1 The boundaries of the criminal law: criminal law, legal theory and history

> You will permit me however very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done . . . He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, it's greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged . . . 'in tracing out the originals and as it were the elements of the law'.[1]

The need to talk about and establish boundaries is perhaps stronger in relation to the criminal law than any other area of law. The field of criminal law marks itself out by its history of preoccupation with limits – of the law, of the sanction, of criminalisation. These images of space and landscape continue with descriptions of the contours of liability, the field of punishment, the frontiers of criminality, or the territory of the law. It is thus appropriate that we should begin with a passage from Blackstone's *Commentaries* that recognises, in a particularly elegant manner, the significance of boundaries and divisions. It is rarely referred to now, but Blackstone's exposition of the common law of crime has been of enduring importance to modern ideas about the law.[2] Equally, it is far from inappropriate that a study which takes the Scottish criminal law – law from over the border – as its subject should begin with the writings of a man conventionally regarded as a founder of the English common law and perhaps its greatest 'academical expounder'. Scots lawyers have consistently underestimated the influence of English law in this area, in

[1] Blackstone 1765 I, p. 35; cf. Kames 1792: 'Law, like geography, is taught as if it were a collection of facts merely: the memory is employed to the full rarely the judgement'. Cf. also Austin 1885, p. 1082.

[2] 'Since the publication of Blackstone's *Commentaries* hardly any work has been published in England upon the Criminal Law which aims at being more than a book of practice . . . simply compilations of extracts from text-writers, and reports arranged with greater or less skill – usually with almost none – but representing the aggregate result of a great deal of laborious drudgery' Stephen 1883 II, pp. 218–19.

preference for the more reassuring belief that Scots criminal law is a purely native product. There will be much to say about this in due course, but the immediate interest lies in the suggestive use of the metaphor of the map, rather than in questions of the origins of substantive law, for it points to two issues which lie at the heart of the argument of this book.

The first of these is the connection that is drawn between the law and physical space. The power of law is a territorial question. This is an obvious point but its significance should not be underestimated. Geographical boundaries are never only natural; they are the point at which nations, and national legal competences, begin and end.[3] The law draws physical boundaries in geographical space, shaping and giving identity to that space. It is thus that the territory of the law is formed: its jurisdiction. It is co-extensive with that geographical space, while sharing none of its physical features. Jurisdiction is divided into political and administrative units, drawing further boundaries between the competences of different regions and areas of law. Although recent writings have tended to treat these as subordinate questions, legal sovereignty means nothing without these physical aspects of space and organisation.[4] The study of the law, then, is not something that can be abstracted from the history of the drawing of these boundaries, or indeed the law's connection with a particular physical space. To study the law is to raise continually the question of how legal structures are built, how lines of communication are drawn, how powers and competences are spatially distributed. In short, it is to ask how the force of the law is maintained. And the answers to these questions are connected to, and reveal, the changing contours of authority and shifting landscapes of power. The law, it must be remembered, is always also the law of the land.

It follows from this, as Blackstone points out, that the process of expounding the law is a process of mapping.[5] This is to acknowledge, as he was clearly aware, that the law is always also a process of representation – it can never lose its metaphorical character. Just as maps recreate space by the use of imaginary or scientific devices, the law, in the form of doctrine or academic treatises, must be capable of representing itself. Legal doctrine is a guide, not to the geographical territory, but to the territory of the law, to the imaginary space that the law occupies. From their earliest

[3] This, of course, is to recall Pascal 'A funny justice that ends at a river! Truth on this side of the Pyrenees, error on that', quoted in Teubner 1989a, p. 414 where this is discussed as a problem of 'interlegality'.

[4] On the absence of the element of 'territoriality' from legal and political theory, see Baldwin 1992 at pp. 207–14.

[5] For a more detailed exploration of cartography and mapping in relation to the law, see Goodrich 1990 *passim*; Sousa Santos 1987. Generally on the relationship between law and geography, see Blomley 1994.

