

Arlie Loughnan's new monograph, *Self, Others and the State* offers a well-researched, wide-ranging, scholarly critique of the dominant criminal legal story about criminal responsibility. Arlie argues that one aspect of this story is that of attributions of blameworthiness through the application of criminal law to the classic legal subject imagined by law, an individual with agency, autonomy, rationality and moral capacity. The second aspect of criminal responsibility is a form or structure of criminal law that ensures the body of law holds together. She critiques this dominant story of criminal responsibility through a historical-spatial analysis. I will analyse two major, intertwined contributions made in the book, first, that of a specifically Australian story of criminal responsibility and, second, that criminal responsibility organises key sets of relations between self, others and the state as relations of responsibility.

An Australian story of criminal responsibility

As a critical criminal law theorist Arlie argues that rather than accepting the dominant account of criminal responsibility as 'singular, general and universal',¹ legal principles and practices should be assessed within a social, political and institutional context, acknowledging and taking account of contingencies, inconsistencies and change over time.² To this end, Arlie adopts a spatial and temporal methodology which analyses criminal responsibility in Australian criminal law. This analysis has the advantage of countering the 'default Northern orientation' through analysis specific to the Australian context.³ For example, in Chapter Three, Arlie provides a critical account of the urge to modernise criminal law in the late nineteenth century. She argues persuasively that although codification is often perceived as the model of modern law reform, modernisation should take into account other practices of law reform, including the consolidation of common law principles in New South Wales in 1883. Analysis of codification and consolidation is often separate and isolated, whereas Arlie points to a common theme at that time of a felt need for the modernisation of criminal law and criminal justice.

In Chapter Four, Arlie reassesses the general story about the rise of a specifically Australian criminal law. Although the dominant story of criminal law is that there is a universal 'grammar' of criminal law, Arlie provides an historical account about a meaningful sense of a national criminal law emerging in the mid-century of Australian criminal law. She argues that her story is contrary to the standard account of Australian criminal law as either emerging towards the end of the nineteenth century (with the enactment of criminal codes) or at the end of the twentieth century (following the passage of Australia Acts and the end of appeals from the High Court and the state Supreme Courts to the Privy Council in England). Arlie's rereading of Australian cases to argue for a different time of the 'birth' of a distinctive Australian criminal law is highly enjoyable. She undertakes an in-depth analysis of cases and Australian textbooks of the time to make her arguments, drawing upon cases that are a staple of contemporary undergraduate criminal law. For example, she argues that the High Court refused to follow the English Court of Criminal Appeal in the case of *Stapleton v R* (1952) 86 CLR 358, adopting instead what was regarded as a progressive

¹ Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press 2020). 253.

² *ibid.* 6.

³ *ibid.* 254.

approach to insanity, reflecting the increasing confidence of the judiciary and Australian practitioners and academics. The High Court held, in a principle that still stands today, that a defendant's criminal responsibility depends on their ability to reason about the wrongness of their act with a 'moderate degree of sense and composure', not merely an appreciation of its illegality. Arlie makes a similar argument in relation to the development of an Australian doctrine of honest and reasonable mistake of fact, which she argues was decided based on an ideal of the rationality of criminal law, that criminal intent and defences such as mistake of fact were separate questions and issues from each other according to the principles of criminal responsibility. I do not think that it is necessary to accept Arlie's argument that the 'birth' of 'a sense of an Australian criminal law occurred in the mid-twentieth century',⁴ but instead to accept that this is a valuable contribution to a genealogy that fragments what was thought unified, and highlights discontinuities in the process whereby the past became the present.⁵

Chapter Five proffers an ongoing discontinuity between the legal system's rhetoric of the centrality of principles of criminal responsibility and the reality through an analysis of the development of the Australian Model Criminal Code. Arlie asserts:

Criminal responsibility was central to the legal systematisation that the Commonwealth Code represented. With the principles of criminal responsibility fixed at the heart of the Commonwealth law, their role is to provide the Criminal Code with integrity, meaning the criminal law makes sense on its own terms, and ensuring that it can stand on its own and act s model of adoption in other jurisdictions.⁶

However, throughout this Chapter, Arlie subverts the centrality of criminal responsibility providing integrity. For example, although the principles of criminal responsibility articulated in Chapter Two were regarded as providing a common language for code and common criminal lawyers, and provided a language in which the Model Criminal Code could be understood, Arlie notes it did not limit what could be said in this language. Nor did the Code prevent overriding of the default principles articulated in Chapter Two. The Code also has inherent ambiguities, and the High Court has noted that the codification of principles of criminal responsibility in Chapter Two has not made them 'clearer' or 'easier to apply'.⁷ In concrete terms, although the Code asserts subjectivism as providing justification for high measures of penal liability it provides only a thin foundation and has not constrained the legislature in the development of commonwealth criminal law. Arlie asserts that new offences show a careless disregard of principles in Chapter Two.⁸ Although not stated in this Chapter, the project of the Model Code highlights Arlie's argument, and that of many criminal law scholars, about the gap between the dominant story of criminal responsibility and its actual existence in criminal law. Although Arlie argues that criminal responsibility becomes the language of criminal law, her argument shows that this is aspirational rather than actual.

⁴ *ibid.* 132.

⁵ Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed), *The Foucault Reader* (Pantheon 1991). 82.

⁶ Loughnan (n 1). 162.

⁷ *ibid.* 162.

