CRIME AND MORALITY

The Significance of Criminal Justice in Post-modern Culture

Preface by Michael Tonry

Hans Boutellier

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by

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PREFACE

By Michael Tonry

This ingenious book brings greater clarity to understanding of conundras of crime, criminal justice, and crime control policy in Western societies at the beginning of the third millenium. Why has public anxiety about crime not declined in the late 1990s in parallel to declines in crime rates? Why do so many people believe that punishments are generally too soft when many of the same people would prefer punishments in individual cases that are less harsh than are commonly imposed? Why does populist punitivism play so prominent and growing a role in politics in many places? Why most conspicuously in the Netherlands and the United States but also in other Western countries have imprisonment rates risen rapidly over the past quarter century even when crime rates were falling, and despite insistence by most criminologists and criminal justice officials that harsher penalties have few or no crime-reducing effects?

Insight into all these questions can be gained, J.C.J. Boutellier instructs, if we recognize that, in our pluralist, post-modernist time, criminality is commonly viewed as a moral problem and responses to criminality have come to occupy a central position as enunciators of common values. In an inchoate or immanent way, "the public" understands this, even when the agents and agencies of the state do not. Thus modern technocratic approaches to criminal justice, that attempt to rationalize, regularize, and de-emotionalize crime and responses to it, have been moving in the opposite direction from public sentiments and needs, which want to emphasize the immoral quality of crime and to draw moral lessons from it.

In admirably multidisciplinary fashion, Boutellier draws on the ideas and writings of philosophers, post-modernist social theorists, classical sociologists, and criminologists to show that crime and criminal justice perform somewhat different functions in our than in other times. In Durkheim's time, it may have made some sense to imagine a gradually evolving collective conscience, and to conceptualize criminal law primarily as a secondary socializing institution that expressed and reinforced the mor-

al values of particular times. In our pluralistic and polyglot time, it is much more difficult to imagine a single overriding, widely shared set of cultural values for a whole society, and in our self-styled post-modernist era, it is impossible credibly to argue for the existence of transcendent truth or a common cosmology. Many writers on post-modernism, having reached this point, then wallow in nihilism or despair or parochial politics. Boutellier, instead, argues that there are broadly-shared common values that abhor personally harmful actions – cruelty, undeserved suffering, humiliation, harm infliction, exclusion – and that crime and criminal justice provide a "basal negative point of reference for a pluralistic morality."

To express this new function, Boutellier creates the concept of "victimalization of morality". This is the process by which actions or harms come to be seen as metaphors about wrongful conduct. Victimalization changes over time, as did the normative standards of Durkheim's collective conscience. Boutellier, for example, shows how child sexual abuse received increasing penal attention in the 1980s and 1990s, and prostitution less, as widely shared values evolved. Victimalization is not the same as victimization. Children have always suffered from the victimization of sexual abuse but only in recent decades has that suffering become a focus of popular and state attentions, and when it did, that showed that the criminal law had become a mechanism for manifesting shared values that appeals to religion or ideology or other higher truths no longer could.

All social theory is provisional and contingent, and subject to refutation, and so, of course, is Boutellier's. It is nonetheless an important addition to contemporary efforts to understand crime and crime policy. Analysts of criminal law and criminal justice have often explored the overlaps and discordances between law and morality and have long pondered the law's and punishment's moral-educative effects. Boutellier does not quarrel with such analyses but moves a step further to hypothesize that in our time crime and criminal justice have moved from ancillary and peripheral roles in the enunciation and reinforcement of moral values to the center. If he is right, and to this reader his hypothesis is plausible and his argumentation strong, it may explain why crime and criminal justice refuse to stay within the rational bureaucratic bounds that governments want to build for them, and provide beginning to answers to the other questions that began this foreword. This is an important and creative book that deserves a wide audience.

FOREWORD TO THE TRANSLATION

I am extremely pleased that this book that I put so much of myself into is now being published in English. It is enabling me to keep a promise I made to various of my colleagues abroad after some of the papers I presented and the English summary of the book. Although the Dutch version was published as far back as 1993, the themes the book addresses are more relevant than ever. The issue of the morality of today's culture is mainly of such major importance because of the problems involving social safety and the role of the criminal justice system. The original Dutch version has been altered though in two significant ways.

