Crime, Reason and History

Many books seek to explain the rational nature of the criminal law. Crime, Reason and History stands out as a book that critically and concisely analyses the law’s general principles and comes up with a different viewpoint: that the law is shaped by social history and therefore systematically structured around conflicting elements. Updated extensively to include new chapters on loss of control and self-defence and with an extended treatment of offence and defence, this new edition combines challenging and sophisticated analysis with accessibility.

Alan Norrie is Professor of Law at Warwick University where he is at present Head of School. He has held chairs at Queen Mary and King’s College, London, and is a Fellow of the British Academy.
The Law in Context Series

Editors: William Twining (University College London), Christopher McCrudden (Queen’s University Belfast) and Bronwen Morgan (University of Bristol).

Since 1970 the Law in Context series has been at the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but will also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes, and comparative law.

Books in the Series

Anderson, Schum & Twining: Analysis of Evidence
Ashworth: Sentencing and Criminal Justice
Barton & Douglas: Law and Parenthood
Bell: French Legal Cultures
Bercusson: European Labour Law
Birkinshaw: European Public Law
Birkinshaw: Freedom of Information: The Law, the Practice and the Ideal
Brownsword & Goodwin: Law and the Technologies of the Twenty-First Century
Cane: Atiyah’s Accidents, Compensation and the Law
Clarke & Kohler: Property Law: Commentary and Materials
Collins: The Law of Contract
Collins, Ewing & McColgan: Labour Law
Cowan: Housing Law and Policy
Cranston: Legal Foundations of the Welfare State
Darian-Smith: Laws and Societies in Global Contexts: Contemporary Approaches
Dauvergne: Making People Illega: What Globalisation Means for Immigration and Law
Davies: Perspectives on Labour Law
Dembour: Who Believes in Human Rights? The European Convention in Question
de Sousa Santos: Toward a New Legal Common Sense
Diduck: Law's Families
Fortin: Children's Rights and the Developing Law
Glover-Thomas: Reconstructing Mental Health Law and Policy
Gobert & Punch: Rethinking Corporate Crime
Goldman: Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority
Harlow & Rawlings: Law and Administration
Harris: An Introduction to Law
Harris, Campbell & Halson: Remedies in Contract and Tort
Harvey: Seeking Asylum in the UK: Problems and Prospects
Hervey & McHale: Health Law and the European Union
Holder and Lee: Environmental Protection, Law and Policy
Jackson and Summers: The Internationalisation of Criminal Evidence
Kostakopoulou: The Future Governance of Citizenship
Lewis: Choice and the Legal Order: Rising above Politics
Likosky: Transnational Legal Processes
Likosky: Law, Infrastructure and Human Rights
Maughan & Webb: Lawyering Skills and the Legal Process
McGlynn: Families and the European Union: Law, Politics and Pluralism
Moffat: Trusts Law: Text and Materials
Monti: EC Competition Law
Morgan: Contract Law Minimalism
Morgan & Yeung: An Introduction to Law and Regulation: Text and Materials
Norrie: Crime, Reason and History 3rd edn
O’Dair: Legal Ethics
Oliver: Common Values and the Public–Private Divide
Oliver & Drewry: The Law and Parliament
Picciotto: International Business Taxation
Probert: The Changing Legal Regulation of Cohabitation, 1600–2010
Reed: Internet Law: Text and Materials
Richardson: Law, Process and Custody
Roberts & Palmer: Dispute Processes: ADR and the Primary Forms of Decision-Making
Rowbottom: Democracy Distorted: Wealth, Influence and Democratic Politics
Scott & Black: Cranston’s Consumers and the Law
Seneviratne: Ombudsmen: Public Services and Administrative Justice
Stapleton: Product Liability
Stewart: Gender, Law and Justice in a Global Market
Tamanaha: Law as a Means to an End: Threat to the Rule of Law
Turpin and Tomkins: British Government and the Constitution: Text and Materials
Twining: Globalisation and Legal Theory
Twining: Rethinking Evidence
Twining: General Jurisprudence: Understanding Law from a Global Perspective
Twining: Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na’im, Yash Ghai and Upendra Baxi
Twining & Miers: How to Do Things with Rules
Ward: *A Critical Introduction to European Law*
Ward: *Law, Text, Terror*
Ward: *Shakespeare and Legal Imagination*
Wells and Quick: *Lacey, Wells and Quick: Reconstructing Criminal Law*
Zander: *Cases and Materials on the English Legal System*
Zander: *The Law-Making Process*

*International Journal of Law in Context: A Global Forum for Interdisciplinary Legal Studies*

The *International Journal of Law in Context* is the companion journal to the Law in Context book series and provides a forum for interdisciplinary legal studies and offers intellectual space for ground-breaking critical research. It publishes contextual work about law and its relationship with other disciplines including but not limited to science, literature, humanities, philosophy, sociology, psychology, ethics, history and geography. More information about the journal and how to submit an article can be found at http://journals.cambridge.org/ijc.
Crime, Reason and History

A Critical Introduction to Criminal Law

THIRD EDITION

ALAN NORRIE
If you call me brother
Forgive me if I inquire
Just according to whose plan?

Leonard Cohen

Our external symbols must always express the life within us with absolute precision; how could they do otherwise, since that life has generated them? Therefore we must not blame our poor symbols if they take forms that seem trivial to us, or absurd for . . . the nature of our life alone has determined their forms.

A critique of these symbols is a critique of our lives.

