PHILOSOPHICAL FOUNDATIONS OF

Criminal Law

EDITED BY

R.A. Duff

& Stuart P. Green

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RA DUFF

and

STUART P GREEN

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Preface

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INTRODUCTION: SEARCHING FOR FOUNDATIONS

RA DUFF AND
STUART P GREEN

THE title of this volume, *Philosophical Foundations of Criminal Law*, might seem to beg at least two important questions. First, does the criminal law have foundations? Second, if it does, is it the responsibility of philosophy to construct, or to excavate, those foundations?

Talk of foundations implies that the criminal law has an ordered, stable structure, whose basic or foundational elements can be discovered; to call those foundations philosophical is also to imply that they are a matter of reason. But, critics will argue, the criminal law (indeed, law generally) is not like that. It is certainly not a matter of reason, if that is taken to mean that it is grounded in coherent principles or that it displays a rational structure of consistent rules or doctrines. Nor can it claim the security or stability that foundations are supposed to provide, since it is grounded in and determined by nothing more stable than the shifting sands of historical contingencies—of political, social, and economic forces. What an understanding of the structures, the development, and the bases of criminal law therefore requires is not (just or primarily) the metaphysical explorations, conceptual analyses, or rational reconstructions that may be offered by different types of philosopher, but the more empirical and interpretive skills of the historian and the sociologist. They have more chance of explaining criminal law—what it means, how and to what ends or with

what effects it functions—by explaining how it has developed, and by identifying the historical and social factors that have made it what it is, and that have created the conflicts that it embodies. To understand the criminal law, or to identify whatever foundations it might have, we must attend to its history and to its social and political context, not to the rational (re)constructions of philosophers.[1]

Such critics might find symbolic support in the explanation of this volume's title, since it was indeed a matter of historical contingency rather than of rational or principled reflection. Oxford University Press asked the editors if they would like to organize a volume to follow in the steps of *Philosophical Foundations of Tort Law*,[2] and that gave us our title: no deeper or philosophically more ambitious meaning is to be found. To understand our choice (if it was a choice) of title the reader must therefore look not to philosophical theory, nor to a conception of criminal law as having 'philosophical foundations', but to the contingencies of publishing history and to the marketing concerns that help to drive that history. So, too, critics will argue, an understanding of criminal law requires attention not (just or primarily) to the abstractions of philosophical inquiry, but to the messy contingencies of its history—more precisely, of the histories of the very different systems of criminal law to be found in our contemporary world.

We will resist this criticism. This is not because we think that philosophical inquiry is *the* key to understanding criminal law, or that philosophical inquiry can isolate itself from other disciplines such as history and sociology. There is indeed no such thing as *the* key, in part because there is no unitary goal of 'understanding criminal law'. Different understandings are gained through different disciplinary perspectives, and although they cannot be isolated from each other, each has its own distinctive character; theorists should aspire, not to develop some all-embracing theory that could count as *the* theory of criminal law, but rather to explore the theoretical insights that emerge from different disciplinary (and cross-disciplinary) inquiries, and the extent and character of the connections between them.

What, then, should emerge from a philosophical approach to criminal law? What kind of understanding should it offer? What kinds of foundation should concern it? Such questions could be adequately answered only through a thorough discussion of the wide range of very different approaches and methods that might count as

[1] Extreme versions of such criticisms were pressed by proponents of Critical Legal Studies (eg M Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 *Stanford Law Review* 591, and 'Trashing' (1984) 36 *Stanford Law Review* 293). For more recent, less radically negative (and for that reason more interesting) critiques see eg L Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1996); N Lacey, 'Contingency, Coherence and Conceptualism', in Duff (ed), *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998), 9, and '"Philosophical Foundations of the Common Law": Social not Metaphysical', in J Horder (ed), *Oxford Essays in Jurisprudence, 4th Series* (Oxford: Oxford University Press, 2000), 17; AW Norrie, *Crime, Reason and History* (2nd edn; London: Butterworths, 2001).

[2] DG Owen (ed), *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995).

'philosophical'—a discussion on which we will not embark here. A further closely related question is whether philosophers should seek to develop a 'theory' of criminal law—and, if so, what kind of theory that should be, and what it should be a theory of. As far as that question is concerned, we can usefully start with the traditional distinction between analytical, or expository, and normative, or censorial, jurisprudence—between a focus on what criminal law is, and a focus on what it ought to be.[3]

Expository jurisprudence, if it is to claim to be philosophical, cannot of course be simply a matter of describing the content and the operations of existing legal systems: it must delve beneath the surface, to articulate the structures that inform that content and underpin those operations. Some would talk now of an enterprise of conceptual analysis that explicates the meanings of legal concepts (concepts that can of course be understood only in the contexts in which they are used); some would talk of a related enterprise of discerning the logic, or the logical structure, of the criminal law; others, with larger metaphysical ambitions, would talk of discerning the real nature of criminal law.[4] Censorial jurisprudence, by contrast, is focused not on the structure or content of existing systems of law, but the aims, values, and principles that *should* structure a system of criminal law (one key question for any such theorist will of course concern the grounds for such normative claims, and their relationship to the analytical or expository).

