Section I
Approaching Criminal Law

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Images of Criminal Law

Images of criminal law infuse our everyday lives. From newspapers and television news programmes reporting incidents or trials, to detective novels, films and television series such as *The Bill*, *Law and Order*, *Silent Witness* and *The Wire*, crime and the control of crime pour into our individual and collective consciousness. The images produced are complex and contradictory: heroic detectives compete for our attention with 'bent' police; wily criminals and informers jostle with the inadequate, the psychopath, the wife-batterer and even, on occasion, the offender with whom we are invited to sympathise; the dramatic appeal of racial injustice vies with the cultural resonance of racist stereotypes.

For many people who are neither practising lawyers nor legal scholars, criminal law represents the dominant image of what it is to have a legal system. In thinking carefully about the nature of criminal law, however, this familiarity can be an intellectual barrier. Most people's image of crime is dominated by crimes of violence or serious crimes against property, proceeded against through trial by jury. But in fact violent and sexual offences make up only a fifth of offences (and only half of violent offences involve injury). The reality of the criminal justice system is dominated by the processing of road traffic offences, minor public order and low-level property offences. Many never reach a court, having been diverted via fixed penalty notices or cautions (Young 2008). Of those that do, most are dealt with in magistrates' courts, and since the vast majority of defendants plead guilty, the trial process is a summary affair. These will become even more summary with the introduction of video link proceedings for guilty pleas (Coroners and Justice Act 2009). Yet the distortion in popular representations of criminal justice is equally marked in criminal law textbooks, whose image of criminal law is dominated by a focus on violent and sexual offences, along with the more serious offences against property, and by a preoccupation with questions of individual responsibility for serious crime. Students of criminal law are therefore rarely introduced to the more 'everyday' offences which make up the vast majority of the business of the criminal process, and even less frequently to the social context in which images of crime are produced or to the procedural context in which practices of criminal law take shape.

While we have set out to produce a rather different sort of text, taking as our counterpoint the following deft caricature, we aim to illuminate rather than replace the traditional approach:

Lindsay Farmer, 'The Obsession with Definition' (1996) *Social and Legal Studies* 57

The Criminal Law Textbook embodies the supreme positivism of the law. The moral, political and social dimensions of the law are tantalizingly raised and dismissed in a single movement in favour of grinding technical discussions of legal minutiae. Entire chapters and many hundreds of footnotes are devoted to such arcane issues as impossible attempts or the precise meaning of 'subjective liability'. As if this weren't enough, we are continuously reminded by the authors of how uniquely enjoyable the criminal law is supposed to be to students. It alone is said to capture the rich tapestry of human life – though our experience in the classroom suggests otherwise. The standard opening chapter illustrates perfectly this uneasy relationship between the criminal law and what, for want of a better term, might be called its moral and social context. It is, invariably, on the definition of crime – seeking to define the scope of the work and so, more or less implicitly, the object of the criminal law. While . . . it may be unfashionable to begin law books with definitions, few seem capable of resisting. No amount of tinkering with the order and style of presentation can alter the fact that the authors of the average criminal-law textbook are, and perhaps destined to remain, deeply unfashionable.

In this book, our approach to criminal law, far from devoting only a 'single movement' to the social and political context which informs criminal law, locates criminal laws, their development and their implementation, firmly within a social framework.

This Chapter therefore introduces the issues and ideas which form the basis for a critical and contextual reading of criminal law. We remain, however, in Farmer's terms, 'deeply unfashionable'. For though our starting point is a very broad conception of criminal law as one among several sets of practices through which a society – in this case that of England and Wales – both defines or constructs, and responds to, 'deviance' or 'wrongdoing', we do think that it is worth pausing to give some attention to prevailing ideas about what, if anything, unifies or identifies criminal law as a social practice: the problem of definition.

