# Law & Crime

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## Key Approaches to Criminology

The *Key Approaches to Criminology* series aims to take advantage of the disappearance of traditional barriers between disciplines and to reflect criminology's interdisciplinary nature and focus. Books in the series offer undergraduate and postgraduate students introductions to the subject, but the aim is also to advance discussion, move debates forward, and set new agendas in the field.

*Law and Crime* is one of the few books in the *Key Approaches* series not authored by scholars who are based in a Criminology department, group or research institute. This comment is not meant disingenuously. Far from it; I am inordinately proud that the series has attracted two such eminent and respected academics from Law to write for it. In any case, as Gerry Johnstone and Tony Ward acknowledge, they benefit from working in a stimulating interdisciplinary environment and both have made an outstanding contribution to the field of Criminology. Tony's work in areas as diverse as psychiatry and criminal responsibility, crimes of governments, environmental harms, terrorism, and historical perspectives on crime and punishment, has had a significant influence on the development of Criminology over the last decade or more - and all this achieved after qualifying as a Barrister and then working for the voluntary organizations Radical Alternatives to Prison and INQUEST. Gerry, meanwhile, has published widely in the areas of therapeutic interventions into criminal justice, participatory justice and critical legal education but, most notably from a criminologist's viewpoint, he has made the academic study of restorative justice virtually his own!

There can, then, be no two individuals better placed to write a book on *Law and Crime* for this series. They have succeeded in producing a book that covers all the 'basics' in terms of the birth of criminal justice, the development of criminal liability, the tenets of criminal law, and the historico-legal contours that have shaped modern punishment. Theoretically robust and avowedly interdisciplinary, they then apply the insights gained from this broad analysis to the specifics of cases, many of which have reached the criminal courts; some of which typically evade criminalization. Their critique is thoroughly researched, thought-provoking and immensely readable. *Law and Crime* will be greatly appreciated by all scholars working at the interface of criminology, criminal justice and law, and is a very welcome addition to *Key Approaches to Criminology* series.

Yvonne Jewkes
Series Editor

# Acknowledgements

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# 1

# Criminal Law and its Critics

## Chapter Contents

## OVERVIEW

Chapter 1:

- Explains the purpose of this book.
- Outlines some prominent features of the institution of criminal law.
- Introduces a number of important critical perspectives on criminal law.

## KEY TERMS

criminal law the libertarian critique the 'scientific' critique the socio-political critique the restorative justice critique

## Introduction

This book is an introductory account of the institution of criminal law, written for students and scholars of criminology and related social sciences. To be clear, it is not a book on 'law for criminologists'. Rather, we seek to provide an interdisciplinary analysis of key elements of the institution of criminal law. The disciplines we draw upon include not only criminology and law, but also history, philosophy, politics and sociology. Drawing upon works from these disciplines, we explore the creation, development and key features of criminal law, along with some of the ideas, values and projects that have shaped the institution and our expectations of it.

Our account of criminal law is a critical one. We do not start out by making the assumption that criminal law is a necessary social institution – necessary to restrain the tendency which many people have to behave in ways that are seriously wrongful and harmful. Nor do we assume that the criminal law of today is a distinct improvement over what went before. Rather, we want to provide a fair hearing to the viewpoint that criminal law is a deeply flawed institution, e.g. one which causes more harm than it prevents or which unjustifiably violates the liberties of people in order to provide spurious benefits to society. On the other hand, we will seek to avoid the opposite error of taking it for granted that criminal law is a 'failing' social institution. Hence, we will show that, for all its

deficiencies, the criminal law has played a crucial role in articulating and defending very important social values.

In order to chart our course more clearly, we will start by identifying some core features of criminal law. We will then describe, in very general terms, some common critical stances towards this institution.

## Some features of criminal law

### *Rules*

Probably the most prominent feature of criminal law is that it contains a body of rules. More specifically, these are rules of conduct which are formulated and enforced by society's rulers through its legislatures, courts and penal apparatus. These rules are addressed to all persons when they are within the jurisdiction of the rulers (Duff, 2002a: 14). They tend to specify types of behaviour that the rulers declare to be public wrongs: conduct which in that society is deemed harmful, unjustifiable and of concern to all righteous members of the society. These types of behaviour are called 'offences'. The rules also stipulate that those found guilty of committing an offence are liable to some punishment such as a fine or period of imprisonment. The rules tend to be prohibitory in character, i.e. they refer to conduct from which people must refrain. Less commonly – and also controversially – some rules make it an offence to omit to do something in certain circumstances (Ormerod, 2005: 75ff; cf. Hughes, 1958).