A chapter about the relation between religion and crime has been left out because it was not really called for in connection with the central points of the book. The chapter dealt with the frequently formulated voiced notion that the less people go to church, the more crime there is. Based on empirical research in the field, I showed that plausible though this notion might be, it still has only very limited relevance because in essence it stands in the way of thinking about issues involving today's morality. After all, the secularization of the public realm would seem to be an irreversible process. I also deleted a section about the philosophy of law that dealt with the relation between legal protection and instrumental criminal justice policy. The rather abstract treatment of this theme was too much of a detour on the way to my conclusions.

Let me briefly summarize the most important points I make in this book. In the field of criminology, crime is generally conceived of as a structural social problem, for example in terms of social deprivation, or as a management problem in terms of social control. In my view, crime should however be conceived of more than ever as a moral problem. A criminal event is a normative occurrence and whether rightly so or not, it is objectified in criminal law. This means that criminal justice policy should in the first place be comprehended as a normative practice, as a matter of justice and justification.

From a normative perspective of this kind, it is clear why the victim has come to play a central role in criminal legislation, criminal justice

policy, and the administration of criminal law. Victimhood constitutes new legitimation grounds for the criminal law response on the part of the authorities to criminal conduct. However, this trend in the field of criminal justice has not developed in isolation. Inspired by the American philosopher Richard Rorty, in this book I defend the idea that it is typical of the morality of our post-modern society. "Are you suffering?" has become the dominant question in the normative discourse that emerged after the disappearance of the ideologically founded ethics of obligation.

In the Netherlands, this analysis of the post-modern morality in relation to crime has led to no end of discussion. One reviewer called the book "illuminating" because it provides explanations for any number of developments. It has also been criticized for legitimizing a "culture of victimhood". I would like to respond to the critics of what has been called "victimalism" by noting that what I am mainly interested in is a diagnosis of Western culture and the role of criminal justice within it. One aim of the book is to provide points of departure for further normative reflection. In a fragmented society, the need for social safety provides an opportunity to develop new motivations for solidarity and civilization without lapsing into culture criticism that is pessimistic and conservative.

In the past few years, my activities have mainly been to this end. As policy advisor at the Ministry of Justice, I have contributed towards the development of community justice and community crime prevention in the Netherlands (Boutellier 1996, 1997). I have also been working part-time at the Free University in Amsterdam, where much of my attention is focused upon a theoretical elaboration of the relation between social safety and morality. I am grateful that Michael Tonry was willing to add an "American" preface to this book. I would also like to thank Sheila Gogol for translating the book into English, Marita Kok for making the lay-out, and Hans Meiboom for designing the cover of the book.

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CHAPTER 1

MORALITY, CRIMINAL JUSTICE AND CRIMINAL EVENTS

CRIMINOLOGY AND EXPERIENCE

The word crime inevitably brings to mind images of violent offenders targeting defenceless victims. The emotional connotation of crime is more indicative of mugging, bank robberies, rape or murder than tax fraud or illegally dumping chemical waste. So it is no wonder the field of criminology, the social science that addresses conduct relevant to criminal law, is largely focused on differentiating this intuitive significance and putting it into the proper perspective. The results of a great deal of criminological research might be summarized as follows: Criminality as such does not exist. The picture of a violent offender and a suffering victim has been replaced in criminology by predominantly statistical insight into the nature and severity of offences, types of perpetrators, circumstances, underlying factors and the like. The concept of criminality has been stripped as it were of its stereotypical associations centred around the cruelty of man to his fellow man.

