

# Professor Nicola Lacey in conversation with Zelia Gallo and Manolis Melissaris

**Nicola Lacey** is School Professor of Law, Gender and Social Policy at the London School of Economics and Political Science. From 1998 to 2010 she held a Chair in Criminal Law and Legal Theory at LSE; she returned to LSE in 2013 after spending three years as Senior Research Fellow at All Souls College, and Professor of Criminal Law and Legal Theory at the University of Oxford. She has held a number of visiting appointments, most recently at Harvard Law School. She is an Honorary Fellow of New College Oxford and of University College Oxford; a Fellow of the British Academy; and a member of the Board of Trustees of the British Museum. In 2011 she was awarded the Hans Sigrist Prize by the University of Bern for outstanding scholarship on the function of the rule of law in late modern societies and in 2017 she was awarded a CBE for services to Law, Justice and Gender Politics. One of the most preeminent scholars globally in criminal law theory, criminology, and jurisprudence, Nicola Lacey has broken new ground in all the fields in which she has worked.<sup>1</sup>

**Dr Zelia Gallo** is a Lecturer in Law at King's College London. She holds a BA in Law with Law Studies in Europe from Oxford University and an MSc in the Sociology of Crime and Deviance from the London School of Economics. She obtained her PhD from the LSE Law Department where she was also a Research Fellow between 2013 and 2015. Dr Gallo researches the sociology of punishment, with a particular interest in the link between politics, the political economy, and punishment in contemporary Western democracies. Her research has focused on punishment in Italy, as well as England and Wales. She investigates the criminalisation of immigration as a key part of the contemporary Western penal landscape. Her research interests also extend to the role of violent crime in accounts of contemporary punishment, and on the development of accurate, comparative, measures of serious interpersonal violence.<sup>2</sup>

**Dr Manolis Melissaris** is an author. He has published two novels: *Peer Review* and *The Thieves of Phocaea* (Οι Κλέφτες της Φώκαιας, Αλεξάνδρεια 2021). He holds a Law Degree from the University of Athens, an MSc in Criminology and Sociology of Law and a PhD in Philosophy of Law from the University of Edinburgh. From 2002 until 2018 he taught at universities in England, latterly as an Associate Professor at the London School of Economics and Political Science. He currently lives in Nicosia, Cyprus. His academic writings include: *On Solidari-*

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1. For a full list of her publications, see <https://www.lse.ac.uk/law/people/academic-staff/nicola-lacey>.

2. For more details, see <https://www.kcl.ac.uk/people/zelia-gallo>.

ty (2017); *Non-Citizens As Subjects of the Criminal Law* (2017); *Posthumous “punishment”*: What can be done about criminal wrongs after the wrongdoer’s death?, (2017); *Property Offences as Crimes of Injustice* (2012); *Toward a Political Theory of Criminal Law: A Critical Rawlsian Account* (2012).<sup>3</sup>

**M.M.:** *Your work has spanned over a number of disciplines and various topics. So, I was wondering whether there is something – or, rather, what it is that brings it all together. Not that there has to be something, I don’t believe that coherence through one’s life or work is a value, but I suspect that there is something, some thread running through all your work. So, what might that be?*

**N.L.:** Well, it’s very nice of you to assume that there is this sort of coherent ‘Lacey’ plan or programme! But actually I’ve got a lot of thoughts about that, because I don’t think I’d ever set out with a very clear or set programme at the beginning. I just picked up something I was intrigued by, which was the question of what on earth could justify something as grim, really, as the institution of punishment. And, originally, I was very much interested in all the normative, the more philosophical debates about that, and my first book was a political theory book in effect. But the more I thought about that, the more I – I think I’ve already mentioned to you and we talked in the book launch<sup>4</sup> actually about the way David Garland’s review of my first book made me think: ‘Yes, but David’s right – because what he basically said was: what’s the point in having these perfect ideas about what could justify punishment if the world is such that it can’t deliver them? Don’t we need to understand how punishment’s evolved?’ And it was really that exchange with David that started to set me off on both, on the one hand, a socio-legal direction, trying to understand the social reality of punishment, but also, increasingly – and, you know, very much prompted by my relationship with Lindsay [Farmer] and with Alan [Norrie] – to move more in a historical direction. So, basically, I think of what holds my work together as something thematic. I’ve always just been very interested in the criminal justice system, but how I’ve approached it has been hugely influenced by the intellectual relationships I’ve accumulated over the years.