days law students are taught that to venture into this territory without a map is foolhardy. It is vast and ancient, full of unseen dangers. It is possessed of a strange and wonderful beauty that cannot be perceived by the untrained eye. The law as it is taught and written is always an attempt to impose an order on this unruly country by marking out the 'greater divisions and principal cities'. It is always the result of a process of selection, and the symbolic order that is constructed mirrors, or more precisely refracts, the legal ordering of space. These guides show us cities of elegant buildings neatly dissected by wide avenues. Or perhaps, in the case of the common law, the sleepy quarters of faded towns where rambling old buildings, rebuilt and extended time after time, reveal worn charms.[6] But what lies in the shaded areas of the map, in the slums and rookeries? What network of pipes and passages lies under our feet? Which spaces are enclosed and which set free? The map requires us to ask the question of what is being represented and why. Further, it demands that we question the measures and divisions that are used, the terms of the legal order that is being imposed. We can never be sure that we are being shown the most important features of the legal landscape, for a map is really only an accurate guide to itself. Understood in this sense, we can see that the law is always a distortion – although this is not to imply that it is necessarily inaccurate or untruthful.[7] As with all maps, choices of scale and projection affect our perception. Certain features are placed at the centre of the map or given greater prominence in relation to others. The mechanisms of distortion are not chaotic but determinate, they have developed over time in response to changes in that landscape itself, and the symbols by which the law is represented carry their own history and significance. So, in order to understand the law, it is necessary to have some understanding of how the map is made. As the process of representation, or the imagination of the law, becomes our object of study we are once again brought up against the boundaries and divisions of the law.

Crime and the criminal law exercise a boundless fascination for contemporary society – a fascination which has itself been boundlessly documented. There have been many explanations offered for this, certain of which stand out to the lawyer or sociologist, for whom the study of crime and the criminal law is understood to offer a passage to the core values and preoccupations of any society. The crime rate has for a long

[6] See e.g. Blackstone 1765 III, ch. 17; cf. Walter Scott on Baron Hume quoted in Stein 1988, p. 379, 'the fabric of the law . . . resembles some ancient castle, partly entire, partly ruinous, partly dilapidated, patched and altered during the succession of ages by a thousand additions and combinations' and so on. [7] Sousa Santos 1987, p. 282.

time been taken to be not only a matter of considerable political and social concern, but also a barometer of the health or pathology of a particular society. The way that a particular society punishes wrongdoers is regarded as indicating its level of civilisation. Restitutive is compared favourably with repressive punishment. The increase in humanity in the trial and punishment of crime has been almost everywhere treated as a mark of social progress. It is notable that this understanding has been underpinned by a fundamental and, until recently, unbreakable link between the criminal law and modernity. The modern criminal law has been associated with the founding of the modern nation state and the emergence from the period of absolutism and arbitrariness. It is one of the most potent symbols of the move towards humanitarianism and rationalism in government, and its failures are correspondingly hard felt. The measurement and control of crime by means of the criminal law were linked with the emergence of social statistics and the discipline of sociology. The crime rate was taken, along with indicators of suicide and mortality, to be an index of social solidarity, and the criminal law became an instrument in the fight against crime.

However, even as these two modes of thought have dominated thinking about crime and the law in the modern period, there have been challenges to the beliefs that linked modernity with the measured humanity of the law or that saw the control of crime as a sign of progress. Governments have shown an increased willingness to accept a high crime rate as an inevitable and irremediable fact of social life, and there has been a turn towards harsher punishments which are not justified in terms of whether or not they are effective or deter crime, but in terms of an increased punitiveness for its own sake. The fascination with crime remains undiminished, but it is increasingly regarded as the symbol of failure, loss of control and the malaise of government. It is against this background – the loss of faith in the ability of the law to solve the problem of crime – that this book is written. It examines critically the nature of the relationship between the criminal law and modernity by means of a historical reconstruction of the origins of some of the fundamental concepts and institutions of the modern law. It does not join the chorus of advocates of a return to the so-called philosophical or conceptual basics of the law. Rather it pursues the more radical argument that, through their attachment to those supposed basics, criminal lawyers have systematically misunderstood and misrepresented the nature of the modern law, and that this misunderstanding is an important and unacknowledged feature of the crisis of ideas currently afflicting criminal justice. It is thus an attempt to loosen the conceptual straitjacket that has bound the law, developing a critical account of the emergence of the modern criminal law in order to restore a means of analysing the criminal law as a historical practice.

There has been remarkable revival of interest in theories of the criminal law and punishment in recent years. There is an ever-growing body of work that has sought to broaden the narrow technical concerns of criminal lawyers, and that also reflects the sense that all is not well in criminal justice. The starting point for most of these texts, whether conventional or critical, is that there is special relationship, or 'natural affinity' between criminal law and moral philosophy. Thus, Fletcher's analysis of the criminal law begins in the following way:

> Criminal law is a species of moral and political philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons. The link with moral philosophy derives from one answer to the problem of justifying the use of state power. If the rationale or limiting condition of criminal punishment is personal desert, then legal theory invariably interweaves with philosophical claims about wrongdoing, culpability, justifying circumstances and excuses.[8]

First, the limits of state power must be specified, according to the standard of the autonomy of the individual; then the criminal law, using the same standard, can attempt to specify the exact conditions under which individuals may be held responsible by the law for their actions. It has followed from this that the sphere of the responsibility of the criminal law is reasonably well defined. It is to be regarded as a relatively neutral, conceptual exercise that must define in turn the grounds of individual liability, the actions that are prescribed by law and the socially important values (such as bodily autonomy and property) that must be protected by the law.