Despite all these criminological efforts, the solid, physical picture of criminality has survived. Crime novels and items in the media effectively allude time after time to this emotional significance, a meaning criminologists have often looked down their nose at, dismissing it as sensational or irrational.[1] In the seventies it was even common practice to advise concerned citizens to switch to a different newspaper to get a more realistic impression of the danger implied by criminality. Although a realistic assessment of the criminality problem might well reduce one's sense of

[1] See for a survey of research on the relation between the media and criminality, Schneider (1988). He concludes that "Above all it is necessary that a larger public and especially the mass media are being acquainted with the empirical research outcomes of criminology in an understandable and modern fashion" (p. 52). Oddly enough, as far as I know no major studies have been conducted on the concept of crime in popular culture. There has however traditionally been a great deal of interest in crime in serious literature.

being unsafe, the persistence of the picture presented of criminality would not seem to be totally without meaning.

The intuitive significance of criminality obviously is not about to be eclipsed by a static overview or social science discourse on what has caused it. The emotional associations that are linked to a criminal event can not be easily rationalized. This holds true of the concrete victim of the crime, and even more so of the audience, the onlookers. Criminality has to do with crossing some emotional border that, for whatever reason, has been formalized in the penal code. Criminality has to do with conduct that is deemed unfit and, perhaps for precisely this reason, has a special attraction for the perpetrator (Katz, 1988). In general, though, no one is eager to be the victim.

A criminal event unfolds beyond the border of what is considered admissible conduct, at least according to the penal code, and can thus be conceived of first and foremost as *an event that is indicative of a norm*. Regardless of whether or not this norm is right, just, beneficial or desirable, it expresses disapproval that has been objectified by law. In other words, criminality has a moral significance. The reprehensible connotation attached to the concept of criminality represents this moral significance.[2] Criminality pertains to conduct that is disapproved of and undesirable, evil if you will, and it happens to be easier to picture a violent person attacking a defenceless victim than a businessmen being dishonest as he fills in his tax return.

It is not only in the popular consciousness that the moral significance of a criminal event is kept alive, but also in the courtroom. In counsel's address to the court, the statement by the defendant, the testimony of the victim, the closing speech by the public prosecutor and the sentence of the judge, the moral significance of the offence is placed side by side with the punishability according to the law. Legally speaking, it is primarily the punishability of the act that is relevant. Every sentence however always implies a moral judgement about the act (see e.g. Remmelink, 1989). The trial is then a matter of guilt and expiation (Groenhuijsen, 1989).

Thus the moral significance of an offence mainly manifests itself in the popular emotions evoked by it and in the courtroom reaction. In a

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[2] Although the semantics of criminality in the popular consciousness has not been studied, a great deal of empirical research has been conducted on notions held by the public about crime and punishment.

social science approach to criminality, however, this significance usually fades into the background. The criminological rationalization of criminality is detached from any moral judgment of it. Efforts are made to ascertain the causes or examine the ways to prevent it. The emotional reaction to criminal events is either assumed or dismissed as being irrelevant to the criminological analysis. This means it is concealed within meaning systems where there is no room for feelings of abhorrence, fear, disapproval or possibly fascination, admiration or understanding. Ever since the sixties, speaking more or less schematically, two dominant forms of this kind of criminological rationalization have been distinguished. The first is focused on keeping criminality under control, the second on the socio-political analysis of criminality. With the concepts of control and social deprivation, Hirschi (1969) is refering to this distinction.

Control-oriented criminology describes criminal events in such a way that they can be addressed in policies. At the moment, policies address such concepts as social control and physical opportunity more than for example personality or resocialization. Policy-based criminology preferably objectifies criminal events into acts committed by rationally calculating individuals whose behaviour can be preventively brought under control. The moral significance of an offence simply coincides with what the penal code says about it. (The decay of cultural norms, a term now fashionable in policy thinking, will be dealt with later in the book.)

In the more critical approach, first and foremost a structural socio-political significance is attributed to criminal events. In this case, what we are dealing with are descriptions in terms of socially disadvantaged situations, disciplining processes and the power of the state. This form of criminological rationalization perceives criminality as a symptom of socio-political and cultural developments that take place outside the parties directly involved, i.e. the perpetrator and the victim. The essence of the criminality problem is often localized at some other level than the judicial one. In this approach, the moral significance of criminality is not linked to the penal code, but to the perception of social justice in society.