Farmer draws attention to the link between 'the obsession with definition' and the positivist tradition. Legal positivism asserts that law is a discrete set of rules or norms whose validity derives from the fact that they originate from a distinctive source: they have been set down by 'the sovereign' or may be identified through a constitutional 'rule of recognition' (Hart 1961). This positivist claim about the nature of law is inextricably bound up with a modern, scientific conception of law and legal scholarship, in which the task of the legal scientist – and hence of the law student – is to garner knowledge of the distinctive

legal terrain and, ideally, to produce a complete and accurate description of it. However, as soon as one begins to think about the range of conduct covered by modern systems of criminal law – from homicide to harassment, from rape to road traffic infringements, from paedophilia to pollution; from deception to drug dealing (via dangerous dogs . . .) – the idea that there is anything *general* to be said about 'the nature of crime' begins to look very problematic indeed. Nonetheless, the quest for a definition or a theory of criminal law persists: and that persistence is itself of considerable interest. We therefore want to begin by taking a closer look at what is meant by 'the quest for a definition' and to delineate two influential approaches to theorising – producing a general account of – criminal law.

I.1.a. Theories of criminal law: history, sociology and philosophy

I.1.a.i. Explaining criminal law

The first approach to theorising criminal law is located firmly within the social sciences. This is the approach taken by sociologists of law and legal historians. This approach seeks to answer the question of definition in relation to an analysis and interpretation of the history of criminal regulation in specific social and political contexts. This kind of criminal law theory is closely tied to the interpretation of specific areas of substantive and procedural law, and the development of such an approach will be one of the main tasks of each of the following chapters. How might an interpretive approach tackle the quest for a defining conception of criminal law?

To think about this, let us take as a broad starting point that criminal law is a particular social construction of, and response to, 'deviance' or 'wrongdoing'. If we understand deviance to mean behaviour which departs from social norms enforced by criminal law, our definition is clearly circular: criminal law claims to respond to deviance, yet deviance (for the purposes of criminal law) can only be defined by looking to criminal law itself. Evidently, 'external' questions arise about the conditions under which the definitions of crime 'internal' to criminal law – what has been the positivist terrain – become socially effective. These questions include how and by whom norms of criminal law are set; the extent to which criminal laws are underpinned by social consensus at particular times and in particular places; and the relationship between criminal law and other forms of 'social control' – non-legal normative systems whose power entails that the definition and management of deviance cannot be assumed to be exclusively or even primarily the role of the state (see Chapter 2).

Let us, therefore, revise our starting point so as to think of criminal law as a social normative system: in other words, as a system which operates within a particular social space by setting down standards of conduct, and by enforcing, in distinctive ways, those substantive standards or norms. Within this very general idea of criminal law as one normative system among many others – the

religious, moral and traditional norms and institutional systems which we shall discuss in the second Chapter – it is important to see that there are at least two rather different ways of looking at criminal law.

In the first place, we can look at *criminal law as a moral and as a retributive system*. From this point of view, criminal law is a system of quasi-moral judgment which reflects a society's basic values; in which criminal punishment serves the retributive function of meting out to offenders their just deserts; and in which criminal law has a strongly symbolic function. This image is central to most people's stereotype of criminal law, resonating as it does with offences such as murder, crimes of violence or theft. But not everything which is regarded as wrong is criminal – and some of the things which are criminal are not regarded by everyone as wrong. So, secondly, we have to acknowledge that *criminal law has a regulatory, instrumental or utilitarian aspect*: in other words, it prohibits certain things on grounds of public health or safety, or for economic or political reasons, and sees the purpose of punishment as deterring that behaviour. This aspect of criminal law underpins offences such as health and safety offences, unwittingly serving alcohol to an underage person and a wide range of less serious road traffic offences. But it can't explain, for example, the offence of murder, which most of us would support independently of its instrumental contribution to lower rates of homicide.

This is not to say that the lines between the quasi-moral and the instrumental or regulatory aspects of criminal law are absolutely clear. Not all 'regulatory' offences are trivial: some carry severe penalties such as the loss of licences necessary to the defendant's livelihood. And many offences can be seen from both regulatory and moral points of view, with our attitudes to the boundary between 'regulatory' and 'real' crime shifting over time. For example, twenty years ago, driving under the influence of alcohol would have been seen as an essentially regulatory offence, while today it is has become heavily moralised. It is, however, crucial to a proper understanding of criminal law to see that it has these two aspects, and that the balance and interaction between them is a key to its historical development and contemporary social significance.

