here understood broadly, as a collective entity given legal status – is a fitting inclusion in a socio-historical study of criminal responsibility norms and practices in the twentieth century.

In relation to criminal responsibility and collectives, most scholarly attention has been taken up by the liability of collectives. Historically, the most prominent of these has been the corporation, which is not actually a collective. The rising social and political profile of the corporation – and more extensive regulation of corporate activities across Western liberal systems – has made the corporation an attractive focus for criminal law scholars. In relation to responsibility, it has proved challenging to map corporate liability onto traditional conceptualisations of criminal responsibility. These challenges arise in two respects: in relation to traditional conceptions of fault, and in relation to the timeframes employed in evaluations

of criminal responsibility (see Fisse and Braithwaite 1986). More recently, the criminal responsibility of the state – as a perpetrator of war crimes, and crimes against humanity – has come to occupy a number of scholars (eg Veitch 2007), but it is interesting to note that most of these scholars are international legal scholars, rather than criminal law scholars.

In relation to liability in collectives, most scholarly attention has been taken up by gangs and organised crime. Here, I also focus on group crime. This part of the project is designed as a theoretical examination of the principles of secondary liability (parties to crime) read against sociological, criminological, psychological understandings of gangs and groups more general. Through such a study, it is possible to shed critical light on legal structures by reference to extra-legal knowledges, and to assess the ways in which legal evaluation and adjudication utilizes these knowledges. This involves looking at scholarly work from outside law to discuss the utility or validity or perhaps "workability" of (traditional) legal practices and concepts (such as mens rea, actus reus, secondary parties, principles, and accessories). Questions of interest here include whether these distinctions map on to social knowledges regarding what's going on in gangs (for example, in relation to "mob mentality"), and what, if any, impact have changing social meanings around gangs had on criminal responsibility.

In terms of positive law, this is a part of criminal law in which Australian state legislatures have been particularly keen to push the boundaries. Following a series of high profile offences by members of "bikie gangs", and amidst of furore about organised crime, South Australia (and, subsequently, NSW and QLD) enacted extensive legislative regimes to criminalise association between members of "criminal organisations". These laws feature civil orders (a breach of which is a criminal offence) and reverse burdens of proof, and, in Australia, are backed up by extensive civil forfeiture laws. In revisiting the topic of group crime, I seek to examine the ways in which the social meanings given to collectives, and the related issues of criminalisation, enforcement practices and regulation for what they reveal about changing social ideas of responsibility.

(c) "Hybrid" or "compound" responsibility

Within this axis of the study, I explore what I am calling "hybrid" or "compound" responsibility, or responsibility-cum-liability. This part of my study looks different to the first two parts. In contrast to the first two axes that provide a preliminary structure my study, this axis is designed to project the analysis, to "think forward", and consider the ways in which criminal responsibility principles and practices might develop in coming years. So, this axis is drawn to capture not so much in terms of already apparent extra-legal responsibility norms, but, rather, in terms of ideas still emergent in criminal law practices.

Here, my starting point is a hunch that "hybrid" or "compound" legal forms – those in which offence and defence, and responsibility and liability are conjoined – are likely to become more significant in criminal law in the future. These legal forms, of which infanticide is a notable example, are generally regarded as atypical features of positive law, and have a suspect status among legal scholars, as they are assumed to be the product of peculiar historical (institutional, procedural) conditions (see further Loughnan 2012). Conceptualising these parts of substantive law as "hybrid" or "compound responsibility" represents an attempt to take them seriously, and to place them on a more robust theoretical footing for analysis.

My conceptualisation is an attempt to move beyond the sharp binaries of offence and defence, responsibility and liability. As it is at the moment, and reflecting the strong influence of moral philosophy on criminal law scholarship, any contextualisation of the abstract and abstracted subject of the law (the "juridical individual") (see Norrie 2001) at the point of conviction is typically understood as responsibility-denying or responsibility-compromising, as an argument against the imposition of the full rigors of the criminal law (conviction not for murder but for a "lesser" offence, manslaughter, for instance). But it seems plausible to suggest that social norms around liability and responsibility are less clear-cut and not unidirectional, moving between inculpation and exculpation, for instance, in a way that potentially challenges traditional legal thinking and categorisations.

Including what I am calling "hybrid" or "compound responsibility" in my study provides an alternative perspective on criminal responsibility in what are recognised as "difficult" (questionable or problematic) cases. My own study seeks to examine these issues directly, focusing on the ways in which criminal law maps onto (or not) social norms governing such "difficult" cases. Here, it is interesting to note that, on an institutional level, innovative trial and sentencing processes such as drug courts, or veterans' courts, already realise the value of thinking differently about responsibility and liability ascription practices. While typically understood as pragmatic responses to perceived problems and challenges, and still largely marginalised in scholarly work on criminal responsibility, it is possible that these developments might both reflect and exert pressure on the conceptual structure of criminal law and its ascription practices.

CONCLUSION

This short paper has offered an outline of how a study of criminal responsibility norms and practices in the twentieth century might look. Taking the twentieth (and twenty first) century seriously in socio-historical examination of criminal responsibility means recognising this period as a new act rather

than a post-script – it contains its own drama. The aim of my own study is to set developments in criminal responsibility against/in the context of extra-legal developments in responsibility practices. Of course, extra-legal developments in responsibility practices is a wide (perhaps bottomless) category. The approach, which has been merely sketched out here, sets developments in criminal responsibility against/in the context of extra-legal developments in responsibility practices. I seek to develop a composite picture of criminal responsibility norms and practices, each part of which tells a discrete story while at the same time contributing to something of a (compound) whole. We can call this the Cubist painting approach.[1] In this effort, I hope to ensure that a range of disciplinary resources are utilised by criminal law scholars, and to encourage us all to paint new canvasses and tell new stories.

[1] Dictionary.com definition: a style of painting and sculpture developed in the early 20th century, characterized chiefly by an emphasis on formal structure, the reduction of natural forms to their geometrical equivalents, and the organization of the planes of a represented object independently of representational requirements. Thanks to Tanya Mitchell for this analogy.

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