
Article:
Pinto, Mattia (2025) Book Review: Leading Works in Criminal Law by CHLOË KENNEDY AND LINDSAY FARMER. Social & Legal Studies. pp. 134-137. ISSN: 1461-7390

https://doi.org/10.1177/09646639241244665

Book Review

Book Review: *Leading Works in Criminal Law* by CHLOË KENNEDY AND LINDSAY FARMER

Mattia Pinto

CHLOË KENNEDY and LINDSAY FARMER (EDS), *Leading Works in Criminal Law*. Abingdon, Oxon: Routledge, 2024, 284 pp., ISBN 978-1-03204625-9, £135 (Hardback).

How do we capture the meaning of criminal law in a given legal culture, whether it is articulated in theory or embedded in practices? Foucault suggests that we need to examine texts and look for the unities that emerge within them. These unities constitute a discourse. Not all texts have equal influence: some exert a higher degree of power to shape meaning and practice because of their wider circulation or material base in authors or institutions with particular social authority. Therefore, to capture the discourse of criminal law in Anglophone countries, *Leading Works in Criminal Law* identifies, analyses, and critiques some of the leading works in criminal law that have contributed to that discourse. These works shape our understanding of criminal law and influence the way we think about it, even when we critique them. While the Anglophone criminal law discourse may appear commonsensical to those who have been socialised into it, some of its aspects cease to be obvious if viewed from a distance – whether it is a historical, geographical, or intellectual distance.

This edited volume by Kennedy and Farmer retraces the Anglophone criminal law discourse through 11 chapters, each focusing on a different leading text in the Anglophone criminal law tradition and written by academics, activists, and legal practitioners. The chapters are preceded by an introduction by Kennedy and Farmer that explains the methodological choices about selecting, analysing, and engaging with leading works. The chapters are followed by a conclusion that reflects on the influence that the leading works have had on the book editors as students and teachers of criminal law. Thus, already the structure of the book reveals the editors' (and the contributors') aim to 'extricate' themselves (p. 11) from the works they examine. This was crucial for critiquing the same discourse that, as scholars of Anglophone criminal law, they have been socialised into.

The editors' and contributors' effort to explore the contours of the Anglophone criminal law discourse through space and time is largely successful. The book covers jurisdictions from Australia to Canada, passing through India, Malawi, the UK, and the USA. The works analysed include treatises, penal codes, textbooks, a monograph, and an article. They span from Macaulay's *Indian Penal Code* (1837) to Horder's article 'Rethinking Non-Fatal Offences Against the Person' (1994). Along this journey, the readers are explicitly invited to consider the questions: how has modern Anglophone criminal law developed? How is this development related to the exercise of power in colonial and postcolonial contexts? How has it displaced or co-opted traditionally marginalised discourses such as feminism, queer theory, and abolitionism? The volume also implicitly invites the readers to pay attention to many more hidden and overlooked aspects of Anglophone criminal law.

The volume adopts a critical approach, not simply in the sense of exposing what is wrong with Anglophone criminal law but mostly in the Kantian sense of revealing the conditions of possibility of that discourse. This does not mean that the volume lacks a normative component or that it does not identify problematic practices within the criminal law that need to be addressed. It does so explicitly in chapters that highlight the racist and colonial (e.g., chapters by Garg, Evans, Chisala-Tempelhoff and Mandala), sexist and moralistic (e.g., chapters by Lacey and Loughnan), and ableist (e.g., chapter by Tolley) undertones that have characterised modern criminal law and its key texts for the last two centuries. However, the volume is mainly analytical and concerned with questioning what is generally taken for granted in the Anglophone criminal law discourse.

The book does so by searching for continuities that have marked the discourse since its emergence in the nineteenth century until today. Through different texts from various jurisdictions and periods, it shows the persistent use of criminal law to govern populations (domestically and across the world), to regulate sex, gender, and morality, and to construct subjects to either control or liberate. The selected leading works are diverse in their assumptions, themes, and perspectives on criminal law. However, they all depict a criminal law that constantly swings between progressive aspirations of social change and conservative tendencies of social order. This aspect is emphasised in all contributions: despite the numerous, continuous efforts to reform and even transform the criminal law, its repressive elements are never eliminated, and any attempt to change always carries the risk of more coercion and oppression.

The book also does not overlook the ruptures and the changes within the discourse. As the social and moral norms and relations have evolved in the last two centuries, so has the criminal law. And, while a prevalent mode of thinking about, developing, and teaching criminal law has taken hold, dissenting and alternative voices have also emerged to challenge the discourse (see, e.g., the chapters by Leader, Kennedy and Cowan on Lacey et al.'s *Reconstructing Criminal Law*, Norrie's *Crime, Reason and History* and Estrich's *Real Rape*, respectively). The significance of these works (and their varied impact) paradoxically reveals both the malleability of Anglophone criminal law (these critical works are now regarded as leading works within this tradition) and its immutability. While some criticisms have been adopted (e.g., more attention to gender and more critical and contextual teaching of criminal law), most of them have been left unfulfilled, as a testament that, if modern criminal law is not inevitable, it is not purely contingent either. The fact that, as Kennedy and Farmer acknowledge (p. 8), the authors of the 11 analysed works are mainly men and are all white is a clear indication of who still dominates the production and articulation of the discourse of criminal law.