Without going into these two criminological approaches in detail (see Chapter 2), it should be noted that they do not take into consideration the moral significance of criminality that is stipulated above. In control-oriented criminology, it is simply assumed, but not thematized. The moral level of an event is assessed from the existing legislation, and any transgression is preferably defined by using manipulatable variables such as situational factors. In society-oriented criminology, moral significance is

included as a politically relevant fact in a macro-analysis of a higher order. The penal code and any violation of it are then historically or socio-economically analysable areas of knowledge. In the former case, criminality constitutes a technical problem, in the latter a political one.

In this book, criminality is viewed as a moral problem and the moral significance of criminality occupies a central position. A criminal event is viewed as an incident whereby a person commits an act that has moral connotations because it is disapproved of, regardless of whether this is rightly so. So an event not only reveals something about the morality of the perpetrator, but also about the morality of the culture that disapproves of the act in question. In other words, a criminal act is *relevant to the morality of a society*. And the evaluation of criminality reveals something about the society that generates this mode of thinking. Not only does every society get the criminality it deserves, to an even larger extent it gets the criminology it deserves. The way criminality is viewed nowadays can grant us some insight into the morality of our times.

CRIMINALITY AND THE NORM

In recent years, there has been growing concern in any number of fields about the present state of moral affairs. There is ubiquitous doubt about the feasibility of attributing some purpose to society and the individual in a pluralistic, consumer-oriented welfare state. With increasing frequency, a number of social problems are claimed to be due to the lack of moral consensus. In this connection, obligations on the part of the citizen have once again been brought up in the debate on social security, and problems involving the purpose of things have been noted in the field of mental health care. More generally speaking, good citizenship in the sense of living a responsible life in an honourable community has been the focus of a great deal of attention.

The criminality problem is also increasingly viewed as a normative problem or as an issue linked to good citizenship (see e.g. Cliteur, Van Gennip et al., 1991). Moreover, the criminality question has come to serve as a spearhead in the debate on the morality of modern society. Norm degradation is analysed, as are individualization, the lack of a sense of civic duty on the part of the citizen, and such measures as greater coercion, control and discipline. All these issues come together in the debate on communitarianism.

In this connection, the following argument is widely used. Due to secularization, the social and moral frameworks within which people act have faded. The corporative organization of society has eroded. Schools, churches, clubs, social work agencies, neighbourhoods and families no longer serve the normative function they were traditionally endowed with. In the sixties and seventies, relations of authority disintegrated and tolerance toward deviant behaviour changed into not caring, a dearth of social control, and an excessive promotion of individual interests. As a panacea, it was proposed that the societal middle field be reinforced and the sense of civic duty towards the community be somehow revived. This moral approach to criminality advocates a kind of *normative correction* of the sixties and seventies.

For two reasons, I find this line of reasoning about norm degradation as a result of secularization to be a problematic one. Firstly, it isolates a certain phenomenon which is to be viewed as a historical process. In my opinion, the mass secularization of the sixties and seventies is closely linked to the ideals of the liberal state as they have developed ever since the Enlightenment. For centuries, faith in individual freedom, the rational regulation of society, and technological progress have shaped the development of society. This canon of bourgeois society has been so successful it is universally underscored by the growing prosperity in the West. Instead of describing the seventies as a period of rampant tolerance, I would tend to speak of the democratization of the points of departure of the liberal constitutional state.[3]

My second objection to an analysis of this kind is that it does not do justice to the role of the state bureaucracy itself, counseled by the social sciences, in this development. The bureaucratic guidance of society seems to have become a process that is increasingly inwardly directed, and one in which the criteria of efficiency and effectiveness are disconnected from the values in whose service they are supposed to be operating (see e.g. Day and Klein, 1987). In addition to an expanding regulatory system, which in itself also implies a growing number of violations, one might also note the universally observed gap between the government and the people. Schuyt (1990) links the mushrooming of criminality in

[3] Technological and socio-geographic changes, which can be summed up as the pill, the car, the tv and the city, constitute the conditions under which the masses also became secularized and began to behave like modern, autonomous and automobile citizens. These material conditions are presumed in this book, but are not analysed as such.

the first half of the eighties to the cynical no-nonsense policy initiated in that same decade.