Angela Carter
To Gwen, with love and respect
Contents

Preface to the third edition page xvii
Preface to the second edition xx
Preface to the first edition xxii
Table of cases xxv
Table of statutes xxxii

Prologue: A brief history of the ancient juridical city of Fictionopolis 1

Part I: Context 7

1 Contradiction, critique and criminal law 9
   1 Introduction 9
   2 Rationality and legality 10
   3 Individual justice 13
   4 Understanding the contradictions 16

2 The historical context of criminal doctrine 19
   1 Introduction 19
   2 Legal individualism and social individuality 20
      (i) Justice and deterrence in the penal theory of the Enlightenment 20
         (a) The reformers’ task 20
         (b) Retributive justice 21
         (c) Utilitarian deterrence 22
         (d) The need for legality 24
      (ii) Interests and ideology in reform penal theory 24
         (a) Middle-class interests 25
         (b) Middle-class interests and moral-legal individualism 25
         (c) Abstractions and realities 26
         (d) The character of modern law: its repressive individualism 29
   3 Legal individualism and social control 30
      (i) The common law and the criminal law in history 31
      (ii) Logic, ‘policy’ and social class 33
4 The foundational tensions of criminal doctrine 35
   (i) Law’s psychological individualism 35
   (ii) Law’s political individualism 36

Part II: Mens rea 39

3 Motive and intention 41
   1 Introduction 41
   2 Motive and intention: desocialising individual life 43
      (i) Conflicting motives and common intentions 43
      (ii) Hidden motives 46
         (a) Individual morality 46
         (b) Political morality 49
         (c) Social mores 50
      (iii) Informal remedies to the formal politics of denial 53
         (a) Discretion to prosecute 54
         (b) Discretion to convict 54
         (c) Discretion in sentencing 55
   3 Indirect intention: legal and moral judgment 57
      (i) Two approaches to intention 57
         (a) The formal psychological (‘orthodox subjectivist’) approach 58
         (b) The morally substantive approach 59
         (c) Summary of the two approaches 61
      (ii) The law of oblique intention: Moloney 61
         (a) Guidelines to a jury in Moloney 63
         (b) Moloney’s intended practical impact 64
      (iii) Having one’s subjectivist cake and eating it: interpreting Moloney 64
         (a) Guidelines to a jury: Hancock and Shankland and Nedrick 64
         (b) Hancock and Shankland’s practical impact 66
      (iv) Woollin and after 67
         (a) Woollin and the parameters of indirect intention 67
         (b) Two approaches to intention and indiscriminate malice 68
         (c) ‘Entitled to find’ and the moral threshold 70
   4 Conclusion 71

4 Recklessness 73
   1 Introduction 73
   2 Subjectivism and objectivism in the law of recklessness 76
      (i) What was wrong with Caldwell? 76
      (ii) Subjectivism and objectivism: an irreconcilable split 79
      (iii) G and another: roads not travelled 80
Contents

(iv) What is wrong with orthodox subjectivism? 82
(v) What is wrong with orthodox objectivism? Gross negligence manslaughter 83
(vi) A ‘third way’? Introducing ‘practical indifference’ 88

3 Recklessness as practical indifference 89
(i) The concept of practical indifference 90
(ii) Two questions about practical indifference 91
   (a) Practical indifference and determinacy 91
   (b) Is practical indifference subjective? 92
(iii) The political limits of practical indifference 94

4 The historical roots of recklessness 96
(i) ‘Factual’ versus ‘moral’ recklessness 96
(ii) Antinomy and the forms of culpability 98
(iii) An objection: the ‘objective’ question in orthodox subjectivism 99

5 Conclusion 100

5 Strict and corporate liability 102
1 Introduction 102
2 Differentiation: strict liability 104
   (i) Strict liability and the regulatory offence 104
   (ii) The ideological and practical context of the regulatory offence 106
3 Strict liability and ‘real’ crime: a presumption of mens rea? 109
   (i) The historic cases: returning to morals 109
   (ii) From moral judgment to legal principle 113
4 Assimilation: corporate liability 117
   (i) Introduction 117
   (ii) Assimilating corporate to individual fault: the identity doctrine 118
   (iii) From identity to aggregation and beyond 120
      (a) Aggregation 121
      (b) An organisational approach 121
      (c) Problems with the organisational approach 122
5 Between identity and organisation: the 2007 Act 124
6 Social complexity and the corporate form: responsibility and punishment 128
   (i) Economic integration and corporate responsibility 128
   (ii) Social co-ordination and corporate punishment 129
7 Conclusion 132

Part III: Actus reus 135

6 Acts and omissions 137
1 Introduction 137
   (i) Acts 138
   (ii) Omissions 139

© in this web service Cambridge University Press  www.cambridge.org
2 Acts 140
   (i) Conflicting conceptions of voluntariness 140
       (a) Physical involuntariness versus moral involuntariness 140
       (b) Physical involuntariness versus moral voluntariness 144
   (ii) Limiting physical involuntariness 144
       (a) The requirement of unconsciousness 144
       (b) Intoxication, physical involuntariness and moral voluntariness 146
       (c) Denying physical involuntariness: situational liability cases 149
   (iii) Conclusion 151
3 Omissions 151
   (i) Constructing the concept of an omission 152
       (a) The drowning infant/stranger 154
       (b) Killing and letting die 155
   (ii) Juridifying the concept of an omission 156
   (iii) Abstract right and social need 159
   (iv) Beyond individualism? 162
       (a) Line-drawing and the duty of easy rescue 163
       (b) Specific duties of citizenship? Legal form and the preventive turn 166
4 Conclusion 168

7 Causation 171
1 Introduction 171
2 A critical approach to causation 172
3 Liberal principles for the imputation of causation 174
   (i) Abnormal conditions or contingencies 175
   (ii) Third-party voluntary interventions 177
4 Analysing the causation cases 179
   (i) The intervention of a new voluntary act 179
       (a) Framing cases narrowly or broadly 180
       (b) Fright and flight 181
       (c) Suicide 182
       (d) Drug-taking 183
       (e) Law enforcement 185
       (f) Refusing medical treatment 186
   (ii) The intervention of an abnormal occurrence 187
       (a) The medical treatment cases 187
       (b) The ‘eggshell skull’ case 191
       (c) The regulatory context 192
5 Conclusion 193
Part IV: Defences

8 Necessity and duress

1 Introduction 199

2 Necessity 201
   (i) Necessity’s ambiguous history 202
   (ii) Judgment and context: the case of Dudley and Stephens 203
   (iii) The re-emergence of necessity 207
      (a) ’Excusatory necessity’: duress of circumstances 207
      (b) ’Justificatory necessity’: medical cases 210
      (c) ’Justificatory necessity’: challenging the state 211
      (d) ’Justificatory’ or ’excusatory’? State necessity 213
   (iv) Necessity, criminal law and social justice 214

