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.

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Crime, Reason and History

A Critical Introduction to Criminal Law

THIRD EDITION

ALAN NORRIE

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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

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

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

Preface to the first edition

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,

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