The first thing I did after the end of last term, which I just hadn’t had the time or energy to do before and I’d been wanting to do for a long time, was to sit and read very carefully the essays in that *Festschrift* and then write individually to each author to engage with them. And what really struck me – and I think this is true of many, many academics – is that many of those people

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3. For more details, see <http://manoliswrites.wordpress.com>.

4. *On Crime, Society, and Responsibility in the work of Nicola Lacey*, Iyiola Solanke (ed.), Oxford University Press 2021.

writing about my work, they've taken all sorts of different bits of my work had seen connections between my different projects that I haven't always seen. And I do think that, if you're as undisciplined as I am, ranging around projects, sometimes you don't succeed in holding all your vision together. But I have been actually quite pragmatic about it. I've just picked up projects that really intrigued me. And one thing has led to another, so there's a thread, but there was a never a plan.

**Z.G.:** *I was thinking, of all of your most recent works, I think one where you kind of, I don't know how explicitly or not, bring together a lot of the threads is *In Search of Criminal Responsibility: Ideas, Interests and Institutions*.<sup>5</sup> And I wonder whether you think that's a fair assessment of what you were trying to do there and whether it was conscious or not, because it is something that integrates the normative, but also the sociological in what I think is an extremely difficult project.*

**N.L.:** Well, I think that's absolutely right, Zelia, and in a way it was my belated attempt to bring together, to retrospectively impose a coherent agenda on these two quite different bits of my work, the history of ideas, history of institutions work and the political economy work that I've been doing with David [Soskice] and you and David Hope. But again, the realization that they did fit together came relatively late to me, I have to confess. So, you know, they grew as very separate projects. I started that project on responsibility way back in 1998, where I – I'm embarrassed to confess – I had a British Academy small grant, and I had a researcher student spending hours in Kew going through all the public records of the Old Bailey Sessions Papers. And then I was offered the Hart biography<sup>6</sup> and I got completely diverted onto that, I couldn't really do it all at the same time. And, of course, by the time I came back to the project, the Old Bailey Sessions Papers had been digitised and I was able to work in a more systematic way on them. But there was that project and then meanwhile, because I was – again, there's so much serendipity in one's work – asked during my Leverhulme [Major Research Fellowship] to do these two sets of public lectures: the Clarendon Law Lectures in Oxford and the Hamlyn Lectures. And I was so lucky because if I hadn't had the Leverhulme, there's no way I could have done them both. But they of course had to be very different; you couldn't possibly do two high profile sets of public lectures on similar things, and that was what really gave me the spur to turn my hobby of interest in why Germany is so different from Britain (engaging with David's [Soskice] development of varieties of capitalism<sup>7</sup>) into something more coherent.

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5. Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions*, Oxford University Press 2016.

6. Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford University Press 2006.

7. Peter A. Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press 2001.

But, at that stage, I didn't really think about the relationship between those two projects: one was historical and explanatory and about cultural legal history; the other was about contemporary political economy. But then of course I realized when I was (and I had intense difficulty) writing that 2016 book – I mean, for years, it felt like a monster in the basement that I occasionally lifted the hatch with great trepidation and listened to it growling – and I really did wonder if I would ever finish it, as of course I'd originally conceived it as a much more historically detailed book. But because I'd abandoned it when I was doing the biography, I felt I'd rather lost track of some of the historical texture which I'd really read my way into, again, through all those novels I read for the Moll Flanders book<sup>8</sup>.