Not least because of these two very different aspects to contemporary criminal law, the idea that we can define 'crime' in relation to its subject matter looks implausible from an interpretive point of view. The reason is very simple: modern criminal law encompasses a quite extraordinary range of activities. In constructing its particular notions of 'deviance', 'wrongdoing' or 'harmful conduct', however, contemporary criminal law arguably does have two distinctive general features. On the one hand, it is a peculiarly institutionalised practice, structured by relatively fixed norms and procedures, and administered by official personnel. This high degree of institutionalisation is a feature of its position as a *legal* response, and to explain this aspect fully, we must reflect on the idea of law and legal regulation itself and on what, if anything, distinguishes legal from other institutional responses. The entire literature of analytical and sociological jurisprudence peers over the shoulder of the criminal lawyer as she begins her

apparently straightforward task of exposition. She might well, then, turn aside to a second distinctive feature of criminal law. This is that it is distinguished among legal categories from the responses of civil law. This distinction cannot be explained merely in terms of subject matter, since many forms of behaviour are covered by both criminal and civil regulation. Here the lawyer can breathe a sigh of relief as she recognises a firm and familiar terrain; criminal law can be identified in terms of its distinctive *procedural* rules such as rules of evidence, burdens and standards of proof, special enforcement mechanisms such as public policing and prosecution, and particular tribunals and forms of trial, and types of punishment. Criminal law can therefore be defined simply as that legal response to deviance over which the state has the dominant if not exclusive right of action; in which defendants must be proved by the prosecution to be guilty beyond reasonable doubt; and under which, if charged with an offence of a certain degree of seriousness, they are entitled to trial by jury. It is equally that area of legal regulation in which certain sorts of evidence are inadmissible, and in which the result of conviction is typically the imposition of a punitive (as opposed to compensatory) sentence executed by or on behalf of the state. Criminal law, in other words, can be identified in terms of the distinctive features of criminal procedure (Williams 1955, p. 123). And if anyone is sufficiently presumptuous to ask how we can tell whether criminal procedure should (legally) apply, she can be met by the simple answer, 'Whenever the law identifies itself as criminal.'

There is, of course, a sense in which this circular argument about the definition of criminal law as resting in criminal procedure represents a truth. As we have stated it, however – and as it is stated by most textbook writers – it is not illuminating, for it gives little sense of what *kind* of social practice is thus identified. But, as Farmer suggests, a careful historical interpretation can both reveal the social insight lurking within what appears a conceptual truism, and illuminate that social 'truth' as relative to a particular period in the development of criminal law. Farmer argues that both the modern bemusement about how to define criminal law and the modern tendency to resolve the problem of definition in terms of criminal procedure can best be understood in the context of the marked expansion of criminal law in the nineteenth and early twentieth centuries. This expansion was effected primarily through the creation of summary offences tried in magistrates' courts. These offences were a product of the expanding functions of the modern administrative state, for which the criminal law became an increasingly important tool for regulating the areas of social life born of industrialisation and urbanisation from the early nineteenth century onwards. They often, therefore, regulated lawful business activities, and they were punishable not by imprisonment but by fines. As a result, they infused the law with a new set of 'regulatory' standards which did not – and do not to this day – fit comfortably with the 'quasi-moral', received view of crime as genuine wrongdoing. The courts consequently grappled with the question of whether the latter were genuinely 'criminal' penalties:

Lindsay Farmer, 'The Obsession with Definition', pp. 64–6

Although the answer to these problems was sought in a reference to the nature of the offence, they could not be resolved by means of the traditional categorization of crimes as 'public wrongs'. Accurate as it might once have been as a means of distinguishing between civil and criminal jurisdiction, it could no longer bear the load that was being placed on it since the issues raised by these cases largely involved minor offences arising from particular regulatory provisions with no apparent reference to larger questions of moral right and wrong. The line taken by both English and Scottish courts was thus that 'proper' criminal offences could only be distinguished by reference to the practice of the criminal courts, and in particular the matter of whether the object of the proceedings was punitive . . . [C]rime was defined by the development of stricter procedural rules, the specification of criminal proceedings. This finds its clearest expression in the emergence of summary jurisdiction.