This same relationship – viewed in a rather different light – has been accepted as fundamental even in the avowedly critical analyses of Norrie.[9] The claim that criminal law is a species of moral philosophy is accepted at face value in order that the law can be depicted as formal and abstract. From this point of view the 'juridical form' (the free and autonomous individual) is seen as the product in the legal system of specific economic and social conditions. The critique is then driven by an examination of the contradictions in the economic base of society. The juridical form can be criticised from a sociological point of view for being reductive of the complex social conditions and pressures that in fact determine human actions. The significant point is that in both cases it is taken for granted that moral philosophy and criminal law are different levels of the same discourse. The law is thus regarded as no more and no less than the elaboration of the fundamental philosophical or normative concepts which are the terms in which the relationship between state and the free

[8] Fletcher 1978, p. xix. See Nelken 1987a, p. 142 for the natural affinity.
[9] Norrie 1991, ch. 1; 1993 chs. 1 and 2. For an extended criticism of this position, see Farmer 1995.

individual is to be worked out. It is assumed that the route to a better theoretical understanding of the criminal law follows from the clarification, or critique, of those same concepts. But is this necessarily the case? Why should we begin with this conceptual structure? The problem with taking this as a starting point is simply that it is too narrow, leaving too many questions unasked. There may be an affinity, but surely understanding of the criminal justice system would be improved by also asking why this should be the case. Where does this affinity come from?

It is clear that it is not 'natural'. The relationship between liberal moral and political philosophy and the criminal law would seem to be a product of the struggle against absolutism in the eighteenth century. Repressive and violent laws and institutions were attacked by reform-minded philosophers and lawyers. In Europe this led to the drawing up of the great penal codes of the Enlightenment according to new measures of restraint, certainty and humanity in punishment.[10] Legal limits were imposed on the exercise of power in the same period as the boundaries of the modern nation state were drawn, establishing a range of both internal and external constraints on sovereignty. The demand that the criminal law respect the principle of legality, that the criminal process be subjected to rules and constraints, and that punishment be administered only in measured and determinate amounts, set the terms of the compact that was established between the criminal law and modernity.[11] This very history, if we accept it, suggests that this is far from being a 'necessary' relationship – only that it has been perceived as fundamental to a certain characterisation of the modern state. Even if we go so far as to accept that the relationship is desirable, this tells us nothing about how the practices of criminal law are related to philosophising about state power and punishment. Indeed, much of the available evidence suggests that they have little to do with each other. Philosophers have pointed out that the doctrine of the criminal law frequently fails to meet the criteria of philosophical adequacy,[12] and theoretically minded criminal lawyers complain that judges and other criminal justice professionals show little enthusiasm for conceptual clarification or philosophical rigour.[13] And if we look to the sociological literature, we find many studies which demonstrate that the 'justice' in the

[10] See von Bar 1916, chs. 9–15.

[11] See Foucault 1977, pp. 74–5. Foucault's work dramatises the dubious connection between modern systems of punishment and civilisation. We should note that, in the same period, 'moral' behaviour came to be conceived of as the following of rules rather than the pursuit of the good. This suggests another basis for the natural affinity. See Macintyre 1985, pp. 118–9.

[12] Duff 1987.

[13] Willock 1981 points out that Scottish judges have failed to respond to Sheriff G. H. Gordon's conceptually sophisticated account of the Scottish criminal law (1967 and 1978). Lacey 1985 argues that the judicial reception in England of elaborate conceptual analyses of the law suggests that academic lawyers overestimate its importance.

criminal justice system is a product of bureaucratic pressures rather than normative or philosophical ideals.[14] Obviously, this must lead to a questioning of the relevance of academic debate over the philosophical foundations of the criminal law.[15] In spite of the continuing conflict between judges and academics over, say, the subjective or objective character of *mens rea* or the permanently unresolved state of the debate on the punishability of impossible attempts, there remains a limited sense in which the criminal justice system continues to work rather effectively – at least if the sheer number of people that are prosecuted each year is taken as a measure. Criminal law theory is caught in a position where it neither reflects the state of criminal justice nor is able to engage with the contemporary sense of crisis. To be sure, moral philosophy may be important to the law as it is currently conceived, but it may not represent the only, or even the best, route to an understanding of that law.

