



LEGAL CONSTRUCTIONS OF CRIME

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The concept of crime is so familiar that it is taken for granted: by lawyers, by criminal justice practitioners and scholars, and by the general public. Yet when we try to subject it to analysis, it tends to slip away from us, defying any neat characterization. It seems natural to turn to criminal law for help here: criminal law, surely, supplies the answer to how we can identify crime. The idea that the intellectual concerns of criminology are intimately connected in this way with those of criminal law seems obvious. Yet within the institutional construction of disciplines, such common sense is often effaced by the development of theoretical frameworks which illuminate particular aspects of a practical terrain whilst obscuring their links with others. This (in some ways productive) blindness is one to which lawyers are probably more prone than criminologists. Both the professional autonomy of legal practice and the technical nature of legal argumentation have lent themselves to the construction of relatively rigid disciplinary boundaries. By contrast, the status of criminology as a discrete discipline has always been contested, and criminological research is inevitably informed by the methods and insights of the social sciences in general—insights which continue to have a rather fragile position within legal scholarship (Lacey 2006a; Nelken 1987b; Sumner 1994; Tamanaha 2001). It is nonetheless almost as rare to find a criminology text which concerns itself with the scope and nature of criminal law as it is to find a criminal law text which addresses criminological questions about the idea of crime (Lacey, Wells, and Quick 2003; Bronitt and McSherry 2005).

In this chapter, I shall examine the relationship between legal constructions of crime (criminal law) on the one hand and social constructions of crime and criminality (the subject matter of criminology and criminal justice studies) on the other. Focusing initially on criminal law, I shall consider two aspects of the contemporary legal construction of crime: its conceptual form and its substantive scope. I shall then set this analysis in social and historical perspective, illustrating the links between legal and social constructions of crime—and hence between criminal legal and criminological/

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criminal justice enquiry. On the basis of this preliminary analysis, the latter part of the chapter will consider two further issues. First, what can students of criminal law learn from the study of criminal justice? What questions might a degree of criminological insight prompt a criminal lawyer to ask? Secondly, what do criminologists need to know about criminal law? And what might they learn from criminal law scholarship?

My argument will be that an adequate grasp of the two fields may best be attained by conceptualizing them as interlocking spaces within a broader conceptual frame: that of ‘criminalization’ (Lacey 1995, 2001a, 2004). The framework of criminalization keeps the close relationship of the criminal legal and criminological/criminal justice practices in view, whilst avoiding a synthesis which would lose sight of their specificity. Such a framework is, moreover, implicit in some of the most intellectually persuasive recent contributions to criminal law scholarship (Bronitt and McSherry 2005; Farmer 1996a, 1996b; Loveland 1995; Norrie 2001; Wells 2001). In what follows, I shall assume that the reader is a student of criminology or criminal justice who may not have studied criminal law.

THE RELATIONSHIP BETWEEN CRIMINAL LAW, CRIMINOLOGY, AND CRIMINAL JUSTICE STUDIES

Within the academy in the United Kingdom, the study of the various social practices associated with ‘criminal justice’ is currently divided into two main blocks. These blocks are themselves marked by a combination of disciplinary tools and institutional objects. Let us call these two blocks the legal and social construction of crime (though ‘legal’ and ‘extra-legal’ might be more accurate, given that legal constructions of crime are, evidently, themselves social phenomena). Study of the social construction of crime itself divides into two broad fields—criminology and criminal justice—brought together in this particular volume. Criminology concerns itself with social and individual antecedents of crime and with the nature of crime as a social phenomenon: its disciplinary resources come mainly from sociology, social theory, psychology, history, and, though more rarely, economics and political science. Criminologists raise a variety of questions about patterns of criminality and its social construction, along with their historical, economic, political, and social conditions of existence. While the dynamic social construction of crime gives reason for scepticism about criminology’s discreteness as a discipline, it continues to hold a distinctive institutional position in the academy. Criminal justice studies, which have a variety of legal, historical, sociological, and other interests, deal with the specifically institutional aspects of the social construction of crime: with criminal processes such as policing, prosecution, plea bargaining (McConville and Mirsky 2005), trial procedure (Duff *et al.* 2004), sentencing (Ashworth 2005), and punishment, and with normative questions about the principles around which a criminal justice system worth the name ought to be organized (Ashworth and Redmayne 2005; Lacey 2006b; Zedner 2004).

Criminal law, by contrast, concerns itself with the formally established norms according to which individuals or groups are adjudged guilty or innocent. These norms are of several kinds, arguably mapping on to the core functions of criminal law. For criminal law encompasses not only substantive rules of conduct addressed to citizens but also rules determining how liability should be attributed and how breaches of criminal norms should be graded—rules which are arguably more plausibly seen as addressed to officials than to potential offenders (Robinson 1997). Contemporary criminal lawyers tend to be concerned not so much with the historical development or changing scope of these norms—matters which would be of obvious interest to the criminologist—as with their conceptual structure and judicial interpretation in particular cases or sets of cases. Criminal lawyers are therefore also concerned with the doctrinal framework of ‘general principles’ within which interpretive legal practice and—though more tenuously—legislative development purportedly proceed (Ashworth 2003; Clarkson and Keating 2003; Williams 1983). The rules of evidence and procedure, which have an important bearing on the application and historical development of criminal law, tend to find only a small place in criminal law studies in the UK, and are often dealt with in specialist, optional courses or relegated to interstitial treatment in criminal justice or legal methods courses. Within degree courses in law in England and Wales, only criminal law is regarded as a ‘core’ part of the curriculum.

Whilst the organization of research conforms less rigidly to this division, it nonetheless bears a close relationship to the different areas of expertise claimed by scholars within the field. This partitioning of the intellectual terrain is, it should be noted, both historically and culturally specific. To Continental European eyes, the Anglo-American separation of criminal law and criminal procedure, and indeed of criminal law and sentencing, appears extraordinary (Cole *et al.* 1987; Fletcher 1978). And although a superficially similar division has characterized the British approach for much of the last century, the rationale underlying the three branches of ‘criminal science’ of the 1920s and 1930s was rather different from that underlying today’s division (Radzinowicz and Turner 1945; Kenny 1952: ch. 1, Pt II).