3 Duress 218
   (i) Conflicting positions in the murder cases 219
   (ii) The conflict within the basic arguments 220
   (iii) Further limits 224
      (a) Mistake of duress 224
      (b) Standard of resistance 225
      (c) Self-induced duress 227

4 The formal structure of defences 229
   (i) Offence and defence 229
   (ii) Justification and excuse 231

5 Conclusion 233

9 Insanity and diminished responsibility

1 Introduction 237

2 Law against psychiatry: the social control of madness 239
   (i) Law’s rational subject 239
   (ii) The asylum and psychiatry 240
   (iii) Conflicting views of crime 242

3 Between law and psychiatry: the legal defences 243
   (i) Insanity 243
      (a) The breadth of the Rules: ’disease of the mind’ 244
      (b) The narrowness of the Rules: the two cognitive tests 245
   (ii) Diminished responsibility 248
      (a) Meaning of terms under the old law 248
      (b) Conflict and cooperation in the law 249
      (c) Modernising the law: the 2009 Act 251
      (d) Alcoholism and diminished responsibility 254
      (e) Why the partial defence to murder only? 256

4 Law and psychiatry in conflict: the politics of law reform 257
Contents

10 Self-defence

1 Introduction

2 Principles, contexts, conflicts: a ‘commonsensical’ logic

(i) Necessity and imminence

(a) Necessity

(b) Imminence

(ii) Proportionality and the ‘heat of the moment’

3 Mistaken self-defence: offence, defence and the ‘inexorable logic’ of mens rea

(i) The ‘inexorable logic’ of mens rea

(ii) Self-defence as a defence: the counter-argument

(iii) The evaluative context

(a) Self-defence as justification or excuse

(b) Mistaken self-defence: warranted excuse or imperfect justification?

(c) Offence or defence?

4 Mistake as to amount of force: combining conflicting logics

(i) Mistakes of fact and law

(ii) Honest and reasonable mistakes

(a) Fusing incompatible alternatives

(b) Further flexibility

5 Conclusion

11 Loss of control

1 Introduction

(i) Reforming the law

(ii) Historical shifts in understanding provocation

2 The new law and the old law

(i) The new law

(ii) Problems with the old law

(a) Concern over the subjective test

(ix) The post-Hinckley debate in the United States

(ii) Reform proposals in England and Wales

5 Law and psychiatry combined: the decontextualisation of madness

(i) Covering up for the law

(a) Poverty and the insanity defence

(b) Women, infanticide and diminished responsibility

(c) Limits to compassion and pragmatism

(ii) Covering up for society: men killing women

6 Conclusion

(i) The nature of madness

(ii) Law and psychiatry: consensus and conflict

10 Self-defence

274

1 Introduction

274

2 Principles, contexts, conflicts: a ‘commonsensical’ logic

(i) Necessity and imminence

(a) Necessity

(b) Imminence

(ii) Proportionality and the ‘heat of the moment’

3 Mistaken self-defence: offence, defence and the ‘inexorable logic’ of mens rea

(i) The ‘inexorable logic’ of mens rea

(ii) Self-defence as a defence: the counter-argument

(iii) The evaluative context

(a) Self-defence as justification or excuse

(b) Mistaken self-defence: warranted excuse or imperfect justification?

(c) Offence or defence?

4 Mistake as to amount of force: combining conflicting logics

(i) Mistakes of fact and law

(ii) Honest and reasonable mistakes

(a) Fusing incompatible alternatives

(b) Further flexibility

5 Conclusion

301

11 Loss of control

1 Introduction

304

(i) Reforming the law

305

(ii) Historical shifts in understanding provocation

305

2 The new law and the old law

307

(i) The new law

307

(ii) Problems with the old law

308

(a) Concern over the subjective test

309
The objective test: unacceptable grounds for provocation 309

The objective test: over-subjectivisation of the reasonable person 311

The underlying philosophy 312

3 Central issues for the new law 314

(i) Controlling the grounds of provocation 314

(a) The power of the judge 314

(b) Sexual infidelity 315

(ii) Controlling the objective test 316

(a) The normal person test: who does it exclude? 316

(b) Age and sex 319

(iii) The abused woman 320

(a) The fear trigger 320

(b) The anger trigger 321

(iv) Loss of control 322

(a) Why was loss of control reinstated? 322

(b) What is the effect of reinstatement? 324

4 The old and the new: history, structure and form 325

(i) Changes in the law in historical context 325

(ii) Form, substance and the new defence 328

Part V: Concluding 331

12 Sentencing 333

1 Introduction 333

2 Deterrence 336

(i) Individual deterrence and its social context 338

(ii) Individual versus general deterrence 341

3 Retributivism 344

(i) Introduction: ‘just deserts’ and sentencing 344

(ii) Legitimating the allocation of punishment 346

(a) The ideal and the actual in classical retributivism 347

(b) ‘Just deserts in an unjust society’? 348

(iii) Limiting punishment through proportionality 350

(a) The classical approach 350

(b) Cardinal and ordinal proportionality 350

(c) The living standards analysis 352

4 Rehabilitation and incapacitation 353

(i) Individualism versus individualisation 354

(ii) Individualisation and sentencing 355

(a) Rehabilitation 355

(b) Incapacitation 356

5 Competing ideologies and a dominant rationale 359
| Contents |
|------------------|---|
| The antinomies of sentencing | 359 |
| A dominant rationale? | 360 |
| The indeterminacy of the legal form | 361 |
| Conclusion | 363 |

**13 Conclusion**

1 The political nature of juridical individualism | 365
   (i) Psychological individualism: the repressive function | 366
   (ii) Political individualism: the expressive function | 367

2 Juridical individualism in the criminal law | 369
   (i) Offence: mens rea | 369
   (ii) Offence: actus reus | 373
   (iii) Defences | 375
   (iv) Sentencing | 378

3 Criminal law as praxiology | 379

_Bibliography_ | 382
_Index_ | 395
Preface to the third edition

When I wrote the second edition, eight years had passed since the first. I scarcely imagined that the gap between that and the third would be thirteen years. On current form, a fourth edition is due in 2032.