This suggests that there are serious limitations inherent in a study that takes the criminal law conceived of as a philosophical system as the central object of study. However, even as these arguments undermine an understanding of the criminal law as a form of moral philosophy, they reveal how the territory of the law, and the types of questions that fall to be addressed by criminal law theory, has already been marked out in a way that establishes moral philosophy as the only legitimate mode of analysis. Important boundaries are established from the outset between theory and practice and between criminal law and criminal justice. Barriers have been erected to prevent other types of philosophical or theoretical understanding being brought to bear on the criminal law. Most contemporary writing on the issue of crime and the criminal law respects these boundaries, drawn by criminal lawyers, that establish the autonomy of the law.[16] Yet this autonomy is difficult to sustain. In the modern nation state the criminal law is expected to be both an instrument of modern government and a barrier between state and citizen. The theoretical understanding of criminal lawyers is only achieved by the blurring of the distinction between these two functions or, more commonly, by ignoring the distinction altogether.

For example, where the connection between the incidence of crime and particular instances of criminal policy is addressed, the criminal law is regarded both instrumentally, as the means by which policy can be implemented and, more neutrally, as something that escapes reduction to

[14] There are numerous studies in this area. See, for example, Carlen 1976; McBarnet 1981; McConville *et al.* 1991. Much of this literature is reviewed in Nelken 1987a.

[15] Or at least there is a problem with the particularly impoverished notion of philosophy that is adopted, where analytical clarity often seems to be confused with philosophical analysis. For an example of this, see Shute *et al.* 1993.

[16] This has been mapped out at some length in Nelken 1987a and b.

the simple terms of policy. In this way it manages to be both less and more than particular instances of its application, conceived of either as a conduit through which criminal policy must necessarily pass, or as part of a framework of normative rules. From neither perspective does it appear that the criminal law is regarded as part of the problem of crime. The limits of the law are only seen either in practices which can be regarded as marginal to or outside the law (such as the existence of discretion or social inequality) that are said to undermine it, or in the terms of the normative philosophical question which asks which types of action are harmful or blameworthy. This allows the law to be seen as an autonomous philosophical system rather than as something that has its origins in particular practices or policies or systems of enforcement. When policies fail they, and not the criminal law, are to blame. To the criminal lawyer, the question of enforcement is seen as something beyond the law, to be carried out by the agencies and institutions of criminal justice.[17] The law stands above and beyond the sphere of public debate and policy. This, moreover, reinforces the ambitions of criminal lawyers for whom the criminal law must be more than just an instrument or tool of government.

Paradoxically, when criminal lawyers acknowledge the importance of criminal justice this is in order to support the belief that the law is completely autonomous. The modern criminal law is presumed to pursue certain ends, whether these be deterrence, retribution or rehabilitation, or some combination of the three, no matter how incompatible they appear to be.[18] In these terms it would then appear that the important question that the law would have to answer would be that of whether or not it achieved these ends, or as it is more conventionally put, whether or not it worked. However, while it is normal for these ends to be recognised by criminal lawyers – in an acknowledgement of the social functions of the modern law – it is extremely difficult to trace their exact status in criminal law doctrine. There is a crucial slippage by which they disappear from the discussion. After an initial appearance they are not subsequently regarded as relevant to the question of guilt or responsibility, but only to sentencing or punishment – which are not conventionally treated as part of criminal law doctrine.[19] Difficulties or inconsistencies can be deferred to the sentencing stage in order to preserve the theoretical purity of the law, and the blame for the failures of criminal justice can be placed elsewhere. The impression is reinforced that these failures – in prosecution, in enforce-

[17] Where the question of enforcement arises at all, it is in terms of the enforcement of morality. For the classical expression of this, see Devlin 1965.

[18] See e.g. Smith and Hogan 1992, p. 3; Ashworth 1995, pp. 14–17 although he moves to an emphasis on the importance of the values that the law should enforce. On incompatibility, see White 1985, pp. 194–203.

[19] See esp. Norrie 1993, ch. 10.

ment, in the courts, in punishment – are a failure of institutions, policy, procedure.[20] Law becomes an issue in criminal justice only in relation to questions of procedural justice – the legality of police action, of detention, the admissibility of evidence. Amidst the wringing of hands and pointing of fingers, the criminal law is rarely, if ever, implicated. This is a remarkable state of affairs: the institutions that enforce the criminal law are guilty; criminal procedure has taken a wrong turning; sentencing policy requires reform and rehabilitation. But the criminal law, it would appear, has little or nothing to do with criminal justice.