What is the significance of the contemporary partition between the study of legal and of social constructions of crime; between criminal law on the one hand and criminology and criminal justice on the other? Is it not merely a common-sense division of labour based both on distinctive expertise and on the distinctive roles of legal and social factors in the construction of crime? While there is some truth in this, I would argue that the prevailing division obscures our view of certain crucially important issues. For example, criminological insights about patterns of ‘deviance’ pose important questions about the working of criminal justice institutions such as police and courts. The practice of legal interpretation takes place within a particular social context and in relation to criminal laws which are themselves the product of a political process which is relevant to their application and enforcement. Practices of punishment take place against the background of prevailing concerns about patterns of criminality (Reiner 2006), of attitudes to the vitality of social norms thought to be embodied in criminal law, and of beliefs about the legitimacy of state power. The problems of legitimation

and coordination faced by systems of criminal law vary according to both the institutional frameworks within which criminal law is enforced—policing, prosecution, trials, penal practices—and the shifting range of social tasks which the criminal law is expected to fulfil. Furthermore, the very edifice of criminalization as a relatively discrete object of enquiry is porous, given that criminal justice practices exist alongside and relate in an intimate albeit complex way to a variety of other—political, economic, moral, psychiatric, religious, educational, familial—normative, labelling, and sanctioning practices (Lacey, Wells, and Quick 2003: ch. 1).

Whilst it would clearly be impossible to address all criminal justice concerns within a single research project or course, there is a real risk that questions which transcend the prevailing boundaries marking off the three areas may be lost from view. For example, the relevance of the political context or of particular features of the criminal process to the development of legal doctrine in a series of appeal cases may be excluded from a criminal law course, whilst criminal justice or criminology courses may ignore the bearing of legal developments upon practices of prosecution and punishment. In short, a legitimate focus on the issues raised both within particular disciplines and in relation to particular institutional practices may serve to obscure broader questions about the assumptions on which those disciplines and practices are based. What are lawyers' implicit ideas about the nature of crime and of offenders? What assumptions do criminologists make about the nature of criminal law? And who, within the prevailing division of intellectual labour, is to study these important matters?

CRIMINAL LAW

As I have already suggested, a certain discreteness of both subject matter and disciplinary framework is much more firmly established in relation to criminal law than in relation to the extra-legal processes contributing to the construction of crime which form the object of criminological and criminal justice enquiry. In this section, I shall focus specifically on the distinguishing features of criminal law—substantive and formal—so as to examine the degree to which these pretensions to disciplinary autonomy are justified. Of course, many criminal law scholars have concerned themselves with sociology and history and with questions about the criminal process: indeed, this socio-legal leaning has probably been more marked in criminal law than in other fields of legal scholarship over the last half century (Hall 1960; Packer 1969). The objection to socio-legal approaches to criminal law has been, however, that they underestimate or obscure the specificity of legal techniques and legal argumentation, reducing legal regulation to the exercise of political or economic power, and assuming legal decision-making to be explicable in terms of some crude set of personal, economic, or political causes. Furthermore, it has been argued that socio-legal scholars often ask the wrong kinds of questions about criminal law—questions which assume that law is to be judged in

terms of its instrumental functions rather than its symbolic dimensions or its discrete logic. These problems are probably best exemplified by American Legal Realism and Chicago-style law and economics, reductive approaches in which legal decision-making is explained, respectively, in terms of judicial actors' policy preferences and their concern to maximize economic efficiency (Farmer 1995, 1996a; Nelken 1987b). In the context of this debate about the proper balance between autonomy and openness in criminal law scholarship, the development over the last fifteen years of 'critical' and historical approaches is worthy of particular attention (for a general review, see Nelken 1987a; Norrie 1992). For, as I shall try to show, they combine a focus on legal specificity without obscuring broader questions about the historical, political, and social conditions under which the apparently discrete and technical practices of modern criminal law flourish.

THE SUBSTANCE AND SCOPE OF CRIMINAL LAW: CONCEIVING 'CRIME'

One obvious reason why criminologists and criminal justice scholars might be interested in studies of criminal law would be to get a picture of the extent and shape of the formally articulated rules which in some sense provide the jumping-off point for all other criminal justice practices—crime prevention, reporting, investigation, prosecution, punishment. More than this, the criminal justice scholar might expect criminal lawyers to deliver some overall and coherent conception of the aims and functions of criminal law (Feinberg 1984–8): a conception which would explain or rationalize why the legal order deals with certain kinds of conduct as a criminal rather than a civil or private matter; as calling for state prosecution and punishment rather than privately initiated resolution. Why are some social harms dealt with by criminal law while others—equally costly or damaging—are not (Hillyard *et al.* 2004)? The social scientist would also be interested in the shifting boundaries of this overall conception, and in what it can tell us about the relationship between legal and popular conceptions of crime: she would attend to the changing contours of criminal law over time and space, the changing balance between different kinds of legal regulation and between legal and informal, social modes of governance, and the implications of these changes for our understanding of how societies are organized.

In pursuing these questions, the criminal justice scholar would not be entirely disappointed in criminal law commentaries. In almost all of them, she would be greeted with a discussion of the aims and functions of criminal law and of the rationale of punishment. From her understanding of criminal justice more generally, she would already be familiar with the way in which two rather different visions of the rationale of criminal law compete for dominance in most accounts (Lacey 2004). On the one hand, criminal law is understood—as distinct from civil law—as being concerned with *wrongdoing* in a quasi-moral sense. On this view, crime is conduct judged to be a sufficiently serious violation of core social or individual interests or shared values that it is appropriate for the state to proscribe and punish its commission. This is a view which sits naturally with a retributive approach to punishment and with a

strong emphasis on the symbolic, expressive dimensions of criminal justice. On the other hand, criminal law is understood in more neutrally instrumental terms as a regulatory system: as attaching costs, through sanctions, to certain kinds of conduct which it is in the overall public interest to reduce. This second view sits naturally with a deterrent or otherwise utilitarian view of punishment. The obvious question arises as to how these competing views are to be reconciled as rationalizations of contemporary criminal law.