Each contribution follows the same structure. It begins by introducing the selected work but also considers the biography of the author and how their experience affected the influence of the text. Then, it examines the socio-political and historical context, the significance of the text and its legacy, that is, its contribution to the overall Anglophone criminal law discourse. The voice of the contributors is not neutral and distant, but engaged and personal, often explicitly indicating how that work has shaped their thinking. The volume is organised in chronological but also somehow in thematic order.

The first three leading works analysed are two penal codes and a treatise, each having left a significant imprint as legislation across various British colonies. These instruments, enacted to cement colonial rule, have all outlived the empire, illustrating the criminal law's efficacy in disseminating, perpetuating, and replicating colonial power, knowledge, and identities within both colonial and post-colonial milieus. Macaulay's *Indian Penal Code* (written in 1837 and enacted in 1860) is a prime example. It was implemented

not only in the Indian subcontinent but also in numerous other ex-colonies throughout Asia and Africa. The code's dual objectives – to instil uniformity within a diverse legal framework and to 'civilise' colonial subjects – continue to resonate, as Garg articulates, in its 'unmistakable role in the oppression of disfranchised groups and dissidents' (p. 23). Similarly, Stephen's *Digest of Criminal Law* (1877) sought to restructure the penal system on ostensibly more equitable grounds, thereby enhancing its utility as an instrument of control and subjugation. This is why – Evans elucidates – Stephen's codification project failed in England but succeeded in the colonies. Modernising English law implied 'a sort of self-colonialism' (p. 52), that many Britons refused for themselves but were keen on imposing on 'uncivilised' and 'distant' others. The *Malawi Penal Code* (1929), which remains largely unaltered to this day, is another testament to this phenomenon. Chisala-Tempelhoff and Mandala's chapter reveals how this code embodies the persistent vestiges of colonialism and its ongoing influence on societal dynamics and, notably, on sexual relations in Malawi.

The deployment of criminal law to uphold a particular (often sexual) morality is not limited to (former) colonies, but it has also involved the metropole. Lacey, in her analysis of Devlin's *The Enforcement of Morals* (1965), revisits the Hart-Devlin debate and shows that, despite the prevailing view that Hart had the better of the argument, it was Devlin's moralistic stance on criminal law that had the lasting impact. Farmer's analysis of Fletcher's *Rethinking Criminal Law* (1978) further underscores that moralism has been a longstanding feature of Anglophone criminal law theory and scholarship. Fletcher's moralism, with its universalistic pretensions, stands in contrast to Devlin's more populist and communitarian model. However, as Farmer reveals, this claimed universalism conceals a historically specific and geographically circumscribed legal morality – the same Anglo-American (or German) morality disseminated globally through imperial and colonial endeavours. Loughnan's chapter on Howard's *Australian Criminal Law* (1965) textbook illustrates a similar adoption of what is presumed to be a universalistic and coherent set of principles inherent in common law, which in fact hides unexamined racist and sexual biases.

While Howard's textbook exemplifies traditional teaching methods in Anglophone criminal law, Lacey et al.'s *Reconstructing Criminal Law* (1990) and Norrie's *Crime, Reason and History* (1993) – analysed by Leader and Kennedy, respectively – serve as direct, explicit counterpoints. These texts prompt students to reconsider the study and learning of criminal law, acknowledging its historical contingency, and contextualising its application. However, as Kennedy observes in her analysis of Norrie's work, they often remain entangled with the legal liberalism/moralism they aim to critique, falling short of establishing a distinctly emancipatory criminal law discourse. Estrich's *Real Rape* (1987) makes a more concerted effort in this direction. Cowan highlights in her chapter that Estrich's book not only critiques the penal system's treatment of women rape victims but also advances a feminist discourse aimed at transforming criminal law to become part of the solution. More than three decades on, it appears that these efforts have not succeeded. Feminist engagement with the penal system has not significantly reduced its punitiveness or bias, which disproportionately impacts racial minorities and poorer social classes.

What becomes of the Anglophone criminal law discourse following its critique and the unsuccessful attempts at transformation? Ashworth's *Principles of Criminal Law* (1991) and Horder's 'Rethinking Non-Fatal Offences Against the Person' (1994) suggest minimal change and a return to legal moralism. Legal moralism, as Cornford discusses in relation to Ashworth's text, may adhere to rational principles and advocate for minimal criminalisation. Conversely, as Tolley illustrates in her chapter on Horder's article, it can also be grounded in communitarian values and what is presumed to be the 'best moral conception' of

wrongdoing in contemporary society (p. 243, referencing Horder's article, p. 335). In either case, nearly two centuries after Macaulay's *Indian Penal Code*, the Anglophone criminal law discourse continues to be anchored in a specific, contingent morality. Despite being a product of dominant socio-cultural frameworks, this morality is often portrayed as universal and necessary.

The Anglophone criminal law discourse, as presented in *Leading Works in Criminal Law*, reveals a consistency in tone despite numerous efforts at reform, critique, and change. This raises the question: does the apparent immutability at its core stem from the peculiarities of Anglophone legal systems or is it inherent to the nature of criminal law itself, with its elements of coercion, criminalisation, and punishment? Reflecting on this volume from the standpoint of a scholar versed first in Italian and then in English criminal law, one wonders how a similar collection might differ if approached from a Continental legal perspective. It seems likely that, while the superficial aspects (the contingent elements) would vary, the essence (the more substantive and material components) would remain the same. Such a comparative work remains to be composed. For now, students, researchers, professionals, and activists have much to gain from this collection. The critical groundwork laid by this volume paves the way for further insightful enquiries into the discourse of criminal law, both within and beyond the Anglophone frameworks.