This is not a textbook in the standard mode, which in part explains the time lags. Its underlying argument, right or wrong, is central to its significance, and permits it some leeway should the law change. Nonetheless, it was time to revisit in light of changes to the criminal law over a decade and more.

Scarcely a substantive law chapter remains unaffected. Intention has remained surprisingly stable, but recklessness abandoned Caldwell after a twenty-year ‘error’ (Chapter 4). A new offence of corporate manslaughter was enacted (Chapter 5). The law of omissions has had to be rethought in the light of the ‘preventive turn’ (Chapter 6). Causation seems to have gone back to first principles, but not perhaps in a principled way (Chapter 7). Necessity has expanded, albeit under cover and piecemeal (Chapter 8). There has been reform of diminished responsibility (Chapter 9). In sentencing, contradictory processes have led to a greater emphasis on both just deserts and incapacitation (Chapter 12). I have also added two new chapters, on self-defence and its mistaken form (Chapter 10), and on loss of control (Chapter 11).

These new chapters (plus a new section in Chapter 8) make the book more comprehensive and develop its argument. In the second edition, I tried to bring out the relationship between ‘legal form’ and ‘moral substance’. Legal form is abstract, individualistic, factual, cognitive, psychologistic. Moral substance refers to the ‘thick’ descriptions that represent the ‘content’ of moral states. These lurk behind or within formal legal criteria for blame. In criminal law, these descriptions are excluded by conceptions of responsibility, but force their way back in as the law’s hidden ‘other’. An uneasy relation between ‘legal’ and ‘moral’ responsibility lies at the core of the general part. In this edition, ‘moral substance will out’ is a leitmotif.

The new chapters extend the analysis into the basic categories of offence and defence, justification and excuse. Criminal law concepts hunt in pairs. The pivotal relationship in the second edition involved the motive/intention couple (Chapter 3), the physical/moral involuntariness couple (Chapter 6), and the twin defences of necessity and duress (Chapter 8). These defences were
understood as morally substantive supplements required by the formal (factual and psychological) accounts of intention and voluntary acts in mens rea and actus reus.

These basic categories give form to the law, but they break down in the face of morally substantive issues. Moral experience is too complex, contested, conflicted and fluid to fall within neat legal terms. A good test of this thesis is to be found in the law of self-defence, where mistakes are conventionally seen either as pertaining to the definition of the offence, or as a separate defence. I suggest both positions can be right; it depends on how actual mistakes are viewed, morally and politically. If a mistake is vindicated, it is a case of doing the right thing for the wrong reason (which denies the offence); if not, one does the wrong thing for the right reason (which requires a defence). Of course, the argument is as always grounded in the historical analysis of modern legal form, on which the book rests.

A word should be said about underlying social changes since the first edition was published. Over twenty years, we have witnessed increasing moves towards a less liberal and social democratic polity. The neo-liberal discipline of the market is relied on more in organising social life. Left to its own devices, the market cannot sustain social order. The reassurance provided by welfarism and social democracy has been significantly withdrawn. More emphasis is therefore placed on criminal law, and more authoritarian versions of that law, to maintain order. This has had its effect on some areas. We see it in the preventive turn (Chapters 6 and 12), in the reshaping of diminished responsibility (Chapter 9), and in the new loss of control defence (Chapter 11).

But change should not be overstated since other parts of the law have retained their earlier commitments. Intention has seemingly found a balance between its oblique form and legal politics (Chapter 3); recklessness has returned to its orthodox subjective form (Chapter 4); strict liability has generally retained an emphasis presuming mens rea, while corporate liability has been expanded, whether for symbolic or practical reasons (Chapter 5); causation has reaffirmed the principle of novus actus (Chapter 6). It is thus not yet time to invoke Hegel’s Owl of Minerva, though the use of the law is changing.

The arguments have been elaborated in front of first-year students at Warwick, Queen Mary and King’s College London over the years. The book is meant to be taught to undergraduates, either directly, or as a critical reflection on more orthodox texts, of which there are many. It is a challenging read, but I believe that good students wish to be challenged.

As ever, I owe thanks to friends and colleagues who have read and commented on the text. These include Niki Lacey and Celia Wells, fond colleagues since the summer of 1988 on an Oxford lawn; Peter Ramsay, Craig Reeves and Henrique Carvalho, former doctoral students and now collaborators; Ronnie Mackay, Andrew Ashworth, Arlie Loughnan; and Victor Tadros and Roger Leng, colleagues at Warwick over the last five years. The last connection is important in that this book originated at Warwick (and Roger read and
commented on the whole of the first edition). Things have come full circle with my return there.

My thanks as always go to Gwen, to whom the book is again dedicated. We have been with each other since long before the first edition. I also thank our sons, Stephen and Richard. To them must now be added Sach and Eleanor, our cheerful, determined, delightful granddaughter. Life is a long song.

Alan Norrie
June 2014
Preface to the second edition

It is eight years since the first edition of this book was published. Where relevant, I have sought to update the argument with new case and statute law. I have also developed the analysis, especially in Chapter 3, where a closer link between the two main sections, on motive and intention and indirect intention, is established. There, I have sought to bring out the conflict between 'factual and cognitivist' approaches to intention on the one hand and 'morally substantive' approaches on the other. This seems to me to involve a conflict central to criminal law, as is evidenced by its repetition in many areas. It is paralleled in the law of recklessness (Chapter 4), in the law of strict liability (Chapter 5) and in the law of acts (Chapter 6). Its existence spills over into defences like necessity and duress (Chapter 8) and the principles of sentencing (Chapter 10). Elsewhere, I have argued that it also underlies acute problems in the law of provocation (Norrie, 2001). Recognising the problem helps explain tensions in the law between formalism and informalism (below, pp 53–7), and many logical inconsistencies and contradictions with which criminal lawyers grapple.

The idea that the general principles of criminal law might be founded on conflicts or contradictions seems hard to grasp. It runs up against the assumption that arguments of underlying principle should resolve problems by finding a better, or even a right, solution. Analyses of the moral significance of motive, or generally of a morally substantive approach, to formulating intention are assumed to lead directly to proposals for legal reform (see eg Clarkson and Keating, 2010, 148; Horder, 2000; Smith, 2001, 402). My argument is that such analyses are indeed relevant to the law, but are at the same time repelled by its structural tendency to deny moral substance through its general principles. The law has a complex dilemmatic structure involving inclusion and exclusion of the morally substantive within an overall framework based on the psychologically factual and cognitive.