Two attempted resolutions are of interest in this context. At a philosophical level, H. L. A. Hart's account, which builds on the liberal utilitarianism of J. S. Mill (Hart 1963, 1968; Mill 1859), argues that, while the general justifying aim of criminal law is a utilitarian one of crime reduction through deterrence, the state is only justified in invoking its coercive criminalizing power as against conduct for which an individual is responsible and which is harmful to others or (in Hart's modified, social-democratic version of Mill's 'harm principle'), under certain conditions, to oneself. This account provides a less moralistic version of the nature of crime than is characteristic of the quasi-moral, retributive conception already discussed, while nonetheless providing an account of why criminal law is of special moral significance. It has difficulty, however, in generating an adequately specified concept of harm: does, for example the offence felt by people who disapprove of certain kinds of behaviour such as homosexual conduct or public displays of nudity count as 'harm'? Furthermore, this approach fails to ask an obvious—and crucially important—question for any social scientist: if the concept of 'harm' is neither fixed nor analytically robust, how are sociocultural notions of 'harm' constructed, and how do they influence criminal/legal constructions of harm (Harcourt 1999; Hillyard *et al.* 2004)?

In legal scholarship, the most common approach to reconciling the different aspects of criminalization consists in a division of the terrain of criminal law between the 'moral core' of 'real crime'—theft, homicide, assault, rape, and so on—and the 'quasi-criminal' 'regulatory offences'—licensing offences, driving offences, tax offences, pollution offences, and so on. In other words, it is accepted that criminal law has not one, but two rationales; and their coexistence is enabled by a functional differentiation between offences. This functional differentiation is then, so the argument goes, mapped on to legal doctrine. Again, however, this pragmatic reconciliation leaves many questions of interest to the social scientist unaddressed. How is the division between 'quasi-moral' and 'regulatory' crimes defined, and is the boundary a clear one? How does it change over time? Under what kinds of social, political, and institutional conditions does such a criminal law system emerge, and what broader governmental or ordering roles, if any, does it pursue? These are questions, however, in which contemporary criminal lawyers are relatively uninterested: as we shall see in the next section, their rationalization of criminal law moves on quickly from the sketchy substantive conceptions mentioned above to a more elaborated, technical account of the specific form which criminal liability must take.

The reason for this lack of focus on a substantive account of criminalization (Katz 2002) is relatively clear. In a system in which criminal law is regarded as a regulatory

tool of government and in which (as in the UK) there are very weak constitutional constraints on what kinds of conduct can be criminally proscribed—a world in which everything from terrorism through dumping litter to licensing infractions and ‘raves’ can be criminalized—there is little that can be said by way of substantive rationalization of the nature of criminal law. This, however, is a contingent matter. If we look back to the legal commentaries of the mid-eighteenth century (Blackstone 1765–9) or even the late nineteenth century (Stephen 1883), we will find a richer and more confident assertion of a substantive rationale for criminal law: of the interests and values which criminal law sets out to express and protect. In Blackstone’s Commentaries, the account is organized around groups of offences threatening these interests—offences against God and religion; offences against the state; offences against the person; offences against property. This works well enough for a very circumscribed system of criminal law. But over the last two hundred and fifty years the scope and functions of criminal law have increased dramatically. The expansion of criminal law’s scope has entailed a fragmentation of its rationale and, as we shall see in the next section, has gone along with an intensification of focus, among legal commentaries, on the formal conditions of criminal liability. This change in the way in which criminal law is organized and thought about is of enormous significance to criminal justice scholars, because it gives us a real clue to the way in which criminal law resolves the changing legitimation and coordination problems thrown up by its environment (Lacey 2001a, 2001b).

THE CONCEPTUAL FRAMEWORK OF CRIMINAL LAW

Contemporary codes and commentaries on criminal law in both the common law and the civilian traditions tend to be organized around a core framework which sets out the general conditions under which liability may be established. This core framework is often known as the ‘general part’ or ‘general principles’ of criminal law—in other words, the set of rules and doctrines which apply across the whole terrain of criminal law rather than to specific offences. In the UK, this framework consists in four main elements: capacity, conduct, responsibility, and (absence of) defence.

1. *Capacity*: only those who share certain basic cognitive and volitional capacities are regarded as genuine subjects of criminal law. One might regard defences such as insanity as defining certain kinds of people as simply outwith the system of communication embodied by criminal law. Since law operates in terms of general standards, the line between criminal capacity and criminal incapacity is a relatively crude one from the point of view of other disciplines. For example, almost every criminal law system exempts from criminal liability people under a certain age, whatever their actual capacities.

2. *Conduct*: criminal conviction is founded, secondly, in a certain kind of conduct specified in the offence definition: appropriating another person’s property in the case of theft; causing a person’s death in the case of homicide; having sexual intercourse with a person without their consent in the case of rape; driving with a certain level of alcohol

in one's blood in the case of driving while intoxicated. Though there are exceptions in the UK's criminal law doctrine, it is generally asserted that mere thoughts, being of a certain status rather than doing an act, and, in the absence of a specific duty to act, omitting to do something rather than acting positively, are insufficient to found criminal liability.

3. *Responsibility/fault*: criminal liability is generally said to depend, thirdly, on the capable subject being in some sense responsible for or at fault in committing the conduct specified in the offence definition: we do not hold people liable, to put it crudely, for accidents. Responsibility or fault conditions generally consist of mental states or attitudes such as intention, recklessness, knowledge, belief, dishonesty, or negligence. To revert to the examples above, the relevant conditions consist in a dishonest intention permanently to deprive in the case of theft; an intention to kill or cause some less serious kind of harm or gross negligence in relation to these results in the case of homicide; recklessness or negligence as to the victim's lack of consent in the case of rape. The fourth example—driving while intoxicated—provides an exception to what is generally represented as the general principle that a discrete responsibility element must be proven by the prosecution: only the driving and the blood alcohol level need be established by the prosecution. Notwithstanding their 'exceptional' status, however, these offences of so-called 'strict' liability are in fact empirically dominant in English criminal law today. This division between offences of 'strict' liability and offences requiring proof of fault is the way in which the division between the 'quasi-moral' and 'instrumental/regulatory' terrains of criminal law is purportedly mapped on to legal doctrine. However, as the example of driving while intoxicated—an offence which thirty years ago was regarded as a quintessentially regulatory offence, yet which today carries a marked moral stigma—illustrates, this line is in fact far from clear.