But then I actually realised that while I'd lost that sense of texture that I'd had at my fingertips a decade earlier, I'd got a better idea of the shape of the interpretive argument. And it was when I realised that, I also realised that the explanation I was coming up with was not just cultural. It was a political economy explanation in a very basic way, because how institutions develop had to do with power. And so, it was a really nice way of bringing together these two ostensibly very different projects. But if you had said to me then 'Well, is this a feminist book?', well, no – see, I'd compartmentalised. I'd done *Women, Crime and Character* as an explicitly feminist enterprise; and then, *In Search of Criminal Responsibility*, there's not much about gender in it. Sharon Cowan, very rightly, in a review of that book, said 'But hang on a minute, what about all those feminist arguments?' And I realised that all that work in the early part of my career - *Unspeakable Subjects*,<sup>9</sup> the work I did with Liz Frazer<sup>10</sup> about atomism and individualism and communitarianism - was also at work in the criminal law work. So, I am gradually understanding how it all connects up, but I wasn't always conscious of it at the time.

**M.M.:** *I don't want to reopen the dull and arid debate between institutional theories and deontological theories, but we probably have to mention that not everyone would agree that institutions of the criminal law or ideas such as criminal responsibility, harm and so on are determined by the social and political context in which they will come into being. They might think that they're conditioned by that context, but there's always something external to those institutions that determines them in the last instance. Well, first of all, does that debate still go on? Because I've not been keeping track! And secondly, what do you think of that debate? I mean, is it productive at all?*

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8. Nicola Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles* (The Clarendon Law Lectures), Oxford University Press 2008.

9. Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, Hart Publishing 1998.

10. Nicola Lacey and Elizabeth Frazer, Elizabeth Frazer, *The Politics of Community: A Feminist Analysis of the Liberal-Communitarian Debate*, Harvester Wheatsheaf / University of Toronto Press 1993.

**N.L.:** You mean the methodological debate? So, I mean, it's the stuff of academia, isn't it? I think it's productive in the hands of the really imaginative people, like Antony Duff. One way or another, I feel quite guilty because in practically everything I write at the moment, I seem to take Antony as my counter, in relation to whom I'm differentiating my position, and I have to keep apologising to him. I say, you know, 'You've got to take it as a compliment! I keep having a go at you because yours is in my view the most sophisticated version of the view of criminal law', that it of course is conditioned by history and context, but it builds on something pre-legal, something moral in Antony's opinion. But in his latest iteration of that theory in papers written after his last book, he has described his position as 'political legal moralism'. Not everybody agrees with my position; it's a relatively hard core constructivist one. But of course I would have to acknowledge that there's always a very difficult balancing act for any theory, whether it's a more constructivist or more deontological, as to how you identify the phenomena that you are trying to theorise and either explain or justify.

And so, I don't think my position is absolutely methodologically straightforward and Antony's is problematic, or other legal moralists' is problematic. I just, I guess I'm more persuaded by – I don't know if you've been coming at all, Zelia, to the 'Political Turn(s) in Criminal Law' seminar. So, Manolis, at the beginning of just before the pandemic, there was going to be a big conference in Santiago, in Chile, and it had to be cancelled because of the pandemic. However, it turned into a very regular online seminar called the 'Political Turn(s) in Criminal Law Theory'. And it's actually a fantastic thing because particularly for graduate students, it's given them an ability to network at a time when they couldn't travel, when many of them were very, very isolated. But I would say basically the impetus of the conference was to explore this more political view of criminal law that comes out of, say, Lindsay's work or mine – political with a very small 'p' – or Vincent Chiao's in *Criminal Law in the Modern Administrative State*.<sup>11</sup> But increasingly, the people who have taken a more moralist approach have been joining the seminar and engaging in a dialogue.

