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CITIZENSHIP AND CRIMINALIZATION IN CONTEMPORARY PERSPECTIVE: INTRODUCTION

*Ely Aharonson and Peter Ramsay**

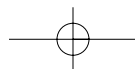
The substantive criminal law supplies the terms on which individuals are called to account for wrongdoing that offends against the collective interest and morality of the political community. The practices through which criminal law is enforced bring to bear the most coercive powers that governments in liberal democracies are entitled to exert over their citizens. It is therefore uncontroversial to say that, to some extent at least, the rights and duties of citizens are determined by the form and content of the substantive and procedural criminal law. But does the relationship work the other way around? Does citizenship provide a useful normative or explanatory framework for understanding the development or the limits of the criminal law? This was the theme of a colloquium where the papers in this special issue were first presented.¹ More specifically the meeting set out to address the relationship between citizenship and criminalization in the context of contemporary developments, at a political moment when there is both a pronounced political emphasis on new ideas of citizenship and a ready willingness on the part of legislatures to enact new criminal laws, and to transform long-standing criminal and penal procedures.

The ruling idea of citizenship has been transformed dramatically over the past three decades. The postwar emphasis on extending citizens' rights to welfare as a primary path of political inclusion has been dismantled.

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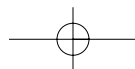
1. Citizenship and Criminalisation in Contemporary Perspective, Modern Law Review Seminar, London School of Economics, December 5–6, 2008.

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In its place, there emerged a more complex set of interlocking ideas and institutional arrangements through which citizenship is defined and enforced in contemporary liberal democracies. Among other things, this new model of citizenship is no longer premised on a belief in the power of redistributive welfare policies to ameliorate class inequalities and to foster social solidarity. This shift has both foreclosed and opened up new possibilities for defining the scope and range of citizens' rights and duties. Although the decline of Keynesian-style welfarism has constrained the development of social rights, it has also been associated with the proliferation of new social movements mobilizing around other mechanisms of exclusion from citizenship rights. The assumption that the nation-state can and ought to serve as the exclusive guarantor of citizenship rights has also been called into question. The essays in this collection explore the implications of these structural transformations with regard to the form, content, and the political and social functions played by criminalization in contemporary liberal democracies.

In particular, recent structural shifts both in discourses of citizenship and in practices of criminalization have been fostered by two interrelated driving forces, namely, the rise of neoliberalism as a dominant framework of public policy and the impact of globalization on contemporary culture and politics. Neoliberalism has fostered the idea of the citizen as a consumer of public services on the one hand and as an active participant in the life of the community on the other. And criminal justice has been officially promoted in these terms, with the citizen-as-potential-victim as its consumer, on the one hand, and its "responsibilized" crime-preventing active participant on the other. A paradox of this "neoliberal" approach to the governance of (and through) crime is its combination of a political commitment to rolling back the state with unprecedented reliance on criminalization as a policy means. Formal criminal legislation has expanded in recent decades, and citizens are also increasingly obliged to manage crime risks throughout their daily activity. The essays in this collection consider the implications of the internal contradictions within the neoliberal vision of the role of criminalization as a mechanism of social ordering. How do the ideas of citizenship encouraged in the current efforts at civic renewal interact with the expanding reach of criminal regulation, the blurring boundaries between criminal and noncriminal forms of regulation, and the diffusion of risk-management technologies and rationalities throughout civil society?

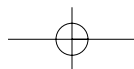


Contemporary conceptions of citizenship have also been challenged by the processes of “globalization,” broadly defined as technological and political developments that facilitate the mobility of people, capital, commodities and ideas across national borders. Many of these processes have profound implications for the form and functions of criminalization policies. The codification of international human rights norms and the formation of supranational political and legal institutions not only created new bodies of substantive laws and jurisdictions, but also altered the way in which a state defines and enforces the criminal law within its own territory. The erosion of traditional conceptions of sovereignty throughout the formation of the post-Westphalian international order has called into question both the descriptive accuracy and the normative legitimacy of nation-states’ assertions of their monopoly as definers and guarantors of citizens’ rights. In this context, the essays in this collection consider the role of criminal law in facilitating or hindering the mobilization of political claims, collective identities, and solidarities, above and below the state.