4. *Defences*: Even where a capable subject has committed the relevant conduct with the requisite degree of fault, a range of defences may operate to preclude or mitigate his or her liability. For example, if the defendant has committed a theft while under a threat of violence, she may plead a defence of duress; if a person kills, intentionally, in order to defend himself against an immediate attack, he may plead self-defence; and if she kills under provocation, she may be convicted of a lesser degree of homicide. 'General defences' apply not only to crimes which require proof of responsibility but also to those of strict liability. Hence, for example, a person who drives while intoxicated because of duress, whether in the form of a threat or in the form of highly compelling circumstances, may be able to escape liability. Defences are often thought to fall into three main groups—*exemptions*, *justifications*, and *excuses*—each relating to the other three components of liability already mentioned. The defence of insanity, for example, arguably operates to recognize that the defendant's *incapacity exempts* him or her from the communications of criminal law; the defence of self-defence may be seen as amounting to a claim that the *conduct* in question was, in the circumstances, *justified*

and hence not the sort of *conduct* which criminal law sets out to proscribe; the defence of duress may be viewed as *excusing* the defendant on the basis that the conditions under which she formed the relevant *fault* condition—in cases of duress, this would generally be intention—are such that the usual inference of *responsibility* is blocked. The defences may be seen as fine-tuning, along contextualized and morally sensitive lines, the presumptive inferences of liability produced by the first three elements.

At one level, this conceptual framework is analytic: it simply provides a set of building blocks out of which legislators and lawyers construct criminal liability. On the other hand—as the description of the framework as a set of ‘general principles’ suggests—it contains an implicit set of assumptions about what makes the imposition of criminal liability legitimate. The ideas, for example, that there should be no punishment for mere thoughts, or that a defendant should not be convicted unless she was in some sense responsible for her conduct, or under circumstances in which some internal capacity or external circumstance deprived her of a fair opportunity to conform to the law, express a normative view of criminal law as not merely an institutionalized system of coercion but, rather, a system which is structured around certain principles of justice or morality. This normative aspect of the ‘general part’ of criminal law becomes yet clearer in the light of two broad procedural standards which characterize most modern systems. The first of these is the *principle of legality*: criminal law must be announced clearly to citizens in advance of its imposition. Only those who know the law in advance can be seen as having a fair opportunity to conform to it. Principles such as clarity and non-retroactivity are therefore central tenets of the liberal ideal of the rule of law. The second procedural doctrine is the *presumption of innocence*: a crime must be proven by the prosecution (generally the state, and hence far more powerful than the individual defendant) to a very high standard. Criminal law is therefore implicitly justified not only in terms of its role in proscribing, condemning, and, perhaps, reducing conduct which causes or risks a variety of harms, but also in treating its subjects with respect, as moral agents whose conduct must be assessed in terms of attitudes and intentions and not merely in terms of effects. And underlying this normative framework is a further set of assumptions about the nature of human conduct: about voluntariness, will, agency, capacity as the basis for genuine human personhood and hence responsibility (Hart 1968).

The various assumptions underlying the conceptual framework within which criminal liability is constructed should be of great interest to criminological and criminal justice scholars. For they give us insight into the processes of interpretation in the courtroom—one key site in the process of criminalization. They also provide some interesting points of both contrast and similarity when compared with the assumptions on the basis of which other practices within the criminal process are founded. Are the assumptions of responsible subjecthood which constitute the core of criminal law thinking the same as, or even consistent with, those which underpin the development of policing strategy, sentencing decision-making, probation practice, or prison regimes? If not, does it matter? And what does it signify?

‘GENERAL PRINCIPLES’ OF CRIMINAL LAW: A CRITICAL ASSESSMENT

The need to bring criminal justice and criminal law analyses into relation with one another is therefore clear. However, it is equally clear that criminal justice scholars ought to be wary of taking the ‘general principles’ of criminal law on lawyers’ terms. For the fact is that the ‘general principles of criminal law’ are honoured, in many systems and certainly in the UK, as much in the breach as in the observance. The preponderance of criminal offences in fact derogates from these principles in some way: by imposing ‘strict’ liability without fault; by requiring proof of responsibility in relation only to certain components of the offence; or by modifying the prosecution’s burden of proof by imposing evidential or, occasionally, legal burdens on the defence (Ashworth and Blake 1996; Tadros and Tierney 2004) The fact that a substantial number of these derogations occur in serious offences such as sexual, financial, and drug-related crime suggests that the ‘general principles’ are as much an ideological as an actual feature of criminal law’s operations. In this respect, the criminal justice scholar will gain some enlightenment from the more critical genre of criminal law scholarship which has subjected the ‘general principles’ of criminal law to a searching examination.

Conventional criminal law scholars, as we have seen, generally provide a brief résumé of the moral/retributive, regulatory/deterrent aspects of criminal justice. They go on to give a terse statement of the competing concerns of fairness and social protection, due process, and crime control which are taken to inform the development and implementation of criminal law in liberal societies. From this point on, they take the idea of ‘crimes’ as given by acts of law-creation. In this way both political and criminological issues are quietly removed from the legal agenda. In contrast, critical criminal lawyers assume that the power and meaning of criminal laws depend on a more complex set of processes and underlying factors than the mere positing of prohibitory norms to be enforced according to a particular procedure. Most obviously, they assume that the influences of political and economic power permeate not only the statutory construction of crime but also the practice of doctrinal interpretation. Yet their view is not the reductive, instrumental one of Realism or the Chicago School. Rather, critical criminal lawyers argue that judicial practice is shaped by tensions between competing values whose power infuses all social practices, and which cannot be reconciled by either legislative reform or feats of rationalizing interpretation. From this perspective, further links between the legal and social construction of crime appear. For it seems, a priori, likely that the evaluative and pragmatic tensions which shape the development of criminal law will also manifest themselves, albeit to different degrees and in different ways, in other criminal justice practices.