The name given to the dominant psychologistic approach is 'orthodox subjectivism'. It informs the great post-war textbooks on criminal law, as it does the work of the early law reformers, the Victorian Criminal Law Commissioners. My argument is that its dominance stems from how it reflects the historical, legal and political value structure of modern Western societies. It is this that explains its
Preface to the second edition

enduring importance even if it is seen by many as problematic for its evasion of issues of moral substance. My own position is that both orthodox subjectivism and moral substantivism have value, though both are also morally inadequate. It is this complex relationship of the positive and the negative, of the legal, the historical and the moral, that makes legal change inherently problematic.

Crime, Reason and History has turned out to be the second of three books on modern Western ideas of criminal law, responsibility and punishment. The relationship between it and its predecessor, Law, Ideology and Punishment (1991) is described in the Preface to the First Edition below. Its successor, Punishment, Responsibility and Justice (2000) is a more ambitious philosophical and theoretical work. It advances what I call a relational theory of justice against both the orthodox subjectivists and the moral substantivists referred to above. It seeks in brief to identify and explain the ambivalence and ambiguity which accompany judgments of individual responsibility in modern law and morality. It does so by revealing the intrinsic yet occluded links (relations) between individual and social responsibility, between doing individual and doing social justice. The broad connection between these two books is that Punishment, Responsibility and Justice develops, underpins and defends the analysis presented here. I briefly refer to it at various places in this edition, but I have in general not sought to rewrite the earlier book in the light of the later one. The exception to this is Chapter 3, where the argument of the first edition needed development. I stress, however, that no knowledge of the later book is presupposed below.

Once more, I would like to thank the many academic friends and colleagues who through their agreements and, as important (and more frequent!), disagreements support the intellectual dialogue of which this book is a part. I also thank once more Gwen, Stephen and Richard for being there.

Alan Norrie

September 2001
The impetus to write this book came from an earlier work (Norrie, 1991) which considered the broadly ‘Kantian’ historical development of the modern philosophy of punishment, and explained the concept of justice and the contradictions within it in terms of the ideological premises upon which it was based. Those premises, I argued, stemmed from the ideological form of the abstract juridical individual at the heart of modern legal theory. Towards the end of that work, I began to develop the central argument of the present book. If the philosophy of punishment is essentially contradictory in its forms, and if these forms are based upon legal ideology, then it ought to be possible to understand not only the philosophy of punishment but also the theory and practice of the criminal law as contradictory.

Sustenance for this view was derived from the North American Critical Legal Studies approach, but such work remained peculiarly ‘legal’ in an inverted way: it retained an insider’s commitment to law at the same time as it challenged law’s central premises. Critical Legal Studies has had surprisingly little to say about criminal law, but the leading work in the field (Kelman, 1981) does not move significantly beyond the activity of ‘trashing’, simple negation, of the rationalist premises of orthodox criminal law theory. This work is important, but in presenting a systematic critical introduction to the law’s general principles, I try to move beyond it. I have sought to synthesise a critical ‘internal’ account of criminal law which ‘takes doctrine seriously’ with an ‘external’ commitment to presenting law as a social and historical practice emerging in the first half of the nineteenth century.

I regard the practical work of the penal reform movements of this period as crucial in establishing a criminal law project that was deeply influenced by the philosophy of the Enlightenment. That influence remains at the heart of orthodox legal practice and scholarship through the commitment to liberal subjectivist and legal positivist analysis. It is the marriage of social practice and philosophical ideology that links my earlier concerns in the philosophy of punishment with the present work, and which provides the bridge for an analysis that seeks to break down any inside/outside distinction in legal scholarship.

The main title of this book reflects these concerns, but perhaps a word is required about the subtitle. The idea of ‘critique’ as in ‘Critical Introduction’ is
that of starting from the forms of law in orthodox usage and showing the contradictions within that usage. From there, one moves to examine the fault lines that underlie the operative forms and to explain their existence in a particular social and historical context. In this way, one shows how the legal forms ‘hang together’ within criminal law discourse, and that there is an historical logic which underlies, suffuses and explains its intrinsic illogic.

This is, however, a ‘Critical Introduction’ and not an ‘introductory critique’. I have sought to make the argument as accessible as I can, in particular by developing it slowly in the first few chapters. My aim, however, has been to develop it to meet some of the very sophisticated orthodox analyses head on, and this requires an approach that cannot be too simplistic. Where the work is introductory is in the scope of its coverage of the law’s general principles. I examine the most important areas of criminal responsibility, and treat them to critical analysis. These are also the central areas that need to be covered, alongside the substantive crimes, in an undergraduate criminal law course.

This book is in many ways a companion volume to the other criminal law text in the Law in Context series (Lacey, Wells and Meure, 1990). Although the two works share many sympathies, they are also remarkably different. Lacey, Wells and Meure deal primarily with the substantive crimes and the contexts which generate the particular shape of the laws that protect and control (some forms of) social life. I start with the central categories of the orthodox approach to criminal law, and seek to locate them in a social and ideological context. The former approach locates criminal laws in the diversities of social life and the differentials of social power, while I begin with the ideal of unity within orthodox scholarship, and show both its intellectual limits and the social conditions of its possibility. At the risk of considerable oversimplification, it might be said that Lacey, Wells and Meure’s primary focus is the content of the criminal law, whereas mine is its form. It may be that neither approach tells the whole story, and that therefore the two books genuinely complement each other. Perhaps subsequent work will be in a position to seek a further, deeper synthesis of form and content, in part on the basis of these two books.