The collection is divided into four sections. The papers in the first section discuss the potential and limits of the concept of citizenship in contributing to our understanding of the sociopolitical and normative aspects of criminal law. The papers in the second section look at how the rise of neoliberalism has transformed the regulatory and symbolic functions played by criminalization within the political landscape of liberal democracies. The papers in the third section explore how recent developments in discourses of citizenship (as well as the underlying epistemological and normative categories that underpin them) affect the constitutive elements of criminal law doctrine. Finally, the papers in the fourth section probe how criminalization serves to redraw the boundaries of citizenship in contemporary political life. In the remainder of this introduction, we will briefly summarize the main themes discussed by the papers and reflect on some of their broader implications for the normative and sociohistorical analysis of criminal law.

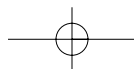
CITIZENSHIP AS AN ANALYTIC TOOL IN THE STUDY OF CRIMINALIZATION

In the opening article of this collection, Markus Dubber examines the potential and limits of the concept of citizenship as an explanatory and analytic tool in the study of criminal law. At the heart of Dubber’s account



lies the observation that the concept of citizenship is comprised of both exclusionary and inclusionary components. Historically, even as the idea of citizenship, throughout the development of Western political tradition, has served to justify extending the right to self-government upon new categories of persons, such extensions were usually conceived to be consistent with (and, at times, as requiring) the denial of the right of self-government of other groups. Thus, Dubber argues, the liberal values of equality, liberty, and democracy do not derive from the concept of citizenship but rather from the idea of personhood (understood as the capacity for autonomy). Although the concept of citizenship might accommodate liberal notions of personhood, any attempt to use this concept as a foundation of normative thinking about penal law is inescapably prone to delimit the full recognition of the personhood of offenders and victims because it is bounded by the exclusionary dimensions inherent within this concept. Thus, Dubber concludes, recent attempts to think about the positive and normative dimensions of criminal law through the lens of citizenship are likely to lack significant explanatory power and to rationalize illiberal interferences with individuals' rights by the criminal justice system.

Whereas Dubber's article considered the potential contribution of the concept of citizenship to normative and descriptive analyses of positive criminal law, the second article in this volume, written by Mariana Valverde, focuses on the contribution of the sociological study of practices of citizenship to our understanding of the social and political functions of criminalization. Valverde sets out to shift the focus from the conventional study of citizenship as a legal status and to concentrate instead on sociological analysis of citizenship as a discursive means for constructing political identities. This framework for analyzing the connections between citizenship and criminalization opens up new avenues for research. For example, it makes clear that criminalization plays a constitutive role in shaping forms of citizenship not only via formal mechanisms of restricting liberty and attendant political rights but also, and more subtly, through constructing a sense of collective identity among members of the "insider group" (the body of citizens who are authorized to represent the values and interests of the collective). In an era in which norms of political inclusion and exclusion are increasingly shaped by practices and technologies of governance which operate—simultaneously—at the municipal, national, and supranational levels, this framework is also useful to moving beyond the conventional state-centered approach to the study of criminalization.

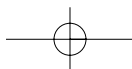


THE IMPACT OF NEOLIBERALISM ON THE RELATIONSHIP BETWEEN CRIMINALIZATION AND CITIZENSHIP

The essays in the second part of this collection examine the impact of neoliberalism on the social and political functioning of criminalization in contemporary liberal democracies. In the opening article of this section, Robert Reiner looks at how the rise and fall of the postwar model of citizenship has shaped patterns of crime and criminalization in Britain from the eighteenth century to the present. Reiner develops his account against the backdrop of the historical narrative delineated by the British sociologist T.H. Marshall in his 1949 *Citizenship and Social Class*, a work that continues to be regarded as the most influential elaboration of the normative principles and historical trajectory of the social-democratic model of citizenship. Reiner argues that the core of the Marshallian perspective—namely, the observation that the market forces of modern capitalism are inevitably in conflict with the ideals of democratization and equal political membership, and the claim that these ideals can be protected through a model of citizenship encompassing not only civil and political rights but also social rights—continues to provide a compelling blueprint for the design of a more humane and effective criminal justice policy today. However, the feasibility of restoring this model of citizenship is dependent on whether the political conditions created by the recent economic crisis will be conducive to the revitalization of the political ideals and policy creeds that were discredited during the entrenchment of neoliberalism. This question remains open at the present.