And so, for my money, to go back to your question, – is it consequential, the methodological joinder of issue? I suppose we might be spending a bit too much time on that sort of conceptual methodological question rather than looking at the key substantive issues. On the other hand, we increasingly, in the last few sessions, ended up having a debate about whether most of us when push comes to shove, albeit for different reasons, are normatively abolitionists. And that's been quite interesting. There was a very fascinating session when Matt Matravers and I both surprised each other and ourselves by outing ourselves as abolitionist in our old age. Sorry! That's probably a bit of a rambling, not very clear answer to your question, Manolis!

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11. Vincent Chiao, *Criminal Law in the Age of the Administrative State*, Oxford University Press 2018.

**Z.G.:** *I have to say that I am woefully and wilfully ignorant of a lot of the more normative debates, because I have a much more visceral reaction to them. I have no methodological nuance in this at all. I wonder whether this is where the feminism in the early feminist work that you did, or even the contemporary feminist work that you do, has an influence, because it doesn't really allow you to live in the realm of ideas, abstract ideas. You have to engage with a sociological reality that often does not coincide with the abstract. And so, you can't really sit on your laurels and say, let's engage with beautiful logical syllogisms regardless of what their impetus or their practical outcome is.*

**N.L.:** You're absolutely right, Zelia. I've always thought it was obvious that to take a feminist perspective on law meant taking a socio-legal perspective or a situated perspective, a contextual perspective, because it is to deny the inevitability or the necessity for that abstract legal subject as the core component of jurisprudence, of legal theory. So, I think that, yes, becoming a criminal justice scholar as well as a criminal lawyer and discovering feminist legal studies were also very important in pushing me in that more contextual direction.

I think one of the reasons I stopped working so much directly on feminist theory was that it had become so 'meta' in a way, that I felt that, I mean, obviously not all feminist theory by any means, but a lot of it had lost touch with precisely that socio-legal impulse and political with a small 'p' impulse that was what I saw as valuable about it. So, I do think it is a bit of a *déformation professionnelle* of the academy to find itself becoming ever more obsessed by second order questions. And funnily enough, at the moment, the piece I'm researching, as Zelia knows, this summer is a piece for a book that Lindsay [Farmer] and Chloë Kennedy are editing on foundational texts in 20th century criminal law. And they asked me to do Devlin's 'The Enforcement of Morals', which has become a yet more strange and problematic thing. Manolis, you may not know this, but about six weeks ago, Bea Campbell revealed the shocking fact that Devlin's 81-year-old daughter has just given evidence to the current inquiry on historic child abuse, to say that her father abused her from the age of seven to seventeen.

And, anyway, as a result of this project, I've been reading a lot of secondary literature about the Hart-Devlin Debate, which obviously is voluminous. It's very, very interesting to see how the nature of that literature has changed from the original contemporaneous secondary literature to today where it's still going on, but it's much, much more focused on the methodological questions than on the substance. The early debates are very much about the substance of how should you think about, what you should do about decriminalising homosexuality or abortion or whatever it may be, but it has become ever more a professional philosophers' debate. Very, very interesting. So, as you can imagine, I enjoyed reading the older literature much more than the newer literature.



**M.M.:** *Well, shall we move to a first-order question then? Well, I don't whether we can or you can talk about larger contexts such as Europe, but what do you think is the strongest driving force of criminal justice policy these days either in the UK or in Europe more generally, or however we actually define it?*

**N.L.:** That's a very good question and a very difficult one to answer. Funnily enough, I've just been revising my *Oxford Handbook of Criminology* piece that I do with Lucia Zedner, which is a review of the links between criminology, criminal justice and criminal law. And I found myself feeling that the narrative that we've been working with for the last 20, 30, certainly 20 years, ever since David Garland's *The Culture of Control*,<sup>12</sup> is beginning to feel quite old, isn't it? I mean, I think this sort of penal populism has, it's not that it's gone away, of course it hasn't, but it's become articulated with a much broader set of populist movements, but also dynamics of social polarization.

