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Prologue: A brief history of the ancient juridical city of Fictionopolis

(with apologies to Norton Juster)

Fact is often stranger than fiction, and fiction can sometimes help us understand fact. Let me tell of an old world with a wise ruler and some enlightened advisers.

One day, the old King was picking through a thick pile of papers. These were tedious to him, though important to their writers, and the chore of reading them caused the King to yearn for some change, if only he could think of one. Fictionopolis had a good name as a city in which all were happy and each knew his or her place, but it must be said that there was a dark side to it. This took the shape of horrific laws under which a person could be put to death, often most unpleasantly, for a wide variety of not very good reasons (and in some cases for no reason at all). The laws were neither fair nor just, and it was because of this that the King had to perform the daily chore of picking through the papers. For these were requests for pardon from execution, and the King really had to make an effort, stifling a yawn, to preserve some semblance of caring for his people. Day in, day out, he would divide the pile into two – this side for the gallows, that side for transportation to some bizarre-sounding island many thousands of miles away where the lucky pardonees could do what they liked, out of sight, out of mind.

The King was bored and there was some word (he refused to believe it) that the people were not wildly happy either. Some got extraordinarily angry at the sight of 'justice' being done to their family and friends. To make matters worse, there was a growing gang of malcontents, claiming to speak for the people, who kept on muttering to anyone who would listen that the system was not only unfair but also downright inefficient. Eventually, the old King decided, for want of anything better, that perhaps the mutterers' hearts were in the right place and he should listen to them. They might not be 'his sort' but one sometimes had to do that which was distasteful. Besides, if it meant getting out from under the daily ordeal of the two piles – well, almost anything was better than that.

The malcontents were a new sort of people, lacking in breeding and culture, but with an impressive measure of brash self-confidence which was not unrelated to a vulgar ability to make rather large sums of money. Their ideas

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were pretty new-fangled and the King was inclined to send them packing with a flea in the ear. As we said, however, the old monarch of Fictionopolis was a wise man. Although what he heard grated terribly, and although, were he to agree, he would lose some of his own power, he began to see how things might not be so bad under a new régime. These rather offensive upstarts might not even be bad partners in the business of rule. Thus it was that the malcontents became transformed rather rapidly into enlightened advisers.

They said that the old system was unjust and did not work. If evil, wicked people (of whom there were many) got caught, they could really get it in the neck – but not many were caught and the penalties were so severe that juries kept on acquitting them. Even His Majesty connived at this situation (they tactfully pointed out that he too was a victim of the system) by giving out so many pardons. The King pricked up his ears. The system of pardons, said the advisers, had to go. 'But,' said the King suspiciously, 'how will my people be protected from harsh laws otherwise?' 'Simple,' said the advisers, 'we will amend the laws and make them less harsh.'

Then they got down to brass tacks. The present system was old-fashioned. It relied too much on the undoubtedly present but personal ties between His Majesty and the people. They loved the King, but there was rather a lot of temptation about on account of the recent activities of the advisers themselves (here they puffed out their chests) as Creators of Wealth. 'We are the new men,' they said (their women were at home attending to domestic matters), 'and we see the world differently. His Majesty sees loving subjects who know their place and obey the rules out of respect for the past and the King. We are the new men of the future, a world in which a man does what a man must (their women were still at home). A man must be free and all men must be equal for we are all the same – all out to get for ourselves what we can. We know what is best for ourselves, and the law must respect our rights as individuals.'

By this point, the King's eyes were beginning to glaze over. 'Yes, yes,' he said, 'enough of the harangue. What has this got to do with law and order in the city?' 'Everything', said the advisers. If every man was an individual, and all were the same, and each was able to look out for himself, then, properly set, the laws could act as a genuine deterrent to crime. Everyone had to realise that any crime would be followed by a penalty matched to it. There would be a scale of crimes and punishments and (provided that there was a more efficient police force and an effective prison system) everyone would work out for themselves that no crime was worth committing. 'Trust the people,' said the advisers, 'they are like us. Grade the punishments and make them less harsh, make the laws rational, certain and fair and the people will obey them.'

The King could see what they were getting at, but he had some doubts. These advisers might be a common lot, but they weren't half as common as the rabble whose petitions he had to read. Would *they* obey these laws? Terror seemed a better prospect. Then he thought of his brother-in-law, who just happened to be Lord High Chief Justice of Fictionopolis.

