Book Review

The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective by Markus D Dubber (2018) Oxford University Press, 304 pp ISBN 9780198744290

James Monaghan*

I Introduction

Liberal penality is in crisis. States supposedly committed to a liberal view of criminal law routinely engage in penal violence, seemingly unconstrained by the limits that concepts like 'law' and 'liberalism' — in certain idealised forms — are meant to provide. In *The Dual Penal State*, Markus D Dubber offers us a diagnosis of this crisis, presents a particular set of critical tools and demonstrates how they might help us to respond to the crisis, and invites us to take up those tools.

This is an ambitious book: Dubber puts a comparative-historical study of German and United States ('US') criminal law and criminal law scholarship to a methodological purpose, namely, demonstrating the value of a mode of analysis that Dubber calls '*critical analysis of criminal law in a dual penal state*'.[1] Though the argument is dense at times, its methodological focus makes it compelling reading even for those unfamiliar with penality in Germany and the US. And the fruitfulness of his comparative-historical study commends the critical tools that he employs.

In this review, I outline Dubber's diagnosis of the crisis of liberal penality and the tools that he employs in his study. Then, I take up Dubber's invitation in a preliminary way, suggesting two sites of penal power in the Australian context where his tools might prove illuminating.

II Diagnosing the Crisis of Liberal Penality

'The threat and infliction of state penal violence on a massive scale are liberal phenomena, rather than characteristics of "other," non-liberal societies.'[2] This is the basic insight on which Dubber builds. The so-called 'war on crime', and its

* BA (Hons I and University Medal) LLB (Hons I) (Syd). Researcher to the Court of Appeal, Supreme Court of New South Wales, Australia. Views expressed in this review are those of the author personally, not those of his employer.

1 Markus D Dubber, *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford University Press, 2018), 99 (emphasis in original).

2 Ibid 4.

international manifestation, the 'war on terror'; Guantánamo Bay; detention centres and camps of migrants, sometimes in remote or offshore places; racialised police violence that makes it necessary to protest that 'Black Lives Matter'; mass incarceration, especially of non-white populations — all these phenomena are found in States that are supposedly committed to 'the modern liberal legal-political project'.[3] Dubber knows that the term 'liberalism' names a complex set of traditions, which are expressed differently in different times and places. But working at the 'general level of the legal-political project of modern liberal states,' he suggests that a core commitment by which liberalism defines itself is the 'fundamental and continuous critique of state power'.[4] States committed to the liberal legal-political project must, on pain of existential hypocrisy, address 'the *penal paradox*' — the challenge of legitimating 'violent interference with the autonomy of persons upon whose autonomy the state's legitimacy rests'.[5]

Working on the hypothesis that this crisis in liberal penality is a supranational phenomenon, Dubber studies two comparators, the US and Germany, 'tolerably representative' of the common law and the civil law traditions respectively.[6] Through this comparison, Dubber aims 'to explore different ways of framing and addressing the penal paradox'.[7] As he subjects the penal law and scholarship of each system to scrutiny, he finds that, for different reasons, the crisis of liberal penality is not being attended to in either Germany or the US: both are in 'states of denial'.[8]

In Part I — comprising the first two chapters — Dubber offers a critical appraisal of the dominant tradition of German criminal legal scholarship,[9] or as it is known (reflecting its own self-understanding), criminal law 'science'. In chapter 1, Dubber begins a provocative (re-)reading of the history of criminal law science. His fundamental move is to argue that German criminal law scientists have taken the questions of the legitimacy of penal power to have been resolved by the first generation of German legal scientists — particularly by Feuerbach.[10] For adherents of this founding myth, 'the question of legitimacy is no longer a proper subject of scientific inquiry'.[11] He argues in chapter 2 that criminal law science has developed a set of rhetorical strategies that 'facilitate the construction and perpetuation of such a calming self-conception'.[12] He cuts some (admittedly) rough distinctions between these strategies: sloganism, labelism, taxonomism, and a somewhat different, overarching category, ontologism. Without going into the details, scholars working in a variety of legal sub-disciplines could fruitfully employ these categories in analysing law's rhetorical diversions.

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3 Ibid 1. Dubber's claims about whether such a shared project actually exists are modest. Because his focus is how State penal power can be subjected to meaningful scrutiny, it is enough for his purposes 'if it makes sense to postulate a shared project for purposes of common, and comparative, critical analysis': at 111.