The other big difference, it seems to me, is that in most countries – and sadly I can't spend so much time in Europe anymore, so I don't feel I have a very good sense of what's going on in Germany or Italy or even France, although I know a bit more about France, partly from being here [each summer], partly because my stepson lives in Paris and we talk about politics a lot – I feel that criminal justice has slipped down the political salience agenda, which in a way should be very good news for all of us, but the trouble is it slipped down the priority agenda at a time when it was in very bad shape. So, although, for instance, the imprisonment rate in Britain has stabilised and, particularly during the pandemic, the number of cases being prosecuted has dropped quite substantially, so there's a dip in criminalisation, nonetheless, we are stuck with a habitus of sentencing and so on that is extremely punitive, extremely unequal, and very hard to justify. And I think what's sad at the moment is that it's hard to really motivate a very strong impulsive reform because people are so preoccupied about other things.

And the debate is so polarized generally that there is a real feeling of political stasis. The Howard League [for Penal Reform] is still working away – it's having its 100th anniversary conference next month –, the Prison Reform Trust, all these wonderful people out there are working to try and civilise and temper punishment, but actually what's happened in Britain is quite different. When I was teaching the Legal Systems first year course the week on criminal justice was structured around a case study, which I think Insa [Koch] or Meredith [Rossner] had designed, about the London riots of 2011, and the question of perceptions of the State's legitimacy and what happens when the State's legitimacy is in question, if people feel they're just not part of the deal really. This year I added in a Coronavirus Act case study because officials had – I didn't

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12. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Chicago University Press 2001.

know until I looked at the Coronavirus Act – really an extraordinary extent of delegated power to restrict potentially infected persons or potentially risky persons.

Now, I'm very pro the public health messaging and so on, but this is a massive expansion of criminalisation and of police discretion and the relevant decision-making process is virtually invisible. And that's what strikes me about what's happening with criminal justice powers. They've sort of been..., a lot of them have just been normalised. And in that context, it's quite hard to motivate a critical resistance. Does that make sense?

**M.M.:** *Yes, absolutely. And there might even be a surface opportunistic consensus between the Left and the Right on the criminal justice system. Maybe that's the reason why it slipped down the agenda, because the left doesn't really want to touch it. If Greece is anything to go by, even the government of the Left didn't really do much in this respect. I mean, they tried to decongest prisons by reforming the Penal Code and lowering sentencing or decriminalising certain things, they tried to improve conditions in prisons, but that was about it. They weren't interested in even understanding what's going on with criminality in Greece. And that's because it would make them unpopular, because everyone buys into the 'law and order' story. And because, I suppose, their priority was different. It was more narrowly left wing. And, you know, it had to do with the economy.*

**Z.G.:** *Yesterday I was at the European Society of Criminology set of conference panels organised by political economists of punishment. And one of the debates that's going on at the moment is the fact that in periods of economic recession, rather than punishment increasing, incarceration rates increasing, in certain nations, Spain for example, they dropped. So, you have this disconnect with the typical Marxist account, which would predict that economic crisis leads to increasing incarceration. This is just to say that at a certain point, one of the authors was talking about crime no longer being the kind of signifier that it is in Ian Loader's idea of the anti-politics of crime.<sup>13</sup> In certain nations it's fallen down, as you say, the priority list, it no longer stands in for all of our worries. And I have some quibbles with that, because I think it's always a very available tool. It's always a very available narrative and ideational tool for people to identify as a manifestation of a problem: if you make a problem a crime, you name it and you give it form. But actually, even leaving that aside, even assuming that crime is no longer a big problem, I think that doesn't work with punishment.*

*So, there is still a disconnect between crime and punishment. Crime can be out of the public eye, it's no longer in the public eye as it was during punitiveness, but punishment has a different function because it's a manifestation of State authority and it's an always available tool. And I*

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13. Loader Ian, The anti-politics of crime, *Theoretical Criminology*, 12(3), 2008.