⁸ *Ibid.*

Criminal responsibility as relations of responsibility between self, other and the state

A second major contribution from the monograph is the argument that criminal responsibility organises key sets of relations – between self, others and the state – as relations of responsibility. There have been arguments made about this by other legal theorists, but it is particularly valuable and insightful to have this idea sustained and analysed in a holistic way throughout the book. It provides an overarching framework through which to unite disparate research. For example, in Chapter Six entitled “Self”, Arlie critiques the legal assumption of the rational, autonomous individual through an analysis of women as victims and perpetrators of violence. Arlie draws upon feminist analysis to argue that the legal construction of women has an ameliorative tenor, proffering an amalgam of agency and victimhood/survivorhood. Arlie argues that in contemporary criminal law, rather than being conceived of as isolated legal subjects, women who kill violent perpetrators are assessed in a context where they are perceived of as being failed by the state. Their actions are situated as implicating other actors, including state actors such as the police.⁹ This generates atypical responsibility forms which may be understood as an admission of state failure to protect women from violence. Whilst these arguments have long been made by feminist theorists, Arlie’s approach is valuable because it situates these arguments within a generalised account of relations of responsibility, rather than isolating them as a special case.

In Chapter Seven, Arlie argues rightly that analysis of, and engagement with, relations between individuals and others tends to be circumscribed in criminal law. The classic offences of criminal law assumes a legal subject engaging with strangers, and theorists have long pointed to the difficulties that criminal law has had in conceptualising continuing relationships. Arlie undertakes an historical analysis of consorting laws to highlight shifts in the organisation of criminal responsibility. She argues that early twentieth century consorting laws were oriented around public protection and based upon the social status of individuals as ‘undesirable’ and disorderly, including prostitutes and thieves. This had specific impacts on the policing of Aboriginal people, including Northern Territory laws criminalising association between Aboriginal and non-Aboriginal people animated by fear of miscegenation.¹⁰ In contrast, Arlie argues that contemporary consorting laws are oriented around the security of the state. Unlike earlier consorting laws which rested on external statuses and meaning, the mode of responsibility is legal, the laws rest on other legal practices and technologies (e.g. prior convictions). In the final pages of the Chapter, Arlie argues that this second generation of consorting laws inculcate ‘friendship with the state’, that is, with ‘relations of responsibility between individuals assuming a flat and standardised structure, and the state brought into the relationship between individuals in a distinct way’:¹¹

The state is posited as ‘friend’ albeit a weak, institutional form of a friend. With all the hallmarks of mutuality and equality, and correlates of loyalty and allegiance, friendship is a mode of relation characterised by choice: it may be contrasted with

⁹ Ibid. 191.

¹⁰ Ibid. 204.

¹¹ Ibid. 195.

unchosen, fixed relations, characterised by role or custom, and with unequal relations, characterised by dominance, vulnerability of dependence.¹²

On this account, the legal subject is required to choose between (criminal) friends and the state, and thus not associating with the 'friends'. This idea is interesting but I'm not completely persuaded by it. The friendship of the state here seems very similar to that of a schoolyard bully who tells you who you can be friends with, and then takes your lunch money. Alternatively, it could be argued that the consorting laws reflect an almost feudal interest (and control) in the life of a legal subject. I would be interested in Arlie further arguing the idea of state as friend.

In the final substantive Chapter, entitled "State", Arlie analyses the construction of the responsibility of the state. This argument is particularly valuable in situating the treatment of Aboriginal peoples, and analysing state responsibility between past and present, empire and nation, and considering the state's assumption and denial of responsibility across the boundary between Australia's past, as part of the British empire, and its present, as an independent nation. Arlie draws upon public inquiries about the abuse of children to analyse the shifting conceptions of state responsibility. She argues that historically the state tended to point to individual rather than institutional responsibility, assuming bad apples rather than criminogenic institutions.¹³ In contrast, contemporary inquiries, such as the Royal Commission into Institutional Responses to Child Sexual Abuse have led the state taking on responsibility for institutions and the responsibility society bears as a collective:

The close examination of the institutions in which offences occurred has exposed the ways in which lack of official oversight, inadequate resources and lax organisational controls permitted offences to occur, suggesting that some institutions are themselves criminogenic. As a result, and by contrast with other historic positions of the state, the state is not thought of as an invisible hand or a servant of self-governing individuals, but rather as 'a centralised power that regulates the exercise of sub-institutions of power and authority.'¹⁴

These arguments are well made, but I would also point to the relative lack of any changes in terms of official oversight, resources and organisational controls post Royal Commission. Here there is the rhetoric of apology for past wrongs, but little to no actual change.

A query about criminal responsibility and corporations

This is a very well-written monograph that is enjoyable to read. The argument that criminal responsibility organises relations between self, others and the state is valuable and insightful. Early in the book Arlie refers to Scott Veitch's analysis that law organises not only responsibility but irresponsibility.¹⁵ Veitch offers a flipside of Arlie's arguments, considering the ways in which the law produces and legitimises irresponsibility of the self, other and the state.¹⁶ Whilst he does not organise his arguments in this specific way, his monograph can be read in this way. These arguments of irresponsibility are particularly salient in regard to

¹² Ibid. 219.

¹³ Ibid. 244.

¹⁴ Ibid 252.

¹⁵ Ibid. 27-28.

¹⁶ Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007).

corporations.¹⁷ Although Arlie makes several passing comments in relation to corporate accountability or lack thereof throughout the book, noting the difficulties that the common law has had in conceptualising corporate responsibility due to (failed) attempts to anthropomorphise the corporation to accord with the classic legal subject, there is no sustained analysis of the failure to attribute criminal responsibility to corporations. Arlie argues that her analysis considers how power relations structure the allocation or distribution of responsibility between the state and individuals. In light of the power of multi-national corporations and their capacity for systemic harms, I wonder how corporations can and should be conceived of in Arlie's schema. Are they self, other or the state, or should an extra category be added?

¹⁷ Penny Crofts, 'Legal Irresponsibility and Institutional Responses to Child Sex Abuse' (2016) 34 *Law in Context* 79.