The primary aim of early critical criminal law scholarship was to develop an internal or ‘immanent’ critique of the doctrinal framework within which different areas of law have been taken to be organized. Taking a close interest in the way in which criminal liability is constructed within legal discourse, critical scholars took as their focus the structure of ‘general principles’ which are usually taken to underpin criminal law in liberal societies. These included not only the liberal ideals about the

fair terms under which criminal punishment may be imposed upon an individual agent, which we considered above, but also the aspirations of neutrality, objectivity, and determinacy of legal method which are associated with the rule of law (Norrie 2001). For example, Kelman's work scrutinized the basis of the responsibility/fault doctrine which purports to structure and justify the attribution of criminal responsibility to the free individual via the employment of standards of fault such as intent and recklessness. He showed that fault requirements veer in an unprincipled way between 'subjective' standards in which attributions of responsibility depend on what the defendant actually intended or contemplated and 'objective' standards such as negligence which impute to the defendant the state of mind of the 'reasonable man'. Following from this, Kelman emphasized the fact that criminal law doctrine evinces no consistent commitment to either a free-will or a determinist model of human behaviour (Kelman 1981).

Furthermore, Kelman and others demonstrated the manipulability of the generally accepted doctrinal framework according to which criminal liability is constructed in terms of the four elements discussed above; capacity, conduct, responsibility or fault, and absence of defence. For example, the issue of mistake could be conceptualized as a matter pertaining to the existence of the conduct or fault elements of a crime or to the existence of a defence (Lacey, Wells, and Quick 2003: ch. 1). A person who assaults another person in the mistaken belief that that other person is in the process of committing an assault on a third party could, in other words, be regarded as having a defence (of mistaken-self defence), or as lacking the conduct (no 'unlawful' act), or (in certain circumstances) fault/responsibility (no relevant intention) elements of a crime. Since these conceptualizations sometimes affect the outcome of the legal analysis, this entails that doctrinal rules are not as determinate as the conventional theory of legal reasoning assumes. Moreover, the outcome of legal reasoning is contingent upon factors such as the time frame within which the alleged offence was set. For example, whether or not a person is regarded as negligent, in the sense of having failed to reach a reasonable standard of care or awareness, may depend on what range of conduct the court is able to examine. What appears an unreasonable lapse judged in itself may look more reasonable if evidence about its history can be admitted. This broadening of the time frame or context is precisely what the defences often effect. Yet the influence of the framing process is not acknowledged within the doctrinal structure, which accordingly fails to regulate judicial interpretation in the way which is generally supposed.

The critical enterprise here is to hold criminal law up to scrutiny in terms of the standards which it professes to instantiate, and, in doing so, to reveal that, far from consisting in a clear, determinate set of norms, based on a coherent set of 'general principles', it rather exemplifies a contradictory and conflicting set of approaches which are obscured by the superficial coherence and determinacy of legal reasoning. By scrutinizing carefully the form which criminal legal reasoning takes, it becomes possible to reveal that practice as having important ideological dimensions, rationalizing and legitimating a system which serves a variety of powerful interests by representing criminal law as a technical and apolitical sphere of judgement (Norrie 2001).

An important part of this process is the (re)reading of cases not merely as exercises in formal legal analysis but also as texts whose rhetorical structure is at least as important as their superficial legal content (Goodrich 1986). In this kind of reading, critical scholars emphasize the significant symbolic aspect of the power of criminal law, along with the implicit yet powerful images of wrongdoing and rightful conduct, normal and abnormal subjects, guilt and innocence which legal discourse draws upon and produces (Lacey 1993).

RELATING FORM TO SUBSTANCE: PERSPECTIVES FROM HISTORY AND THE SOCIAL SCIENCES

The early critical focus on the intricacies of doctrinal rationalization and the exposure of conflicts which such rationalization obscures has, however, gradually been supplemented by a further set of questions suggested by the process of immanent critique. If critical criminal law was not to remain a set of observations about the apparent irrationality of legal doctrine, the question of the deeper logics underpinning legal discourse had to be addressed (Norrie 2001). Hence questions about the broad socio-political conditions under which a particular doctrinal framework arises and ‘works’, about the historical conditions of existence of particular doctrinal systems of classification (taken as ‘given’ within conventional scholarship), and about the relationship between criminal law’s form and its substantive regulatory project, have begun to claim the attention of criminal law scholars (Norrie 1992; Lacey 1998a, 2001a, 2001b). This development, which might be conceptualized as ‘external’ critique, illuminates some important links between criminal law scholarship and socio-legal and sociological work on the criminal process. For as critical scholars have sought to understand the deeper political and historical dynamics underpinning the logical defects of criminal law doctrine, new issues began to force themselves on to the research agenda. These include questions about the ways in which a focus on certain portions of substantive criminal law, and a lack of attention to others—notably the so-called ‘regulatory’ offences—serves to perpetuate the myth of coherent ‘general principles’, and about the ways in which this selectivity relates to prevailing understandings of what constitutes ‘real crime’, the imperatives of ‘law and order’ politics, and the deeper factors underpinning the governmental and judicial need to represent criminal law as just and as politically ‘neutral’ (Reiner 2006). They also include questions about the way in which a certain model of criminal procedure—that of trial by jury—plays a legitimating role which can only be maintained by diverting attention away from the exceptional nature of jury trials and the prevalence of lay justice, diversion from the criminal process, and practices such as plea-bargaining (McConville and Mirsky 2005).

Whilst earlier examples of critical criminal law scholarship were primarily concerned with the form of criminal reasoning, later examples have begun to examine the substantive patterns of criminal legislation and judicial interpretation, and the relationship between shifts in these frontiers of criminality and the broader social meaning of the practice of criminal justice (Loveland 1995). Striking examples include

the development of criminal law in the area of serious fraud (Weait 1995) and the debate about homicide doctrine following a number of unsuccessful ‘corporate manslaughter’ prosecutions consequent upon incidents which would until recently have been regarded as fatal ‘accidents’ (Tombs and Hillyard 2004; Wells 1995, 2001). Similarly, socio-legal work on patterns of enforcement in the so-called ‘regulatory’ offences have revealed that, in the context of limited resources, specialist regulatory enforcement agencies often fall back on criminal law-like notions of fault such as negligence or recklessness in selecting cases for prosecution—hence disrupting the doctrinal distinction between regulatory and fault-based offences, between ‘real’ crime and ‘quasi’-crime discussed above (Richardson 1987).