*know it has to be linked to a crime. So that's where I think a lot of debate can still happen. But I think that the appeal of punishment is somehow independent and hasn't gone away. And in the Left, certainly the Italian Left, which after the fall of the Berlin wall and after the end of the Cold War has really lacked a proper, a sturdy ideological identity, the State, for better or for worse, becomes the thing to protect, and the way you protect it best, or one of the ways in which you are justified in protecting it, is by punishing those who threaten it in different ways. And this is kind of Garland's basic idea of punishment as a visible manifestation of State authority, which I think is still with us.*

**N.L.:** I don't know if either of you have read any of Didier Fassin's work – the French sociologist-anthropologist – he wrote a book few years ago called *The Will to Punish*,<sup>14</sup> in which he basically takes Hart's definition of what punishment is. And he just says: this is just completely off beam. Punishment is not that. We punish lots of people who haven't committed offenses, and we don't punish lots of people who have. Actually, the will to punish is about something quite different; it's about the assertion of power. And it's a very dystopic view, but it's quite persuasive, I think. And I agree, Zelia, about the disarticulation of crime and punishment. The assumption is, and that's key to the legitimation, that it's about crime – punishment follows crime–, but actually that's a very, very misleading cartoon of the real story.

And I think in Britain, certainly if we think about, for example, the impact of austerity on the criminal justice system, what's happened is that it has somewhat rationed criminalisation, but it hasn't done so effectively. What's happened is that it's just become cheaper, nastier and more targeted. If you look at the policing cuts, they fell largely on poorer and Labour-voting local authorities. What that means is that the policing of those areas becomes more brutal, worse. It uses less consensual, more targeted tactics because they're cheaper. And so there are lots of complexities to the way in which social policy at quite a concrete level has fed into this. Court delays is another good example, with all the public spending cuts – 40% in the Ministry of Justice budget between 2010-2016, just think what that means, a 40% cut!

**M.M.:** *I was just going to ask whether you worry that this biopoliticization of punishment will be here to stay. Because, I mean, after Covid, do you think it might change the very sense of what it is to commit a crime and what it means to be punished?*

**N.L.:** I think it just desensitised us to the expansion of power yet further. So, thinking back to those themes in Garland's *The Culture of Control*, it's a sort of expansion of what he called the 'criminology of everyday life'; it's that we don't even really think of it as criminology or crime,

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14. Didier Fassin, *The Will to Punish (The Berkeley Tanner Lectures)*, edited by Christopher Kutz, Oxford University Press 2018.

but it is criminalisation and it's a bit the same as the... , I suppose it's the normalisation of the idea that 'here's a social problem, here's a common-sense solution to it'. And the broader implications aren't really considered. Most people think it's not about them. If I'm having a hopeful day, I would think that, precisely because a wider range of people have been affected by the coronavirus criminalisation, it should have helped a sort of critical sensibility, but it hasn't, because it's been policed in an incredibly discriminatory way. You know, the people who have been picked up for violations have been young black people, young people generally, people in city areas, crowded areas, people who don't have gardens, where they can hang out with their friends, etc. etc.

**M.M.:** *Here [in Cyprus] it's mainly immigrants who are the soft targets. The police go after them, because they just hang out in groups in the town centre, they're easier to be stopped, checked, and punished for not wearing a mask, not having a safe pass or whatever. And then they may find themselves in all sorts of other kind of trouble too.*

**Z.G.:** *My criminal justice antennae have been lowered on this one. But in Italy, the way it's come to the fore is the intersection between the NoVax movement and the far Right. Interestingly, the Five Star Movement have now become the enemy, whereas they first were kind of a landing ground for some NoVax, because they are in a certain sense quite libertarian, or they have an innate distrust of the State and State institutions combined with quite a fervent punitive legalism. And I think that is very problematic, because it's not a nuanced critical view of the overreach of State powers.*

**N.L.:** No, I think that's true in England as well. And as you said earlier, basically the Left doesn't want to touch it and you can see that in the way [Keir] Starmer<sup>15</sup> has struggled to position himself in the debates about coronavirus restrictions.