The nineteenth-century expansion in the business of the summary courts created bureaucratic demands for the administrative processing of large numbers of people, or the regulation of the administrative distribution of bodies within the criminal justice system. This demand was met by the development, among other things, of a more rigorous and systematic body of procedural law. Under this new body of law, jurisdiction was not defined primarily in terms of competence relating to a geographical space, the nature of the crime or the power of the particular court to punish – as had traditionally been the case. Instead the decisive factor was the type of procedure used . . . [T]he mark of the modernity of the law is less a matter of the division between civil and criminal jurisdiction than it is the emergence of this new reliance on procedural law.

This underlines a more general transformation in the legal order that occurred in the course of the nineteenth century. As the political order was secured against the threat of external domination and internal revolution, there was a movement towards the more intensive regulation or government of territory and the population of that territory. Criminal justice became a matter of administration and security, increasingly less concerned with the establishment and protection of sovereign power. So, as the substantive jurisdiction of the criminal law changed, with the increasing predominance of administrative or police offences, there was a subtle change in the way that the object of the criminal law was conceived (in relation to social order). There is . . . a movement away from crimes regarded as actions that offend against the community or justice, as this has been constructed through the mirror of political order (public wrong). Crimes instead come to be seen as actions that offend the community in its social interest or welfare, which is the aggregate of individual interests as this is known through the new social knowledges. That criminal law can then be defined only according to the positive criterion of whether an act is tried under criminal proceedings simply reflects the diversity of functions of law in the interventionist state. There is no single, simple moral or other purpose that is capable of holding the whole together. It cannot be that we fall back onto the definition of crime as an act that harms the community . . . for this is merely to reflect the same tautology (i.e. what harms the community – a crime) dressed up as moral or political theory. The specifically legal character of modern criminal justice cannot be so easily hidden.

The 'obsession with definition', in other words, stands in for a prevailing tension in contemporary criminal law: that between the older ideas of crime as public wrongdoing and the modern reality of criminal law as a predominantly administrative system managing enormous numbers of relatively non-serious and 'regulatory offences': between the older, quasi-moral and retributive view of criminal law and the instrumental, regulatory aspect of criminal law which has become increasingly dominant under modern and late modern conditions. This modern reality also underpins the explanatory appeal of legal positivism; since the validity of positive law derives from its source rather than its content, positivism can encompass without difficulty the expanding terrain of criminal regulation. Nonetheless, the assumption that for example common assault is wrongdoing while health and safety regulation is administrative is open to question.

I.1.a.ii. Justifying criminal law

Interestingly, the tension between the 'quasi-moral' and 'regulatory' conceptions of criminal law also surfaces in the second, very different, approach to criminal law theory which we shall consider. This approach is essentially philosophical – Farmer's 'moral and political theory' – and consists in normative theorising: the task of producing an account of what the nature, functions and scope of criminal law *ought* to be. The most famous account of the nature and limits of criminal law is a liberal one deriving from J. S. Mill's 'principle of liberty' (Mill 1859) and from the associated literature which applies that principle to the limits of criminal law (Hart 1963). Mill argued from a utilitarian ethic, according to which the justifying purpose of any social rule or institution must be the maximisation of happiness. This approach leads naturally to a view of criminal law as devoted to minimising human suffering through the prevention of harmful conduct – crime – by the most efficient means possible (Gross 1979). However, the content of criminal law should be circumscribed, Mill argued, according to the principle that the coercive powers of the state should only be invoked as a means of preventing 'harm to others', and never to control harmless behaviour or to prevent the person harming herself. The 'harm principle' thus purports to accommodate the concerns of the state whilst respecting individual freedom. In the context of criminal justice, the harm principle has been refined by the liberal precept that an individual's harmful conduct should only be subject to punishment where she is genuinely responsible for it, in the sense that she had the capacity to act otherwise than she did (Hart 1968, Ch. 1). Since Mill's time, this principle has informed debate about issues such as the enforcement of morality through criminal law in offences such as blasphemy, and the proper limits of 'paternalistic' legislation which aims to protect people not from the harms which are inflicted on them by others but rather from those harms which they may inflict on themselves: laws, for example, which prescribe the wearing of seatbelts or which prohibit the use of certain drugs (Hart 1963; Devlin 1965).