Further insight can be achieved by taking a longer-term, historical perspective on the substantive development of criminal law and of the institutional framework within which it is interpreted and enforced. As we noted above, two hundred years ago, English criminal law was far less extensive than it is today, and was more readily rationalized in terms of a set of core interests and values. Of course, this does not mean that there was no social or value conflict, or that criminal law was not already being used for what today we would think of as ‘regulatory’ purposes. But with rapid urbanization and industrialization in the early nineteenth century, and with the growth of the nation state’s governmental capacities and ambitions, the conditions under which criminal law operated changed markedly (Lacey 2001a). Social mobility and fragmentation also had direct implications for the environment which shaped the extent of social reliance on criminal law, as opposed to informal or private dispute resolution. The first institutional responses to these developments were the reforms of the policing, prosecution, trial, and penal processes of the nineteenth century (Langbein 2003; Lacey 2001b), with a professionalization of enforcement and legal practice and a regularization of penal practice consonant with an emerging, rationalist, modernist, and, potentially, liberal conception of the rationale of criminal law (Dubber 2005). In the UK, the obvious counterpart in the substantive law—full-scale codification—never materialized. But the successive attempts at codification, along with the changing conditions under which criminal trials went forward—a developed set of rules of evidence, legal representation of defendants, the slow emergence of an appellate system—conducted to the judicial and scholarly articulation of more general principles of criminal law (Smith 1998). Such general principles were important not only in rationalizing criminal law power in the context of an increase in democratic sentiments and hence within an emerging liberal understanding of the legitimation problems of the system, but also—crucially—in focusing the legitimation narrative on the *form* of criminal law rather than its *substance*, hence managing the substantive fragmentation and diversification of criminal law occasioned by its rapid expansion. Furthermore, these doctrinal developments spoke to the resolution of the changing problems of gathering and validating knowledge—the facts on the basis of which a criminal conviction is arrived at via the application of legal norms—in an increasingly centralized system in which reliance on the local knowledge of jurors and justices of the peace, characteristic of the early modern criminal law, was no longer feasible.

One striking feature which illustrates further connections between criminal law developments and broader social and intellectual developments here is the gradual formalization of principles of criminal responsibility around mental concepts such as intention, knowledge, belief, and recklessness, as opposed to the overtly evaluative concepts such as malice and wilfulness which had characterized the common law for centuries (Binder 2002; Horder 1997). This development played a crucial role in criminal law's legitimation, because it shifted the focus of justified liability from an overt evaluation (malice) to a factual, psychological state (intention), hence (apparently) distancing controversial moral and political judgements from the courtroom. This shift from older ideas of 'fault' to a more empirically based conception of 'responsibility' was made possible by the growth of what we would now call psychology, itself premised on a certain understanding of the mind-body distinction and of the idea of the mental as a discrete object of social knowledge. But the legal development could not have occurred had it not been for the further belief that the factual question of what is going on in someone's mind when he or she is acting can be an object of investigation and indeed proof in a criminal court (Smith 1981). This in turn depended on institutional developments in the trial process, and particularly in the law of evidence (Lacey 2001b).

These brief examples suggest that the full implications of legal critique can only be realized in the context of a broader set of historical, political, and social questions about the conditions of existence and efficacy of particular doctrinal arrangements. These questions are not legal questions, nor do they detract from the importance of a specifically legal critique. What they do is to give that critique a greater significance than it would otherwise have, both by relating it to a wider set of social-theoretic questions and by suggesting links with normative thinking about the conditions under which the criminal process might operate in less unjust, undemocratic, and oppressive ways. In this sense criminal law scholarship has begun to open up a new agenda for cross-institutional and interdisciplinary study.

CONTEXTUALIZING CRIMINAL LAW: CRIMINOLOGICAL PERSPECTIVES

It follows from what has been said in the last section that criminological thinking, broadly understood, brings important insights to the study of criminal law. Since the specific practices of both legislation and legal interpretation take place within the context of broader social processes which shape not only the range and definition of criminal laws but also the particular subjects in relation to which the courts apply their legal techniques, that context is an important factor in understanding the dynamics of legal interpretation. Ideas and principles which are central to criminal law doctrine and its broader accompanying framework, the ideal of the rule of law, begin to take on a

different colour once we appreciate, as criminology helps us to do, the partiality and selectivity of their enforcement.

As an overtly coercive state practice within societies which think of themselves as liberal—as composed of self-determining individuals whose rights and freedoms must be respected—criminal law confronts a serious challenge of legitimation. The challenge is accentuated by the increasing scope and diversifying functions which characterize the development of criminal law since the early nineteenth century, and by the value pluralism and social conflict which characterize late modern societies (Garland 2001; Young 1999). Criminal law seeks to meet this challenge by making a number of normative claims which relate both to the substance of legal norms and to the process through which they are enforced. In relation to the former, criminal law legitimates itself in two main ways. First, it does so by appealing to the normative, purportedly ‘objective’ status of the standards which it applies. Yet, as we have seen, this poses problems of reconciliation with both the vast range of actual criminal laws and the political manipulation of the frontiers of criminality by legislative changes and executive decisions which criminalize hitherto lawful activities or remove criminal sanctions from formerly prohibited conduct. Secondly, criminal law legitimates itself by appealing to the basis of its standards in common, shared understandings or commitments. This is difficult to reconcile with pervasive social conflict in relation to the existence or interpretation of particular criminal norms. Instructive contemporary examples include not only obvious disagreements about the propriety of criminalizing certain forms of sexual behaviour and commercial conduct but even dissensus about the proper standard of fault to be applied in the key offence of homicide (Lacey 1993; Lacey, Wells, and Quick 2003: ch. 6).