It is easy enough to state this distinction between analytical and normative jurisprudence, but we should not suppose that it can be sharply drawn, for two reasons.

First, an analytical approach cannot avoid normative engagement. This is not just because what we are trying to analyse is itself a normative institution—one that centrally involves the authoritative creation and application of normative judgments; it is because anything more ambitious than an unstructured, piecemeal description of that institution (and philosophical analysis must be more ambitious than that) will inevitably involve an attempt at more or less radical rational reconstruction—an attempt whose failure would be just as instructive as its success, since it would show the institution to lack any rational structure. As critical theorists rightly remind us, our criminal law is not the carefully crafted product of a divinely inspired creative moment, but the messy outcome of the variegated, shifting forces that determined its historical development. The challenge is to make sense of this set of practices—a

[3] See J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789; ed Burns and Hart, Oxford: Oxford University Press, 1996), ch 19 on 'expository' as against 'censorial' jurisprudence (he comments there on 'local' as against 'universal' jurisprudence, and remarks that, given the diversity of laws, in both content and form, expository jurisprudence can claim universal application only if it confines its attention to 'terminology' or 'the import of words'). For a more contemporary discussion of the distinction between analytical and normative (or 'descriptive' and 'prescriptive') jurisprudence, see DN Husak, *Philosophy of Criminal Law* (Totowa, NJ: Rowman & Littlefield, 1987), 20–6.

[4] See recently MS Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997): conceptual analysis, on Moore's view, is at best a somewhat uncertain guide to the underlying metaphysics that it is the proper task of philosophical inquiry to uncover.

sense that must be a normative sense, given their normative character: to discern a normative structure that expresses coherent principles and values, and that is adapted to the pursuit of identifiable ends. This is not to say that a rational reconstruction must produce a normative structure that is free of all conflict: once we recognize the reality of conflicting, incommensurable values, we must recognize that conflicts or 'contradictions', even those between which only uneasy compromize rather than definitive resolution is possible, need not mark a rational deficiency in the system in which they are found; they might instead mark the way in which the system is sensitive to the plurality of values.[5]

The task of rational reconstruction, as so far described, is not (yet) fully Herculean, since it does not involve the construction of a political theory:[6] but it is proto-Herculean, since its completion requires the reconstruction of a complete system of criminal law. Inevitably, such reconstruction will require construction rather than mere excavation, blurring the always less than sharp distinction between 'discovery' and 'creation'. It will also require some substantial theory of mistakes: not only will particular judicial decisions turn out to be inconsistent with the doctrines, principles, and rules that rational reconstruction shows to be at least implicit in the system of law; the same will be true of statutes, of doctrines, and of principles or slogans that many might see as entrenched features of our law.

However, the task of rational reconstruction must become more fully Herculean than this, since it cannot attend only to what is strictly internal to the law.[7] Analysis or reconstruction that attends only to what the law itself (insofar as we can even separate 'the law itself' from what lies beyond the law) offers can reveal conflicts or inconsistencies between this aspect of the law and that, and *might* sometimes also be able to show that one of those aspects must be classed as a 'mistake', since the aspect with which it is inconsistent lies closer to the centre of the law's structure;[8] but both the interpretation of the doctrines or principles involved, and the determination of what should count as a mistake, will often need to look beyond what is strictly internal to the law, to some set of moral or political values that we can suppose the law to be intended to embody. What counts as making normative sense at all must depend in part on such underlying values, and any attempt to decide which reconstruction makes better normative sense must appeal to such values. The reconstructive theorist can try still to remain detached—to identify the political and moral values that make best sense of a particular legal system without either endorsing or criticizing

[5] See further DN MacCormick, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 539; RA Duff, 'Principle and Contradiction in the Criminal Law', in Duff (ed), *Philosophy and the Criminal Law*, 156.

[6] See RM Dworkin, *Law's Empire* (London: Fontana, 1986), esp chs 7–10.

[7] See J Tasioulas, 'Philosophy, Criticism and Community' (2009) 26 *Journal of Applied Philosophy* 259; V Tadros, 'Law, Strategy and Democracy' (2009) 26 *Journal of Applied Philosophy* 269.

[8] Compare WV Quine, 'Two Dogmas of Empiricism' (1951) 60 *Philosophical Review* 20, on the 'web of belief' and the ways in which propositions are more or less revisable.