**Z.G.:** *Going back to the example that you were talking about that you've used in your Introduction the Legal System lectures, about State legitimacy, I wonder whether this would be a good segue into some of the most recent work that you've been doing with Hanna Pickard,<sup>16</sup> of which I am an immense fan. One of the latest pieces is about standing to blame. And I wonder if you wanted to say something about that, maybe in relation to State legitimacy, but not necessarily that, anything at all you want to say about that, and the rest of the body of work that goes with it, and this idea of trying to shift our paradigms away from a kind of more narrowly legalist perspective, one premised on blame and retribution, to one that's more clinically informed; one that takes a human as the subject of the law and not an abstract offender.*

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15. Leader of the Labour Party.

16. N. Lacey and H. Pickard, Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution, *The Monist* (2021); A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame, *Journal of Political Philosophy* (2018).

**N.L.:** Thank you! I always enjoy talking about the work with Hanna, because it's been so interesting to work with somebody who's not only a very acute philosopher, but also a clinician. And she's also a great optimist, which of course I'm not. So, that's also probably been very good for me. Our argument that in an ideal world you would learn a lot from how you approach people clinically and how you work with people to try and change them or help them change themselves, work with their capacity for agency and self-reflection, and indeed, do so with a view to moving forward, forgiving or whatever, I thoroughly believe in this argument normatively. I am, however, much less optimistic than Hanna about how it can really be institutionalised in actually anything like our criminal justice systems.

I think we can make them better than they are, and I think we should, but ... So funnily enough, we were having this debate with Alan Norrie in one of the 'Political Turn(s)' seminars yesterday – the piece he wrote for my *Festschrift* is a very, very interesting psychoanalytic piece, which takes, again, a very, in a way, optimistic and ambitious view about how criminal justice might be really other. I think with that last paper on standing to blame, what Hannah and I were trying to do was to, in a sense, connect back with the *Realpolitik* question of what happens when the way State power is being exercised is so very unequal and unfair? At what point do you just say, and how do you make the argument, that punishment is no longer legitimate?

We picked up on this quite lively debate, which has come out of the more absolutist legal moralism tradition in criminal law theory, which says - by analogy with morality, if you are being hypocritical or you are complicit in the wrongs that you are complaining about, or you haven't got clean hands, then you haven't got any standing to blame other people. And I think our view of that is what that's just to misunderstand exactly what the criminal justice system is all about. It isn't about moral relationships in that way. It has a more functional sort of being, if you like, and we understand it in a more functional way, but that that doesn't mean that there isn't a point at which the legitimacy just runs out.

We struggled with that piece to be honest, because we were writing the first draft around the time of the George Floyd murder. Hanna, who was living permanently in the States for the first time, was – I mean, we all know what the American criminal justice system is like, but it's amazing how many of us don't fully understand just how bad it is – absolutely rocked by what she was learning as a result of all the publicity around the George Floyd killing. She was worried that our argument would be taken to be in a sense diluting the critical toolbox. But, in the end, we took a break from the piece for a month or so, and let it roll around in our minds.

I think in the end I persuaded her (and it's my fault, if it's wrong) that actually our position is the better position because it engages in this as a systemic issue. If you have a view of the criminal justice system as something that has a forward-looking role, as we do, then in a sense

the legitimacy has to be adjudged in relation to the extent to which the State is in fact using the criminal justice system for those purposes. And if you put me on the spot and say, do you think it *is*, in America or Britain, at the moment sufficiently legitimate? I would say it's really on the edge of even a baseline of legitimacy.