4 Ibid 4.

5 Ibid 2 (emphasis in original).

6 Ibid 101.

7 Ibid 100.

8 Ibid 5.

9 This appraisal continues throughout the book — notably in ibid ch 4.F–G, ch 7.D.3.

10 Ibid 22.

11 Ibid 23.

12 Ibid 33.

While German criminal law science recognised the challenge of the penal paradox and (wrongly) considered it resolved once and for all, in the US context, Dubber argues that the paradox is not being addressed because it has never been visible. Dubber advances this claim in Part III of the book, where he offers a critical genealogy of American penality. In chapter 5, he contends that penal power in the US was not subject to revolutionary reimagining according to republican ideals. Rather, American penality reproduced

> the deeply hierarchical and preconstitutional nature of English penality … [remaining] a vestige of a patriarchal penal system in which the sovereign disciplines wayward members of its state household if, and as, it sees fit, without meaningful constraints on its punitive discretion.[13]

Readers familiar with Dubber's earlier work will recognise aspects of this account of American penality.[14] Of special importance in *The Dual Penal State* is Dubber's understanding of this mode of penal governance (that is, this way of exercising penal power) as modeled on the unrestrained patriarchal authority of a paterfamilias over the household. In his framework, this mode of penal governance is called 'police'.

In chapters 6 and 7, Dubber shows how this view of penality persisted, in Thomas Jefferson's 'Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital' of 1779, in the framing of the Thirteenth Amendment of the *United States Constitution* in the post-Civil War Reconstruction, in the drafting of the Model Penal and Correctional Code in the mid-20th century, and finally in the 'wars' on crime and terror. From the perspective of police (in Dubber's sense), questions about legitimacy are unintelligible: the authority of the sovereign-patriarch over the State household is literally unquestionable.

These comments on police as a mode of governance move us nicely into Dubber's methodological purposes in the book. Between the (re)appraisal of German criminal law science in Part I and the critical genealogy of American penality in Part III, we find Dubber's presentation of the mode of analysis that he advocates, '*critical analysis of criminal law in a dual penal state*'.[15]

III Critical Analysis of Criminal Law in a Dual Penal State

For some time now, Dubber has been advocating an approach to legal studies called 'critical analysis of law'.[16] That approach seeks to move beyond 'the rhetorical

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13 Ibid 179.

14 See, eg, Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press, 2005).

15 Dubber, above n 1, 99 (emphasis in original).

16 See, eg, the open-access journal *Critical Analysis of Law* <https://cal.library.utoronto.ca/index.php/cal/index> and Dubber's 'minifesto' from June 2012 on what critical analysis of law involves: Markus D Dubber, 'Critical Analysis of Law: Interdisciplinarity, Contextuality, and the Future of Legal Studies' <https://cal.library.utoronto.ca/public/journals/99/CAL.pdf>. For some recent reflections on critical analysis of law in a historical key, see Markus D Dubber, 'Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press, 2018) 99.

juxtaposition of doctrinal and interdisciplinary analysis in the service of a comprehensive critique of state power through law in a modern liberal democracy'.[17] As a form of critical analysis, it has both descriptive (analytical) and normative (critical) dimensions.[18] And as a critical analysis of *law*, Dubber locates the relevant normative standards in a particular normative conception of law, understood as a mode of governance.

Dubber distinguishes two modes of state governance — governmentalities, to use Foucault's term — called 'police' and 'law'.[19] I've already sketched what police means. In Dubber's framework,

> [c]ritical analysis of law … regards modern law as having emerged in explicit contradistinction to police as a mode of governance at the long turn of the nineteenth century. In other words, the present book regards modern law as an invention of the enlightenment that gave rise to, and still shapes, the legal-political project of Western liberal democracies: the law state (*Rechtsstaat*), or the state under the 'rule of law,' in contrast to the police state (*Polizeistaat*).[20]

As Dubber tells it, the 'invention … of autonomy as a capacity shared by all persons as such' during the enlightenment triggered a 'reconceptualization of state power'.[21] In that reconceptualization, those who are mere objects of State power under police are redefined as equal, autonomous subjects under law, to whom the State must justify its exercises of power.[22] In outline, this is the normative conception of law at work in a critical analysis of law.