In writing this book, I have incurred a large number of debts to friends and colleagues. At Warwick, I would like to thank Roger Burridge and John McEldowney who welcomed me onto the criminal law course some years ago, and encouraged me in the development of the arguments presented here. I would also like to thank Davina Cooper, Robert Fine and Linda Luckhaus for reading and commenting on specific chapters, and a number of colleagues for their comments at staff seminars I gave at the beginning and end of the project. These include Hugh Beale, Julio Faundez, Laurence Lustgarten, Sol Picciotto and Geoffrey Wilson. More generally, I would like to acknowledge the value of being in a Law School like Warwick which has a self-conscious tradition of encouraging innovative approaches to legal study. Beyond Warwick, I would like to thank a number of people for their help, including Andrew Ashworth, Antony Duff, John Gardner, Peter Glazebrook, Jeremy Horder, Nicola Lacey,
Preface to the first edition

Roger Leng, Peter Rush, Stephen Shute, Clive Unsworth, Tony Ward and Celia Wells. Roger Leng in particular read and commented on every chapter except the last to my great benefit. From Andrew Ashworth (1991), I have borrowed the realist usage of the male-gendered pronoun to denote the criminal subject. William Twining and Chris McCrudden were supportive Series Editors, while Benjamin Buchan at Weidenfelds was both patient and cracked the whip at appropriate times. Versions of Chapters 3, 4 and 7 have appeared in the Criminal Law Review [1989] 793, the Oxford Journal of Legal Studies (1992) 12, 45 (and appears here by permission of Oxford University Press), and the Modern Law Review (1991) 54, 685.

Finally, I would like to thank my wife Gwen for her love, support and encouragement, particularly in the trying final stages of writing. Stephen and Richard were understanding and unselﬁsh in letting me disappear for hour upon hour when I could have been doing other things with them. I hope their view of academic life has not been too coloured by observing the process of book-writing at close proximity. I am grateful to Stephen for his increasingly mordant wit, and to Richard I owe the Prologue from bedtime reading of The Phantom Tollbooth. It is an indication of how long I have been working on the book that he was recently created a High Court judge. Without them all, I doubt if this book would have been written; for them, it is the best I could do.

Alan Norrie
December 1992
Table of cases

A (children) (conjoined twins: surgical separation), Re [2000] 4 All ER 961 48, 71, 200, 210, 211, 211n11, 212, 213, 224
Abdul-Hussain [1999] Crim LR 570 200, 208, 229
Acott [1997] 1 All ER 706 317, 319
Adomako [1994] 3 WLR 288 79, 84, 86, 127
Ahlers [1915] 1 KB 616 47
Ahluwalia [1992] 4 All ER 889 265, 304n1, 309, 320, 323
Allen [1988] Crim LR 698 149
Alphacell Ltd v. Woodward [1972] 2 All ER 475 104
Anderton v. Ryan [1985] 2 All ER 355 16
Andrews v. DPP [1937] AC 576 84, 88, 96
Arthur [1985] Crim LR 705 155
A-G’s Reference (No 2 of 1983) [1984] 1 All ER 988 282
A-G’s Reference (No 2 of 1999) [2000] 3 All ER 182 119, 120, 122, 127

B (a minor) (wardship: medical treatment), Re [1981] 1 WLR 1421 155
B (a minor) v. DPP [2000] 2 WLR 452 114, 115, 116
Bailey [1983] 2 All ER 503 148–9
Baker and Ward [1999] 2 Cr App R 335 227, 228
Bateman (1925) 28 Cox CC 33 84, 85n9, 88
Becerra and Cooper (1975) 62 Cr App R 212 228
Beckford v. R [1987] 3 All ER 425 224
Beckford [1988] 1 AC 130 280, 287–9, 290, 294–5, 296, 297, 303
Bedder v. DPP [1954] 2 All ER 801 310
Benge (1865) 4 F & F 504 86
Table of cases

Bird [1985] 2 All ER 513 278, 280
Blackshaw [2011] EWCA Crim 2312 343
Blaue [1975] 3 All ER 446 186, 187, 187n15, 188n16
Boggeln v. Williams [1978] 2 All ER 1061 50
Bown [1996] 4 All ER 837 225, 226
Bratty v. A-G for Northern Ireland [1961] 3 All ER 523 137, 145, 244
Brown [1973] NILR 97 186
Burdee (1916) 12 Cr App R 153 86
Burgess [1991] 2 WLR 1206 244
Byrne [1960] 3 All ER 1 248, 249, 250, 250n14 & 15, 253, 256

Caldwell [1981] 1 All ER 961 16, 73, 74, 75, 76–9, 79, 80, 82, 83, 84, 86, 91, 92, 96, 97, 98, 100
Campbell [1997] 1 Cr App R 199 304n1
Carbo v. State (1908) 62 SE 140 180, 181
Chandler v. DPP [1964] AC 763 49, 50n11, 52
Cheshire [1991] 3 All ER 670 190, 191
Chetwynd (1912) 76 JP 544 145

Chief Constable of Avon and Somerset Constabulary v. Shimmen (1986) 84
Cr App R 7 79, 80

In re Christian S (1992) 20 Cal App 4th 1210 281
Clegg [1995] 1 AC 482 279, 280
Clinton [2012] EWCA Crim 2 316, 325
Commonwealth v. Moore (1904) 26 Ky LR 356 185
Conway [1988] 3 All ER 1025 200, 208
Corbett [1996] Crim LR 594 182

Coroner for East Kent, ex p Spooner, Spooner, Reynolds and Reynolds (1987)
88 Cr App R 10 117, 119
Cox (1992) 12 BMLR 38 Winchester Crown Court 48
Crick (1859) 1 F & F 519 85
Crook (1859) 1 F & F 521 86
Crossman [1986] Crim LR 406 80
Cunningham [1957] 2 QB 396 81
Cunningham (1993) 14 Cr App R (S) 444 344n12, 344, 361, 362

Dadson (1850) 4 Cox CC 358 229
Dawes, Hatter and Bowyer [2013] EWCA Crim 322 304, 324, 325
Dear [1996] Crim LR 595 182
Table of cases

Deller (1952) 36 Cr App R 184 229
Deyemi and Edwards [2008] Cr App R 25 116
Dihaawi [2006] EWCA 1139 182–3
Dias [2001] EWCA 2986 183
Dietzschmann [2003] 1 AC 1209 255
Doherty (1887) 16 Cox CC 306 84, 147n9
Doughty (1986) 83 Cr App R 319 317, 317n12, 318
Dowds [2012] EWCA 281 253
Dryden [1995] 4 All ER 987 304n1
Dudley and Stephens [1881–5] All ER Rep 61 111n12, 203–7, 210, 211, 216, 220, 221, 222
Duffy [1949] 1 All ER 932 308
Durham (1954) 214 F 2d 862 257–8
Dyson [1908] 2 KB 454 171