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He could just imagine his reaction! 'Do you expect the judges to go along with this?', he asked. The advisers took a deep breath, for they had anticipated this difficult question. The judges would have to be controlled. They enjoyed too much discretion and power, which they used viciously (despite much cant to the contrary). Their job would be only to apply the law, and not to make it up as they did at present. People had no security when the judges kept reinventing the rules. They must be bound by the rules themselves. New rules should be made by a new body (they crossed their fingers) called Parliament. This would be made up of men like themselves plus some of His Majesty's old hunting friends. The judges might get a bit of a say, but the law was to be applied as it stood and without jiggerypokery. If it were any consolation, they concluded, the judges would enjoy new respect among the people because they applied just laws fairly to all.

The King had felt a certain urge to call the guard at the mention of Parliament, but, being wise, he could see the value of what was said. True, he and his brother-in-law would be shackled by this new system (which he disparagingly referred to as 'the rule of law') but they would gain a certain amount of kudos from that very fact. If the system were to be effective in preventing crime (he still had his doubts), well it couldn't be all bad. Besides, these adviser chaps did have a lot of money to play about with . . . He agreed.

How fared the new régime in Fictionopolis? It 'worked' – after a fashion. There were three problems. First, the idea that the world was full of free and equal individuals calculating their self-interest was (as the King had sensed) both a blessing and a curse. It transpired that the advisers had been rather optimistic in their view of things (to what extent deliberately was hard to say). The law was tailored to respect individual freedom and choice but what the advisers had not seen, or not accounted for, or deliberately ignored (here lies the uncertainty) was the extent to which individuals would be divided into distinct social orders by factors of wealth and power. To give the advisers the benefit of the doubt, they had not realised that for all their talk about everyone being free and equal, the reality would be that in matters of property distribution, some (including the advisers) were decidedly more free and equal than others. It was not that their talk (and their laws) were lies or mere rhetoric. Everyone was (more or less) free and equal in the eyes of the law. It was that legal freedom and equality was rather badly matched to the economic distribution of resources and the political distribution of power. It thus transpired that while the law was expressed in universal terms as applying to all classes of people, individuals from the lower classes were much more likely to contravene it. Occasionally, the odd well-to-do person (even one of the advisers in a particularly scandalous episode) would come before the courts, and when the poor came before them, they were treated reasonably fairly (according to the law). It was just that despite this universality of application, the bulk of the criminals did tend to be drawn from the lower echelons.

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The cynics said that this was hardly surprising. The advisers had proclaimed themselves Creators of Wealth and it was their own wealth that they wanted to protect. The new laws were very fine and fancy in their respect for individuals, but they were there to protect property in the main. Inevitably they ended up protecting those who had the most property and prosecuting those who had little and who committed crimes either in order to get wealth or in reaction to the conditions in which they lived. This disparity between form and substance did not appear in the law itself. Whether knowingly or not, the advisers had concocted a clever scheme which, under the guise of protecting all (and this was not a total sham), protected mainly the few against the many. Of course the law had to manage this gap between the legal categories which respected individuals as free and equal beings and the realities of social life, but lawyers are intelligent and resourceful people and this was more or less possible.

The second problem concerned the judges. The old King's brother-in-law had not liked the new set-up one little bit and fought a determined rearguard action against it. Indeed he succeeded in ensuring that not all the law would be made by Parliament and that the judges would still have a considerable say in what the laws should be. He had to accept the general notion of the 'rule of law', however, and as time passed, he and his colleagues began to get the hang of it. For one thing, as the King had foreseen, resentment at being tied down by the law was offset by a new respect shown to the judges (who continued to be drawn from the city's upper ranks) by the common people. In any case, being bound by the law proved not quite so constraining as had at first seemed to be the case. They still had substantial control over the law and it was possible to manipulate it this way and that where necessary.

In this respect, they saw themselves as being in a bit of a cleft stick. They were charged with applying a set of rules designed to be fair, just and respectful to all individuals, but after a while working in the law, it became clear that each individual was simply another manifestation of serious social problems which the law had to control. At the end of the day, the law was about achieving good order in the city. All the talk about individual rights and responsibilities, frankly, got in the way. So sometimes, they did what they were not supposed to and bent or broke the rules (in effect remade them) to suit the situation as they saw it. Respect for the law was one thing, respect for good order quite another. Occasionally the odd tiresome teacher of the law would complain but, due to the general respect that the judges enjoyed, this could be patched over.

Third, it has to be said that the advisers were sorely disappointed in the results of their system. There was much debate on the matter but it was plain that over the years the amount of crime did not diminish and disappear as the advisers had predicted. Individuals just did not see the reason to obey the law, and were not deterred. Some people said that criminals just weren't rational. Others said that it all depended upon what 'rational' meant. It might be quite

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rational for those in poor social conditions to steal or hit someone, and not consider the penalty. Still others said this was claptrap and all that was needed was greater penalties and detection (this view generally prevailed). Those who favoured it (the King's brother-in-law was a keen advocate) often claimed that the law itself was a problem, and that what was needed was a better balance between the rights of the criminal and society (the criminal not being a part of society for this purpose).