In relation to procedure and enforcement, criminal law legitimates itself as the fair and even-handed application of rules to subjects conceptualized in terms of their formal capacities for understanding and self-control. Yet how is this claim to be reconciled with the statistics on disparate patterns of enforcement along lines of race or ethnicity, gender, socio-economic status, age, place of residence? Criminal law claims legitimacy by appealing to the detached and even-handed application of its standards to all who come before it. How is this claim to be reconciled with the pervasiveness of practices such as plea-bargaining, which are driven by the relative power relations of particular actors within the process and by managerialist concerns about the cost-efficient disposal of cases? Criminal law prides itself on its application of a standard of proof beyond reasonable doubt and on its tailoring of liability requirements to the particular individual before the court. How is this to be reconciled with extensive plea-bargaining, with the indeterminacy of fault/responsibility standards, or with reverse burdens of proof? Evidently, these legitimating strategies are heavily dependent on criminal law’s capacity to sustain the aura of its separateness from the politics and practicalities of the criminal process. Many principles which are central to the ‘common sense’ of doctrinal criminal law come to look somewhat fragile as that separateness is eroded by a little knowledge of criminal justice.

THE DOCTRINAL STRUCTURE OF CRIMINAL LAW: QUESTIONS FOR THE SOCIAL SCIENCES

The idea that criminological insight can sharpen the perspective of criminal lawyers will probably be accepted by anyone who has chosen to study criminology. The converse idea that criminologists or students of criminal justice ought to concern themselves with criminal law may be less intellectually digestible. For some students of criminology this has to do with a (not entirely unjustified) scepticism about the relative importance of law in shaping social practices of labelling and punishment. Yet criminal law has a discrete significance as an interpretive practice which plays a central role in the legitimation of the state's penal power. I shall suggest, therefore, that much is to be gained from examining the specificities of criminal law from a socio-legal or regulatory point of view.

First, the critical criminal lawyer's focus on shifting boundaries of criminal law provides one important part of the broader criminal justice jigsaw. Whilst changes in the legislative content of criminal law are themselves highly significant as both political and legal events, the subsequent process of judicial interpretation is what shapes both the meaning and (to some degree) the social efficacy of new criminal laws. Judicial interpretations which, for example, render criminal laws very difficult to enforce will have both knock-on effects for future prosecution policy and implications for the symbolic meaning of the relevant law. An excellent example is the law on incitement to racial hatred, the strict interpretation of which has arguably rendered it virtually unenforceable and which is regarded by some as a *de facto* legitimation of racial abuse (Fitzpatrick 1987). Furthermore, long-standing aspects of the doctrinal framework of criminal law may facilitate or inhibit the movement of the boundaries of criminality in directions aspired to by political institutions and other groupings. One good example here is the inchoate move towards imposing criminal liability on corporations—a development which continues to be inhibited by the association of the 'mens rea' framework with the mental states of individual human agents (Wells 2001).

Secondly, the critical criminal lawyer's focus on the specificities of legal reasoning sheds light on the ways in which power at one stage of the criminal process is exercised and legitimated. Notwithstanding their relative infrequency, trial by jury and criminal appeals play a central role in the legitimation of the entire criminal process (Duff *et al.* 2004). A close appreciation of how these stages work is therefore of central importance to any integrated understanding of criminal justice. Critical scholarship has generated important insights into the ways in which the power of law depends on the capacity of legal discourse to construct itself as generating 'truths' which are impervious to critical scrutiny from other perspectives (Smart 1989). This in turn sheds light on processes by which other knowledges introduced as evidence in criminal trials—sociological or psychological knowledges, for example—are subtly invalidated or modified in the course of 'translation' into the terms of legal discourse. A good example here is the slow and partial legal recognition of evidence about the effects of long-term violence in 'domestic' homicide cases. Whilst recent cases have begun to accept such evidence as

relevant, its force was initially limited by the need to shape it to fit the conceptual straitjackets of legal defences such as provocation, self-defence, and diminished responsibility (Lacey 1998b: ch. 7; Lacey, Wells, and Quick 2003: ch. 6). For instance, the legal requirement that, to qualify as provocation or self-defence, a violent response must follow immediately upon provocative or threatening conduct posed difficulties in several cases in which defendants (most of them women) who have been subject to 'domestic' violence kill their abusers, yet in which there was no immediate relation between the ultimate killing and a particular attack (Nicolson and Bibbings 2000: Pt II; Renteln 2004). The result is that defence lawyers were forced to reconstruct the relevant evidence in psychiatric terms so as to invoke a diminished responsibility defence which misrepresented the defendant's position. Such transformations of non-legal knowledges in the legal process have generally been invisible to conventional legal analysis and until recently received only partial recognition and understanding in socio-legal scholarship.

This is not to imply a reductive, sociological reading of the criminal trial or the criminal appeal: nor is it, conversely, to deny the importance of interpretive questions about the meaning of the rituals and architecture of the trial as a public event. It is rather to assert that the images of subject and society, of guilt and innocence, of responsibility and non-responsibility, of the autonomy and independence of legal power and of the objectivity and political neutrality of judgement which are produced within legal reasoning are discrete objects of criminal justice knowledge. Whilst the ultimate direction of my argument is that these legal specificities have meanings which are systematically obscured by the structure of legal doctrine, these meanings cannot be grasped without a close analysis of the practices of legal argumentation themselves, along with their historical development and place within particular professional institutions. Hence the critical criminal lawyer's approach of taking the doctrinal framework seriously, but of simultaneously reading it as a clue to broader sociopolitical factors, sheds light on matters of central concern to the criminologist.

Thirdly, historical shifts in the patterns of 'general principles' which purportedly structure legal doctrine, and indeed in the degree of insistence on any such structure, are themselves significant from a criminological point of view. Let us take the fact that today's focus on fault/responsibility as the central doctrinal problem in legitimizing criminal liability emerged only during the nineteenth century and reached its current predominance only in the second half of the twentieth century (Lacey 1998a). Before this, the organizing framework for doctrine was focused on the types of conduct proscribed rather than the basis on which individuals could fairly be held responsible for that conduct. This shift relates to a number of social developments of direct relevance to criminalization: a changing conception of the subject as an individual and of his or her relation to the polity and to government (Wiener 1990); a shifting view of the legitimation problems posed by the criminal justice system occasioned by, among other things, the diffusion of liberal-democratic expectations (Lacey 2001a, 2001b); a changing view of the role of criminal law as one form of social ordering among others, the latter driven by significant transformations in the shape and variety of criminal

procedure over the last one hundred and fifty years (Farmer 1996b: ch. 3). Whilst these developments have been central to the social history of crime, and relate directly to the shift from substance to form in the rationalization of criminal law (Norrie 2001), their significance and its relationship with changes in the organizing framework of criminal law doctrine have largely been ignored. Hence a promising avenue of enquiry into the developing nature of crime and criminal justice has been closed off by the current organization of disciplines.