It may, of course, be the case that the criminal law is perfectly conceived and ideally adapted to the social demands that are placed on it. This seems unlikely, however, and at the very least worthy of demonstration. In addition, as I suggested above, there are signs that criminal lawyers are themselves unhappy with this structure of institutional purposes and want the criminal law to be rather more, in order to preserve something of its perceived social significance. This extra factor has been sought either in the values that the criminal law is said to protect or reinforce, or in some socially significant practice, such as 'blaming', that is said to represent the core of the expressive function of the law.[21] However, there is little evidence of the consensus that must lie at the heart of what criminal lawyers say about values, or indeed of any agreement over the core values that the law is said to protect. It is rather as if thinking about the law is carried out within such extraordinarily narrow confines in order to protect the illusion of consensus. Equally, it is hard not to be sceptical about attempts to get back to basics in criminal law, for in the modern criminal law such expressive functions must always be performed by and through institutions. If we blind ourselves to the operation or practices of these institutions it is unlikely that anything of the experience or meaning of the modern criminal law will ever be captured. In view of this, it is even more strange that we should be bound by rigid theoretical distinctions between the different parts of the criminal justice system, so that the way in which justice is discussed in the texts of the criminal law is far removed from the day-to-day operation of the system.

This raises a number of important questions for the future of the criminal law, questions which criminal lawyers do not or will not face,

[20] Interestingly, this is no less true of historical work. A recent history, Wiener 1990, tells the story of the move from 'moralism' to 'causalism' in Victorian penal thought, and in particular the emergence of penal policy in the modern sense. Although it is argued that the penal law is transformed – through, for example, the creation of new categories of offenders and offences as the result of changes in criminal policy – the end result seems simply to be the tracing of the emergence of the category of policy as something separate from law. The question of transformation in the criminal law is left largely unexplored.

[21] On values, see the summary in Ashworth 1995, ch. 2; on the expressive function, see White 1985.

preferring to relegate them to the realms of policy or process, so better to preserve the theoretical purity of the law. Foremost amongst these is the question of why there is a split between the criminal law and policy, or between criminal law and criminal justice. This leads on to the question of how can we conceive of justice in the criminal law.

There have been attempts to bridge this gap, to make contextual or interdisciplinary studies of the criminal law. Indeed, it has been argued that the criminal law offers an unparalleled prospect to those interested in interdisciplinary study because of its unique combination of the technical, institutional arrangements, procedural and evidential rules, and normative theory.[22] But, if it is reasonably straightforward to point to the complexity and diversity of modern criminal justice systems, it has proved rather more difficult to produce a genuinely interdisciplinary theory of law that does justice to that complexity. It is clear that the promise of inter-disciplinary or contextual study remains unfulfilled. While reference to the need for interdisciplinary or contextual study has practically become a fetish – who today dares to deny the importance of 'context'? – the issue of each new text containing an expanding set of references to philosophical, criminological, psychological and historical works, is accompanied by a growing confusion about how it is all supposed to fit together. It is as if there is the hope that, by bringing along an ever greater part of the context, understanding must magically follow. The danger of according too great a status to context may simply be that of ending up with increasingly diffuse accounts of social control. As the context is brought in, the law is inexorably reduced to that context.[23] Yet this leaves us with something of a conundrum. Sociological approaches to the law in terms of a process of 'criminalisation' are said to miss something of the normative qualities of the law,[24] while those same normative qualities are understood not to be susceptible to study except in terms of precisely the moral philosophy that established them in the first place![25] The divide between criminal law and justice is reproduced at the level of theoretical understanding, as the studies of context reinforce the idea that there is a core understanding of law. Once again we find that boundaries have been drawn in advance by the philosophical conception of the criminal law.

[22] See generally Tur 1986, pp. 195–9.

[23] See Cohen 1989. Cf. the reductive approach of Lacey *et al.* 1990, pp. 7–12, where the multitude of practices of social control that are 'analogous' to the criminal law are listed.

[24] e.g. Lacey 1995 on the process of criminalisation. Why should the sociological category of criminalisation be accorded an *a priori* status? See also Farmer 1996, pp. 59–62.

[25] See also Nelken 1987a, pp. 140–3; 1987b, pp. 107–9. This reinforces an important point about the nature of context, for to study context is also implicitly to reinforce the idea that there is a core, that contextual study can be used to prop up the sense of the discipline. This idea of the core and the margin is something that also returns in relation to the core values that the law is said to protect.