Elliott (1889) 16 Cox CC 710 86
Elliott v. C (a minor) [1983] 2 All ER 1005 77, 91
Emery (1992) 14 Cr App R (S) 394 225
Environment Agency (formerly National Rivers Authority) v. Empress Car Co (Abertillery) Ltd [1999] 2 AC 22 184, 192, 193
Evans [2009] EWCA Crim 650 161, 162

F (mental patient: sterilisation), Re [1989] 2 WLR 1025 200, 210
Faulkner (1877) 13 Cox CC 550 91
Feely [1973] QB 530 50
Field [1972] Crim LR 435 282
Finlay [2003] EWCA 3868 183, 184
Fitzpatrick [1977] NI 20 227, 229

G and another [2003] UKHL 50 73, 74, 75, 76, 77, 80, 81, 82, 88, 89, 91, 96, 100
G [2008] UKHL 37 108n6, 115, 116
Ghosh [1982] 2 All ER 689 51, 52
Gibbins and Proctor (1918) 13 Cr App R 134 158n22
Gilks [1972] 3 All ER 280 50
Gillick v. West Norfolk and Wisbech Area Health Authority [1986] AC 112 47, 70, 71, 72, 200
Gladstone Williams. See Williams (Gladstone)
Gotts [1992] 1 All ER 832 223, 223n29
Graham [1982] 1 All ER 801 224, 225, 226
Greenstein [1976] 1 All ER 1 50
<table>
<thead>
<tr>
<th>Table of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hadfield, Jas (1800) 27 St Trials 1281 240</td>
</tr>
<tr>
<td>Hancock and Shankland [1986] 2 WLR 357 54, 61, 63–4, 64–5, 66, 66n20, 67, 68, 69, 71</td>
</tr>
<tr>
<td>Hardie [1984] 3 All ER 848 148, 149</td>
</tr>
<tr>
<td>Harris (1882) Cox CC 75 81</td>
</tr>
<tr>
<td>Hasan [2005] UKHL 22 199, 208n8, 218, 219n19, 221, 224, 226, 227, 228</td>
</tr>
<tr>
<td>Haughton v. Smith [1975] AC 476 16n4</td>
</tr>
<tr>
<td>Hegarty [1994] Crim LR 353 225</td>
</tr>
<tr>
<td>Hennessy (1989) 89 Cr App R 10 237</td>
</tr>
<tr>
<td>Hines (1874) 13 Cox CC 114 46</td>
</tr>
<tr>
<td>Howe [1987] 1 All ER 771 12, 199, 200, 202n3, 211, 218, 218n19, 219, 220, 223, 223n30, 224, 225</td>
</tr>
<tr>
<td>Howells [1977] QB 614 116</td>
</tr>
<tr>
<td>Hudson and Taylor [1971] 2 WLR 1047 218</td>
</tr>
<tr>
<td>Hughes [2013] UKSC 56 171, 180, 183, 184n13</td>
</tr>
<tr>
<td>Humphreys [1995] 4 All ER 1008 304n1, 317, 318</td>
</tr>
<tr>
<td>Hyam v. DPP [1974] 2 All ER 41 58, 61, 62, 65, 66, 67, 68, 69</td>
</tr>
<tr>
<td>Ibrams (1982) 74 Cr App R 154 324</td>
</tr>
<tr>
<td>ICR Haulage Ltd [1944] 1 All ER 691 117</td>
</tr>
<tr>
<td>Inglis [2010] EWCA Crim 2637 55, 111n12</td>
</tr>
<tr>
<td>Instan [1893] 1 QB 450 111n12, 158, 158n19 &amp; n22</td>
</tr>
<tr>
<td>James and Karimi [2006] EWCA Crim 14 304</td>
</tr>
<tr>
<td>Johnson [2007] EWCA Crim 1978 247</td>
</tr>
<tr>
<td>Jones [2006] UKHL 16 212</td>
</tr>
<tr>
<td>Jones and others [2004] EWCA Crim 1981 212</td>
</tr>
<tr>
<td>Jordan (1956) 40 Cr App R 152 187, 188, 189, 190</td>
</tr>
<tr>
<td>K [2001] UKHL 41 115</td>
</tr>
<tr>
<td>Kemp [1956] 3 All ER 249 244</td>
</tr>
<tr>
<td>Kennedy (No 1) [1999] Crim LR 65 183</td>
</tr>
<tr>
<td>Kennedy (No 2) [2007] UKHL 38 183–4, 184n13, 185, 193</td>
</tr>
<tr>
<td>Khan and Khan [1998] Crim LR 830 161, 162</td>
</tr>
<tr>
<td>Kimber [1983] 3 All ER 316 89</td>
</tr>
<tr>
<td>Kingston [1994] 3 All ER 353 48, 56</td>
</tr>
<tr>
<td>Kopsch (1925) 19 Cr App R 50 250</td>
</tr>
<tr>
<td>Lamb [1967] 2 All ER 1282 80</td>
</tr>
<tr>
<td>Larsonneur (1933) 24 Cr App R 74 149, 150</td>
</tr>
<tr>
<td>Lawrence [1981] 1 All ER 974 74, 76, 79n7, 92</td>
</tr>
</tbody>
</table>
## Table of cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lemon [1979]</td>
<td>1 All ER 898</td>
<td>114n15</td>
</tr>
<tr>
<td>Lewis (1992)</td>
<td>96 Cr App R 412</td>
<td>227</td>
</tr>
<tr>
<td>Lipman [1969]</td>
<td>3 All ER 410</td>
<td>147</td>
</tr>
<tr>
<td>Lowe [1973]</td>
<td>QB 702</td>
<td>159n23</td>
</tr>
<tr>
<td>Luc Thiet Thuan [1996]</td>
<td>2 All ER 1033</td>
<td>304n1</td>
</tr>
<tr>
<td>McEnery (1943)</td>
<td>SR 158</td>
<td>181n12</td>
</tr>
<tr>
<td>Majewski [1976]</td>
<td>2 All ER 142</td>
<td>12, 16, 16n4, 147n9</td>
</tr>
<tr>
<td>Markuss (1864)</td>
<td>4 F &amp; F 356</td>
<td>86</td>
</tr>
<tr>
<td>Martin [1989]</td>
<td>1 All ER 652</td>
<td>200, 232</td>
</tr>
<tr>
<td>Martin, Anthony [2001]</td>
<td>EWCA Crim 2245</td>
<td>279, 299</td>
</tr>
<tr>
<td>Matthews and Alleyne [2003]</td>
<td>EWCA Crim 192</td>
<td>42, 62, 69, 71, 72</td>
</tr>
<tr>
<td>Meridian Global Funds Management Asia Ltd v. Securities Commission [1995]</td>
<td>2 AC 500</td>
<td>119, 125</td>
</tr>
<tr>
<td>Metropolitan Police Comr v. Caldwell. See Caldwell</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miller [1983]</td>
<td>1 All ER 978</td>
<td>159, 161, 162</td>
</tr>
<tr>
<td>Miller and Denovan (1960), unreported</td>
<td>90, 91, 92, 97</td>
<td></td>
</tr>
<tr>
<td>M’Naghten’s Case (1843)</td>
<td>10 Cl &amp; Fin 200</td>
<td>234, 244, 246, 261</td>
</tr>
<tr>
<td>Moloney [1985]</td>
<td>1 All ER 1025</td>
<td>61, 62, 62n18, 63, 64–5, 66, 66n20, 67, 68, 69, 71</td>
</tr>
<tr>
<td>Morgan [1976]</td>
<td>AC 182</td>
<td>11, 12, 16, 114, 224, 288, 289, 295</td>
</tr>
<tr>
<td>Morhall [1995]</td>
<td>3 All ER 659</td>
<td>304n1, 310, 317, 318</td>
</tr>
<tr>
<td>Mungall (2011)</td>
<td>Guardian, 28 July</td>
<td>254</td>
</tr>
<tr>
<td>Nedrick [1986]</td>
<td>1 WLR 1025</td>
<td>59, 62, 64, 66, 66n20, 67, 68, 69, 71</td>
</tr>
<tr>
<td>Nicholls (1874)</td>
<td>13 Cox CC 75</td>
<td>158n21 &amp; 22</td>
</tr>
<tr>
<td>Noakes (1866)</td>
<td>4 F &amp; F 920</td>
<td>84n8, 85, 86, 92n16</td>
</tr>
<tr>
<td>OLL Ltd and Kite (1994)</td>
<td>Independent, 9 December</td>
<td>120</td>
</tr>
<tr>
<td>Ortiz (1986)</td>
<td>83 Cr App R</td>
<td>173 218</td>
</tr>
<tr>
<td>Oxford (1840)</td>
<td>9 C &amp; P 525</td>
<td>244</td>
</tr>
<tr>
<td>Owino [1996]</td>
<td>2 Cr App R</td>
<td>128 296, 297</td>
</tr>
<tr>
<td>P &amp; O European Ferries (Dover) Ltd (1990)</td>
<td>93 Cr App R</td>
<td>72 117, 119, 120, 121, 122</td>
</tr>
<tr>
<td>Pagett (1983)</td>
<td>76 Cr App R</td>
<td>279 185–6</td>
</tr>
<tr>
<td>Parker [1977]</td>
<td>2 All ER 37</td>
<td>82</td>
</tr>
<tr>
<td>People v. Beardsley (1907)</td>
<td>113 NSW</td>
<td>1128 161, 162, 165</td>
</tr>
<tr>
<td>People v. Goodman (1943)</td>
<td>182 Misc</td>
<td>585, 44 NYS 2d 715 181</td>
</tr>
</tbody>
</table>
Table of cases