Of course, the really hard thing the moralists will always say (and it's a very fair point), in cases of very serious crime, then, you know, there are real harms to victims. So as a feminist, you know, there's the old joke that left wing and criminal lawyers are always pro-abolition, except when it comes to corporate crime and sexual offenses. And one of the things that's happened in Britain during the pandemic is that rape, and other sexual offenses, have become de facto decriminalised. And that's not okay either. But that's a different argument.

**Z.G.:** *I wonder if we can reconnect this – again, I'm thinking from the Italian case and you might think this is entirely wrong, but I wonder if we can reconnect this to a crisis of politics where legitimacy becomes..., we seek criminal justice as the site of State legitimacy, and then we try and make it do all these things that are not its role. And again, we're led to do that because of course it is about the State exercising coercion and nominally doing so on our behalf and on the basis of our delegation of power to it. But actually, the legitimacy of the State has got to be mainly, I would say, distinct from the criminal justice system, it's a question of democratic politics. And when that is in crisis, we then pour all of our expectations into the criminal justice system and want it to do much more than it can. And when it fails to revitalise our trust in the State, then that's what comes through most, rather than the roles that it has to carry out, including in the management of interpersonal conflict, which exists and which we can't... Even as an abolitionist, as you say, it's quite difficult to say: well, the State should, should never interfere in interpersonal conflict.*

**N.L.:** I think that's right.

**M.M.:** *Is there a danger in that though? Because if we begin to think of the criminal justice system as autonomous from the State and relatively independent from the legitimacy of the State, then we're only one step away from saying that it's actually normative relations of harm that legitimise the State, that there is something extra-political in the criminal justice system.*

**Z.G.:** *I wouldn't say that you don't link the legitimacy of the criminal justice system to the State. I think that the legitimacy of the State is only partly located in the criminal justice system.*

**M.M.:** *In real terms, I see, right.*

**N.L.:** I do think – picking up on that issue about the relationship between punishment and democracy as it were – I think I agree with you, Zelia, that the issues that we're struggling with in criminal justice are a symptom of something much, much deeper that's going on in politics. And

probably the book that has influenced most of my thinking about that – I know it’s a book you admire as well – is Nadia Urbinati’s *Democracy Disfigured*.<sup>17</sup> It feels as though (as somebody put it in the seminar I was in yesterday), the centre just hasn’t doesn’t hold anymore. Somehow, we’ve..., what used to be that sort of substantive engagement has fallen into a vacuum between the expert-oriented versions of democratic process and the populist or plebiscitarian ones. And I think we’re in trouble, but perhaps people have thought that before, and we’re inclined to be over-dystopian about our own moment; but it does feel like a bad moment for politics at the moment. And if you take a political view of criminal justice, then that’s bound to mean ... that has important ramifications for the criminal justice system.

**M.M.:** *Well, listen, I don’t want to keep you any longer. What are you working on now, Niki?*

**N.L.:** Well, there’s this piece about Devlin, which I’m going to basically contextualise the moralism debate. At the moment, I’m reading lots of novels of the 1950s and 60s to try and get a sense of what the world was like. It’s an amazing thing. I mean, the casual racism and homophobia, not to mention absolute extraordinary sexism, even in these quite progressive authors. I’ve been reading Alan Sillitoe, Stan Barstow, the angry young men, Northern working class voices, brilliant writing, but... So, I’m back to a little bit of a law literature contextualisation there, but I’ll have to work out what I’m going to do about this revelation about Devlin’s abuse of his daughter. It’s very difficult. How do you dissociate the man from his arguments? I’ve been reading biographies and just trying to get myself into that world and try to understand why that debate had the resonance it had and why anybody would think that this book, a very thin book really, counts as a foundational text of the 20th century, which I’m a little bit dubious about, but actually the contemporary nowadays secondary literature remains really, there’s just masses going on – to my surprise.

**M.M.:** *Thank you both so much. You’ve been fantastic and it’s been such a pleasure chatting with you.*

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17. Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People*, Harvard University Press 2014.