In the following article, Peter Ramsay discusses the political underpinnings of the problem of overcriminalization in contemporary liberal democracies and presents a critique of liberal theories of criminalization in the form of Douglas Husak's recent *Overcriminalization*.² Ramsay argues that contemporary patterns of overcriminalization derive from the tendency to frame criminal lawmaking in terms of protecting the vulnerable autonomy of citizens imagined as potential crime victims. Once the representative citizen is regarded as a potential crime victim, then the management of crime risks is placed at the core of the relation between the

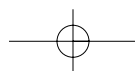
2. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008).



individual and the government, and the political system is set up to expand the scope and range of criminal laws consistently. Although the argument focuses on the limitations of Husak's theory, its implications address deeper problems related to the explanatory and critical power of liberal criminal theory in the current political climate.

In the following article, Ely Aharonson explores the historical underpinnings and political consequences of the recent proliferation of "pro-minority" criminalization (defined as criminal legislation specifically aimed at protecting women and minority groups). He argues that the driving forces which shaped the character of contemporary forms of "pro-minority" criminalization were provided by two large-scale historical trends: first, the shift from the politics of distribution to the politics of recognition as the dominant framework of egalitarian reform of citizenship rights; second, the increasing salience of crime as a platform for political mobilization. The article emphasizes that the success of criminalization reforms in protecting minority groups is dependent on their being embedded within larger frameworks of public policy capable of alleviating the interlocking socioeconomic and cultural causes of these forms of offending. Within this context, it demonstrates that the dominance of neoliberalism over the last three decades has constrained the development of such policy frameworks at the same time that it has facilitated the creation of new pro-minority offenses. It is argued that the current crisis of neoliberalism opens new possibilities for integrating these criminalization policies with larger projects of social justice.

The final essay in this section adds a comparative perspective to the analysis of the impact of neoliberalism on the relation between criminalization and citizenship. Although the policy reforms associated with neoliberalism (most notably, deregulation, liberalization of inward foreign investments, and firmer constitutional protections of property rights) were adopted across the globe beginning in the 1980s, they were institutionalized differently in different regional and national settings. In his contribution to this volume, Manuel Iturralde shows how the characteristics of the legal systems and political cultures of Latin American states (rooted in the legacies of colonialism and military dictatorships) had a distinct influence on the way in which neoliberal reforms were adopted and, in turn, on the role played by criminalization policies (particularly antidrug laws) in tackling and legitimizing the socioeconomic consequences that these reforms have brought about. This case study reveals important implications

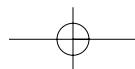


for our understanding of how the interplay between global and regional forces shape the political functions played by criminalization policies.

CITIZENSHIP AND CRIMINAL LAW DOCTRINE IN CONTEMPORARY DEMOCRACIES

The next two essays look at how current shifts in the underlying schemas of criminal law thinking reflect broader political and social trends that have transformed the meaning of citizenship. In the first of these essays, Lindsay Farmer argues that a cluster of recent developments in criminal law (including the creation of transnational and international offenses and tribunals, the consistent expansion of the scope of extraterritorial jurisdictions, and the proliferation of preventive offenses) reflect broader shifts in how we have come to think of the categories of time and space. The increasing mobility of people, goods, capital, and technology creates opportunities for new forms of offending. At the same time, it transforms the epistemological lens through which we define central concepts of criminal law (including causation, harm, and responsibility). To a considerable extent, Farmer argues, criminal law theory has either ignored these developments altogether or struggled to fit them within existing frameworks of analysis based on the spatial unit of the nation-state and the temporal logic that informs modern techniques of social control. By developing an account of the temporal and spatial logic underpinning the attribution of responsibility in criminal law, and by looking at how, in turn, criminal law serves to regulate social conceptions of time and space (material and symbolic), the essay offers new directions for theoretical and historical analysis of how citizenship is constructed through these acts of legal judgment and regulation.