Sadly for this latter view, it never did seem to do much good. A recent traveller to Fictionopolis reports that the criminal courts are as busy as ever applying (and occasionally bending) the law to responsible 'individuals' who come before them in an unaccountably incessant stream. The Parliament has in the meantime prudently sanctioned the building of a brand new prison, to be run as a business by certain offspring of the old King's original advisers.

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Part I
Context

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1

Contradiction, critique and criminal law

> By and large, the dominant tradition in Anglo-American legal scholarship today is unhistorical. It attempts to find universal rationalising principles . . . The underlying structure of the law class remains that of forcing the student to reconcile contradictions that cannot be reconciled. If you do it very well, you then become a professor and you demand it of your students and you continue to do it in your legal scholarship. The ideological 'tilt' of current legal scholarship derives from this attempt to suppress the real contradictions in the world, to make the existing world seem to be necessary . . . to be part of the nature of things. It is history that comes to challenge this approach by showing that the rationalising principles of the mainstream scholars are historically contingent. Consequently, analytic scholarship is anti-historical: it regards history as subversive because it exposes the rationalising enterprise.
>
> (Horwitz, 1981, 1057)

1 Introduction

The quotation from Morton Horwitz with which I begin this introductory chapter contains two main arguments which are central to the analysis of criminal law attempted here. First, there is the identification of traditional legal scholarship as entailing a 'rationalising enterprise'. The standard textbooks affirm the possibility of a rational (logical) approach to criminal law based upon the identification, elucidation and application of certain general principles to the existing law. Williams, for example, prefaces the first edition of his *Textbook on Criminal Law* with the statement that he has sought to show 'that the law is mainly rational', joining in criticism so that it may be improved through 'the effort to expose its shortcomings' (Williams, 1978, v). Smith and Hogan heap praise on one case as 'a major step towards a rational and principled criminal law' while criticising other cases for 'the mischief wrought by those extraordinary decisions' (Smith and Hogan, 1983, v). What makes those decisions 'extraordinary' is that they are irrational and unprincipled. The orthodox approach to criminal law scholarship is committed to what MacCormick (1993) has termed 'rational reconstruction', the 'production of clear and systematic statements of legal doctrine, accounting for statute law and case law in terms of organising principles'.

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The argument of this book, to the contrary, is that criminal law is neither rational nor principled, so that the 'extraordinary' is as much the norm as the ordinary. It is not that there is no rationality or principle in the law at all, but rather that the elements of reason and principle are constantly in conflict with other elements in the law itself. This means that the 'rationalising enterprise' is frequently rationalisation only in the pejorative sense of an apparent rationality papering over the cracks of deeper contradictions.

The second point drawn from Horwitz concerns the relevance of history. If legal rationalism is for much of the time only rationalisation in the pejorative sense, why should this be so? Orthodox legal scholarship, if it saw the question, would have no answer to it. For it, the principles upon which the criminal law is founded are natural and ahistoric, in the sense that they are never seen as the product of a particular kind of society generating particular historical forms of social control peculiar to itself. This is what Horwitz means when he says that current legal scholarship attempts to make the world seem 'necessary . . . part of the nature of things'. To the extent that lawyers think historically about the law, they tend to think in terms of the slow evolution of legal forms from the crude to the sophisticated, and not in terms of the particular connections between different legal forms and different kinds of society. When lawyers look back, they tend to discover no more than the present writ small in the past (Gordon, 1981). They propagate a closed version of legal history that can be described as 'mythical' (Fitzpatrick, 1992).

By contrast, the argument of this book is that the modern criminal law was formed in a particular historical epoch and derived its characteristic 'shape' from fundamental features of the social relations of that epoch. Its principles, therefore, are historic and relative rather than natural and general. Furthermore, these principles were established in the crucible of social and political conflict, and bear the stamp of history in the always-contradictory ways in which they are formulated. Historical analysis shows that, far from being free-standing foundations for a rational criminal law, the central principles of the law are the site of struggle and contradiction. This can only work its way through the legal rules themselves. Thus it is that the fate of law as a rationalising enterprise is tied up with the nature of law as a social, historical force. In the Prologue, I have tried to sketch in an imaginary way the social and historical contradictions from which the law emerges and whose marks it bears. In the next chapter, we will go into things in a less imaginary way. In this introduction, I want to consider what the fundamental principles of the criminal law are, and to show why it is fair to suggest that they are contradictory.

2 Rationality and legality

These two values are intertwined. Legality (the 'rule of law') depends upon making and applying legal rules in a non-arbitrary way. It depends upon a

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