Pigg [1982] 1 WLR 762 79, 89
Pike [1961] Crim LR 547 85n9
Pittwood (1902) 19 TLR 37 158, 158n22
Pommell [1995] 2 Cr App R 607 200, 208, 218
Powell v. State of Texas (1968) 392 US 514 145–6, 146n8
Price (1971) The Times, 22 December 251n17
Prince [1874–80] All ER Rep 881 53n16, 109, 110n8, 111, 111n12, 112, 114

Quayle [2005] EWCA Crim 1415 209, 209n9, 210
Quick [1973] QB 910 147–8

Rashford [2005] EWCA Crim 3377 282
Reid [1992] 3 All ER 673 79
Reniger v. Fogossa (1552) 1 Plowd 1 202
Roberts (1971) 56 Cr App R 95 181, 184
Rogers [2003] 1WLR 1374 183
Ryan v. R (1967) 121 CLR 205 150

Sanderson (1993) 98 Cr App R 325 249
Sandie Smith [1982] Crim LR 531 266n31
Sargeant (1974) 60 Cr App R 74 344
Satnam and Kewal (1983) 78 Cr App R 149 79, 89
Scarlett [1993] 4 All ER 629 296
Seers (1984) 79 Cr App R 261 250
Senior [1899] 1 QB 283 46
Seymour [1983] 2 All ER 1058 54, 79, 86, 87, 87n12
Sharp [1987] QB 853 227
Sharpe (1857) Dears & B 160 47
Shaw v. DPP [1962] AC 220 53n16
Shaw (Norman) [2002] 1 Cr App R 10Shayler [2001] All ER (D) 99 299
Shayler [2002] UKHL 11 199, 211–12, 212n12
Shepherd (1987) 86 Cr App R 47 227, 228
Sherrars v. De Rutzen [1895] 1 QB 918 104
Sims and Midwinter (1749) 1 Leach 66 32
Sinclair [1998] EWCA Crim 2590 161
Smith [1959] 2 All ER 193 188, 188n16, 189, 189n18, 190
Smith [1960] 2 QB 423 47
Smith (Morgan James) [2000] 4 All ER 289 55, 304, 304n1, 305, 309, 310, 311, 315, 316, 317, 319n14, 320, 321, 326, 327
Spencer (1867) 10 Cox CC 525 85, 86
Spiller (1832) 5 C & P 333 85, 86