Yet although the harm principle captures (and indeed has been influential in shaping) some strong and widely held intuitions about the proper limits of state power and the value of human autonomy, the test of 'harm to others' is notoriously difficult to apply. This is mainly due to the flexibility of the core notion of harm. The idea of harm is, after all, not self-defining. For example, if a large number of people find the idea of homosexuality, or prostitution, offensive, is this sufficient to justify criminalising that conduct? Does offence, in short, count as harm? And should the creation of risk – for example, by driving while intoxicated – count as 'harm'? Furthermore, the assumed opposition between individual and state interests which is central to Mill's liberal principle is not accepted by political theorists either to right or left, whose arguments, albeit in very different ways, emphasise the links between individual and social interests. These issues among others have been at the centre of a fierce philosophical debate about the acceptability of liberal utilitarian conceptions of the proper functions of criminal law (Lacey 1988).

The philosophical debate about such theories of criminal law has tried to assess their merits as normative theories: as visions of what criminal law ought to be. However, the distinction between normative, prescriptive approaches and explanatory, descriptive approaches has not always been maintained, and the theories have also been used to rationalise and explain the nature of actual criminal law (Hart 1968). In textbooks, for example, the normative theories not only act as frameworks for critical assessment of criminal law but also influence the selection of offences and aspects of legal doctrine to be discussed: hence, for example, the relative marginalisation of 'victimless' crimes which violate the harm principle or of offences of strict liability which sit unhappily with the principle of individual responsibility (Lacey 1985 and 2001). For our purposes, the most important question is that of just how influential these theories have been in shaping both contemporary understandings and actual institutions of criminal law. In trying to assess their influence and, hence, explanatory power, it is important to distinguish between their influence on the popular image of criminal law (something which is crucial to its perceived political legitimacy) and on the content and enforcement of criminal law. For example, the harm principle has a significant place in public debate about criminal law and its limits: the idea that criminal law should be used only in response to harmful conduct has a strong common-sense appeal. Yet, at the levels of criminal law's content and enforcement, we encounter again the problem confronting any definition in terms of the law's subject matter: the vast variety of contemporary criminal laws entails that many examples can be found which appear either to exceed the harm principle (conspiracy to corrupt public morals and outraging public decency are good examples here) or which fail to meet it (the exemption of rape of women by their husbands until 1991 comes to mind). Such examples suggest that the harm principle is not only indeterminate at a normative level but also incomplete at an explanatory level. They therefore imply that we should see it neither as ideal nor as explanation but rather as an ideological framework in terms of which policy debate about criminal law is expressed.

What is meant by the claim that the utilitarian conception of criminal law and its concomitant harm principle form an ideological framework? The idea that criminal law sets out in advance standards of prohibited behaviour, punishing and threatening to punish breaches of those standards, thus deterring actual and potential offenders, characterises it as a social process which is oriented to the reduction of harm. Yet empirical evidence suggests that the reductive effects of criminal processes (although extraordinarily hard to assess) are meagre, and casts doubt on the validity of characterising criminal law primarily in instrumental terms (Ashworth 2006, pp. 15–16, Von Hirsch et al. 1999). Nonetheless, it may be that a widespread *belief* in the instrumental efficacy of and necessity for criminal law is something which typically underpins its existence. But if that belief lacks foundation, we need to look for the reasons sustaining a belief which is widely yet falsely held. Understood as a descriptive theory, the instrumental conception fails to consider the possibility that criminal law may have important symbolic functions in constructing social values or in upholding the prevailing structure of power relations. Understood as an ideology, the instrumental conception may itself be seen as playing a role in repressing questions about the relationship between criminal law and broader structures of social, political and economic power, and in obscuring the productive capacity of criminal law to generate norms – indeed visions of 'normality' – which have diffuse social implications. As Garland notes in relation to punishment:

David Garland 1990 *Punishment and Modern Society* Third edition (Oxford University Press), pp. 252–3

[Penality] communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters. Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organise our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgments, condemnations and classifications, they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so. These signifying practices also tell us where to locate social authority, how to preserve order and community, where to look for social dangers, and how to feel about these matters . . . In short, the practices, institutions and discourses all signify . . . Penality is . . . a cultural text – or perhaps, better, a cultural performance – which communicates with a variety of social audiences and conveys an extended range of meanings . . . [I]f we are to understand the social effects of punishment then we are obliged to trace this positive capacity to produce meaning and create 'normality' as well as its more negative capacity to suppress and silence deviance.