Drawing on Weber, Dubber uses law and police as 'ideal types': they are 'contrasting clusters … of concepts, practices, and … governmentalities, that add up to a comprehensive framework for critical analysis'.[23] They are tools that are meant to determine 'the appropriate critical vocabulary'[24] for scrutinising contemporary exercises of penal power. These tools serve a functional and political purpose in the present: Dubber's aim in applying them in his historical-comparative study is to critique state power, not to produce an 'authoritative' legal history.[25]

Critically analysing penal power from the perspectives of law and police produces an account of what Dubber calls the dual penal state. This dualistic account of penal power illuminates the operations of, and interactions between, the two modes of penal governance that he identifies. His hope is that others might take up this critical framework for the analysis of penal power, that they might join a 'transnational, and perhaps eventually global, dialogue'[26] about criminal law, and

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17 Dubber, 'Legal History as Legal Scholarship', above n 16, 101.
18 Dubber, above n 1, 174.
19 Ibid 99.
20 Ibid 99–100 (emphasis in original).
21 Ibid 100.
22 Ibid 102–3.
23 Ibid 104.
24 Ibid.
25 Ibid 103.
26 Ibid 101.

that scholars might work together towards a 'modest, unpretentious, and inclusive conception of "legal science"'.[27]

IV Taking Up Dubber's Tools

Given that *The Dual Penal State* is an argument for a particular set of critical tools, one way to evaluate the success of Dubber's project is to try them out. If they help us to better understand the contours of State power, then that would go a considerable way to vindicating the project. Assuming that Australian jurisdictions share in the modern liberal legal-political project,[28] I conclude by briefly suggesting two sites of penal power in Australia where Dubber's tools might be illuminating.

First, Dubber's tools could contribute to the scholarship on the summary criminal jurisdiction. Consider, for example, Mitchell's findings that, for colonial governments,

> the summary criminal jurisdiction presented a means of overcoming many of the impediments to convicting Aboriginal people at trial before a jury, thereby making it a useful means by which to bring Aboriginal people within the pale of the law.[29]

Without prejudging the analysis, Dubber's police/law distinction might provide useful tools for mapping the relationships between penal police and penal law in the colonies — and particularly for understanding how 'policial' technologies (like the summary jurisdiction) have been, and still are,[30] used to circumvent the protections of 'law'.[31]

Second, Dubber's tools might illuminate exercises of penal power in the migration space. In addition to possible connections with the crimmigration literature that readily come to mind,[32] I suggest that Dubber's tools might prove useful in critiquing the transformation of the Australian Government Department of

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27 Ibid 229. See also Dubber's 'The Dual Penal State: Preface' on the 'Project-in-Progress-Page', an innovative online record of the project: <http://individual.utoronto.ca/dubber/LPpref.html>.

28 At least for the purposes of embarking on a critical analysis, this seems a safe assumption. But, of course, how law (as a mode of governance) and the liberal legal-political project are understood and performed in Australia — especially given the contexts of empire, settler colonialism, and federalism — are important questions that a critical analysis would have to consider.

29 Tanya Mitchell, 'Criminalisation of Aboriginal People: Development of the Summary Jurisdiction' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 55, 57.

30 On this point, I note how Dubber's tools — especially those in chapter 2 concerning labelling — could inform consideration of fines in Australian jurisdictions: see Julia Quilter and Russell Hogg, 'The Hidden Punitiveness of Fines' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.

31 Mitchell's recent socio-historical account of the summary jurisdiction in the colonies strongly resonates with Dubber's account of police power as a power to maintain 'peace'. Compare: Tanya Mitchell, 'The Rise to Prominence of the Victim in the Summary Criminal Jurisdiction in the Twentieth Century' (2018) 5(2) *law&history* 30, 33–5 with Dubber, above n 1, 121–3.

32 See, eg, Louise Boon-Kuo, 'The Policing of Immigration: Raids, Citizenship and the Criminal Law' in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 276; Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*' (2011) 44(1) *Australia & New Zealand Journal of Criminology* 56.

Immigration and Border Protection into a security-focused 'super-ministry', the Department of Home Affairs. To sketch just one line of thought, Dubber's analysis of police offers us tools for understanding the choice of the name 'Home' Affairs. This choice paints migrants as threats to the emotionally powerful symbol of the home, and implicitly positions the Government (and particularly, the Minister for Home Affairs) as a kind of paterfamilias. The (intended) effect is to legitimate intrusive or violent State action taken in defence of the home, and to insulate such action from criticism. And Dubber's comparative-historical approach could help us to contextualise the rhetorical choice here, situating it with respect to the US Department of Homeland Security (formed after the terrorist attacks of 11 September 2001) and, in longer colonial and imperial perspective, with the United Kingdom's Home Office and earlier Australian Government Departments of Home Affairs and of Home and Territories.[33]

[33] Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) xxv.