Alan Norrie examines the relationship between the development of criminal law doctrine and the shift from the postwar democratic settlement to the more authoritarian relationship between the state and the ordinary citizen of the present. Setting out from controversial lethal shootings of innocents by British police officers, who were subsequently protected from prosecution by their claims that they mistakenly believed they were acting in self-defense, Norrie examines how a chiasmus at the heart of the English law of mistaken self-defense has allowed a subjectivist legal doctrine that was originally intended to cement an inclusive citizenship

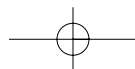


to evolve into one that offers state agents considerable leeway in their use of lethal force. Against legal formalism, Norrie argues that upholding the more liberal values of an earlier period will require open recognition of the substantive moral and political judgments about relations between state and citizen that underlie the legal doctrine and its development.

THE ROLE OF CRIMINALIZATION IN REMARKING THE BOUNDARIES OF CITIZENSHIP

The essays in the fourth section of this collection discuss the way in which criminalization has been deployed for remarking the boundaries of citizenship in the face of current political challenges (associated, most notably, with globalization, terrorism, and transnational crime). Lucia Zedner's contribution examines the intersections between criminalization and immigration control in contemporary liberal democracies. As Zedner shows, in addition to the growing reliance on crime control apparatuses within larger frameworks of immigration policy, we can also identify a corollary trend in which policing and penal measures that were originally rationalized in the name of tackling illegal immigration are gradually being established as standard instruments for regulating marginalized populations within the citizenry. The institutionalization of these measures might urge us to consider whether the conventional conceptualization of citizenship (grounded in the idea of abstract membership in a political community represented by the legislative and executive organs of a sovereign nation-state) can still play a useful role in protecting individual rights in contemporary political life. At the same time, it is questionable whether an alternative model of citizenship (understood as a universal legal status, carrying with it a bundle of rights that cut across territorial borders) can be effectively enforced by supranational institutions. Although there are no easy answers to these troubling questions, it is clear that the humanitarian excesses of the policing measures currently used to govern the conduct of noncitizens and "irregular citizens" provide good reasons to insist that any governmental measures that lead to penal consequences (whether in the context of illegal immigration or in other policy contexts) will be pursued through criminal channels with proper procedural protections.

In the following article, Shai Lavi explores another context in which penal and administrative measures interact while remarking the boundaries



of citizenship. His article looks at the regimes used by three common law systems (United Kingdom, United States of America, and Israel) for the revocation of citizenship. His discussion shows that the disparities among these models reflect broader differences in how each legal system defines the meaning of citizenship and the type of social goods it aims to guarantee (respectively, the right to security, government by consent, and membership in an ethnonational bond). Lavi criticizes the flaws of these three models and delineates an alternative normative framework for justifying the conditions under which the revocation of citizenship might be held legitimate. This model is based on the idea that members of a political community are bounded by their commitment to respecting the right to self-government. Under this model, citizenship might be revoked only in response to criminal acts constituting a violation of this foundational duty, and it has to be executed as a legal punishment rather than an administrative measure. The importance of reconceptualizing the revocation of citizenship as a penal (rather than administrative) measure lies both in subjecting the exercise of this measure to the more restrictive procedural requirement that governs the execution of the state's power to punish (including due process and publicity) and in utilizing the expressive quality of criminal law for conveying the constitutive role of the commitment to self-government as the foundational aspect of political life.

In the concluding article of this collection, Alejandro Chehtman considers the significance of the concept of citizenship for elucidating one of the most intricate questions arising from the current proliferation of extraterritorial criminal jurisdictions: what are the normative grounds that authorize a particular state to assert universal jurisdiction over international crimes committed outside its territory? In particular, Chehtman takes issue with the influential work of Anthony Duff, who regards citizenship as an important factor in measuring the legitimacy of the criminal trial as well as of state punishment. Demonstrating the difficulties of citizenship-based theories in accounting for existing practices in the field of extraterritorial jurisdiction, Chehtman argues that territoriality provides a more illuminative and compelling criterion for identifying the individuals whose interest (taken collectively) warrants conferring on a particular state the power to punish a particular offender.