The definition of criminality adhered to in this book as a moral problem and not a technical or political one is in keeping with the normative evaluation of criminality that has become widespread in recent years. However it has far more fundamental and complex consequences than a definition in terms of rampant tolerance suggests. Morally speaking, crime and criminal justice have completely different meanings in our post-modern culture.

MORALITY AND CULTURE

The inquiry into the morality of society has played an important role in the rise of social theory. In their work, nineteenth and early twentieth-century sociologists thematize the discrepancy between morally evaluating societal issues and rationally controlling them. In particular, there is the question of whether a practical morality can be established without the backing of religious faith. It is interesting to note how Durkheim addresses this question. "In the world of experience, I know (...) only one subject that boasts of a richer and more complex reality than our own, namely the collectivity," Durkheim notes in *Détermination du fait moral*. "I am mistaken," he adds in the same breath, "there is one other that might play the same role, the divinity. One must choose between God and Society."[4] It is neither the individual nor God but the collectivity that Durkheim feels is the source of morality.

Durkheim distinguishes three elements in what he refers to as the moral reality consisting of the collectivity. Firstly, it has moral rules that are binding. In other words, they are irrevocably linked to sanctions, and this is what distinguishes them from other rules. But this binding nature of morality is not separate from the rest. In moral reality, aims are proposed that we feel are desirable. In other words, moral rules are also rules that are wanted. "Never has any act been performed purely on the basis of a sense of duty; it was always necessary for it to somehow seem right,"

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[4] Ever since the Enlightenment, this has also been a central theme in philosophy starting with Kant (1785), who feels a secular moral code might be feasible for the elite, although the masses need religious disciplining. His categorical imperative is: "Behave in such a way that you simultaneously take humanity, you yourself, and every other person to be an end and not only a means".

Durkheim writes. Lastly, morality is linked to the sacred. "For centuries, morality and religion have been closely linked and even indistinguishable; one can not help but note that this close link has continued to survive in human consciousness to this very day. So it is clear that moral life will never be able to rid itself of all the features it has in common with religious life."

As regards the foundation of morality, Durkheim copies the basic principles of religion. He does not however localize morality in the religious experience, but in the perception of communality, the collective consciousness. In his view, society is a transcendent aim and a moral authority. "We are it, we love it, we want it." Just as theology comprehends love and harmony among men via their participation in the divine, Durkheim's sociology comprehends human solidarity via participation in the collective. But in Durkheim's view, the collectivity is not a static aim. "History has shown that except for the abnormal cases, every society largely has the morality it needs." In Europe, social history led to a strong emphasis on the individual. "Society has turned man into a God, whose servant he then became." He analyses this process in *De la division du travail social* (1893) as the transition from a mechanical to an organic form of solidarity.

There is a certain extent of ambivalence in Durkheim's work as regards the assessment of this development. A society can not function without a religiously inspired collective consciousness, but he describes a declining collective and a growing individual consciousness. Morality is increasingly becoming an individual matter, but for Durkheim it is by definition a collective given. The role Durkheim attributes to science is important in this disharmony between individualization and morality. The task of studying, evaluating and if necessary correcting the specific morality of a society is attributed to science in general and sociology in particular. Science makes it possible as it were to save the sacred collectivity.[5] Durkheim takes this line of reasoning one step further and attributes an important role to education.

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[5] In *The Elementary Forms of the Religious Life* (1915, English translation 1965), Durkheim explains the birth and the function of religion on the basis of studies on Aboriginals in Australia. In view of his idea that religion is synonymous with the social aspect, it is understandable that he does not see the origin of religion as a transcendental being, but as social beliefs and rituals. He views the totem – "as a moral power" – as the primal form of every religious act. Durkheim works from the assumption that religion will play less and less of a role in the designing of modern society.