Finally, critical criminal law scholarship generates a finely tuned analysis of the shape of particular criminal laws and their interpretation over time. From a criminological or criminal justice point of view, it is all too easy to take 'criminal law' as a unitary, undifferentiated body of norms which are straightforwardly applied by the courts. Yet a close reading of cases and statutes reveals an enormous diversity among criminal laws: in terms of the style of their drafting; their scope; their construction of their subjects and objects; their assumptions about responsibility; their procedural requirements. Careful microlevel analysis of legal discourse illuminates assumptions about human nature, and about the status of various kinds of conduct, which structure legal reasoning yet which may not appear on the face of legal arrangements. Good examples are the close feminist readings of criminal laws dealing with sexual offences, and with rape in particular (Temkin 1987, 2000; Lacey, Wells, and Quick 2003: ch. 5; Lacey 1998b: ch. 4; Duncan 1996; Zedner 1995), which reveal a troubling set of assumptions about male and female sexuality and about the reliability of female witnesses. Similarly, the readings of criminal law's construction of homosexuality within queer legal theory (Moran 1996; Stychin 1995) reveal a situation which is substantially at odds with the (relatively) liberal approach which appears on the surface of criminal laws. And critical readings of the property offences have generated a wealth of insights about their assumptions about honesty and propriety, their construction of the fragile lines between 'enterprise' and 'dishonesty', and the ways in which this construction shifts as between different kinds of property offence (Lacey, Wells, and Quick 2003: ch. 4; Hall 1952). Such analysis of individual criminal laws or areas of criminal law generates an enormous amount of material which can illuminate the broad social meaning of criminalization. It also reveals a multidirectional process in which both legislature and courts are involved in reflecting, interpreting, and shaping the social attitudes and norms upon which the efficacy and legitimacy of criminal justice depends.

FROM CRITICAL CRIMINAL LAW TO CRIMINALIZATION

My suggestion, then, is that criminology, broadly understood, and criminal law scholarship of a critical temper are complementary albeit distinctive tasks within the intellectual enterprise of working towards an understanding of the diverse social

practices associated with criminal justice. I have argued that the term ‘criminalization’ constitutes an appropriate conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice and criminological studies on the other (Lacey 2004; Farmer 1996a). Escaping the notion of crimes as ‘given’, the idea of criminalization captures the dynamic nature of the field as a set of interlocking practices in which the moments of ‘defining’ and ‘responding to’ crime can rarely be completely distinguished and in which legal and social (extra-legal) constructions of crime constantly interact. It accommodates the full range of institutions within which those practices take shape and the disciplines which might be brought to bear upon their analysis; it allows the instrumental and symbolic aspects of the field to be addressed, as well as encompassing empirical, interpretive, and normative projects. It embraces questions about offenders and victims, individuals and collectivities, state and society.

Within the framework of criminalization, we may accommodate the relevant practices of a variety of social actors and institutions: citizens, the media, the police, prosecution agencies, courts, judges and lawyers, social workers, probation officers, and those working in the penal and mental health systems, legislators, and members of the executive. We can also acknowledge the relevance of a wide variety of disciplines to the analysis of these institutions: sociology, psychology, political science, economics, legal studies, moral and political philosophy, and anthropology, to name only the most obvious. This we can do without collapsing the study of criminalization into a chaotic mass which escapes rigorous analysis, and without falling prey to fantasies about the possibility of a unitary synthesis of different approaches. Doubtless the study of criminalization is less intellectually tidy than the all-encompassing ‘theories of criminal justice’ which have been academically fashionable since the 1960s (Hall 1960; Packer 1968; Gross 1979). This seems an eminently worthwhile sacrifice if it enables us to define a field of scholarship which is sufficiently open to identify the intersecting issues which, as I argued earlier, are all too often lost from view in the prevailing division of labour within the field.

■ SELECTED FURTHER READING

Readers interested in the debate about ‘critical criminal law’ should consult the important early papers by Mark Kelman, ‘Interpretive Construction in the Substantive Criminal Law’, *Stanford Law Review* 33(4): 591–673 (1981) and David Nelken, ‘Critical Criminal Law’, *Journal of Law and Society*, 14(1): 105–17 (1987). Alan Norrie’s *Crime, Reason and History*, 2nd edn, London: Butterworths, 2001, provides an extended application of critical method to criminal law, and pushes the critical approach forward by exploring the historical context in which criminal law doctrine has developed (see in particular ch. 1) and the relationship between criminal law doctrine and sentencing practice (see ch. 10). An assessment of the relationship between developments in political culture, criminal justice institutions, and criminal law doctrine is attempted in Nicola Lacey’s ‘In Search of the Responsible Subject’, *Modern Law Review*,

64(3): 350–71 (2001) and ‘Responsibility and Modernity in Criminal Law,’ *Journal of Political Philosophy* 9(3): 249–77 (2001).

The relationship between questions of criminal law and those of criminal justice is explored in greater detail in Nicola Lacey, Celia Wells, and Oliver Quick (2003), *Reconstructing Criminal Law*, 3rd edn, Cambridge: Cambridge University Press, ch. 1; Simon Bronitt and Bernadette McSherry (2005), *Principles of Criminal Law*, 2nd edn, Pyrmont, N.S.W.: Law Book Company; Nicola Lacey, ‘Criminalisation as Regulation’, in C. Parker, C. Scott, N. Lacey, and J. Braithwaite (eds) (2004), *Regulating Law*, Oxford: Oxford University Press, 144–67; and Donald Nicolson and Lois Bibbings (eds) (2000), *Feminist Perspectives on Criminal Law*, London: Cavendish. Lindsay Farmer’s *Criminal Law, Tradition and Legal Order*, Cambridge: Cambridge University Press, 1996, provides another useful exposition of critical method in the criminal law field, and a fascinating case study of the interaction between national politics, criminal law and criminal procedure in nineteenth-century Scotland: see in particular chs 1 and 3.

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