### *Moral dimensions*

Another important feature of criminal law is that violation of its rules is widely regarded as immoral and/or disreputable. Those who violate the criminal law often attract the disapproval, and sometimes even the hatred, of 'respectable society'. Partly, this is because many of the best known rules of criminal law prohibit conduct – such as murder, theft and rape – that is already, outside of the criminal law, regarded as immoral or disreputable (Duff, 2002a: 3–4, 12). As Sir James Fitzjames Stephen – author of the nineteenth-century classic *History of the Criminal Law of England* – put it:

> The substantive criminal law ... relates to actions which, if there were no criminal law at all, would be judged by the public at large much as they are judged of at present. If murder, theft and rape were not punished by law, the words would still be in use, and would be applied to the same or nearly the same actions. ... In short, there is a moral as well as a legal classification of crimes. (Stephen, 1883: 75)

However, even where the conduct prohibited by criminal law is not obviously immoral or disreputable – is not patently wrong independently of its legal prohibition – those who are found guilty of engaging in such conduct can be morally tainted by their criminal conviction. It is as if the criminal law has its own moral authority so that once it prohibits a type of behaviour, to engage in that behaviour becomes immoral or disreputable even though it would not previously have been so. Hence, along with the formal sanction that is incurred by being found guilty of breaking the criminal law (e.g. the sentence of a fine or imprisonment), criminal conviction – or even suspicion of being involved in a criminal offence – tends to attract a social stigma. To get in trouble with the (criminal) law tends to push one towards or over a line that separates respectable from disreputable elements of society.

This 'moral' dimension of criminal law cannot be ignored if we wish to provide an adequate account of it. However, neither should it be overstated. In modern society there is a strong tendency to use the criminal law to regulate more and more conduct which – although considered injurious or dangerous – is not as obviously immoral or disreputable as Stephen's examples of murder, theft and rape. Being found guilty of breaking one of these rules does not patently reveal some deep flaw in one's moral character (in the way that even a minor conviction for theft is often thought to reveal the character flaw of dishonesty). The more criminal law is used in this way, the harder it is to sustain the notion that breach of the criminal law is inherently immoral or disreputable. Also, many of the sanctions for breaches of criminal law (even where the conduct in question does seem immoral or disreputable) are imposed in such a professionalized, bureaucratic way that they become more like mere 'penalties' than 'punishments'. The latter term carries connotations of moral censure which are not so present in the former: penalties provide people with instrumental reasons to obey the law but do not necessarily construct the penalized behaviour as immoral or opprobrious.[1]

## *Criminal procedure*

Another feature of criminal law is that there is a special procedure for determining whether somebody suspected of committing an offence, and who might wish to dispute the case against them, is guilty of violating one of its rules. The actual nature of this procedure has changed significantly throughout the history of criminal law and it still varies considerably between different countries (Delmas-Marty and Spencer, 2002; Vogler, 2005). However, a persistent underlying premise is that determining the guilt or innocence of a person accused of committing an offence – and certainly a serious offence – is a grave matter and should be done on the basis of a very rigorous testing of the case against the accused.

Such an approach is of course time-consuming, costly and likely to result in at least some people who have in fact broken the law evading conviction. Hence, there tend to be counter pressures and temptations to avoid the most rigorous process for many cases. This tends to result in practices designed to avoid having cases contested by, for instance, informally bargaining with accused persons over the charges to be brought against them or over the sort of sentence that will be demanded. It also leads to the creation of more summary processes for what are deemed to be minor offences attracting relatively light sanctions. It can also result in tendencies to remove the regulation of some conduct from the ambit of criminal law proper, by for example creating new 'quasi-criminal' regimes of regulation which use 'on the spot fines' imposed with little formality by agents such as traffic wardens, ticket inspectors or even machines.

In the popular imagination, the process of determining whether somebody accused of breaking the criminal law is guilty or innocent is a weighty affair involving rigorous testing of the case and lengthy and solemn deliberation by the decision-makers. This certainly captures the reality of some criminal law. However, a large proportion of cases are handled in a much more summary manner. It is not surprising that many of the public controversies surrounding criminal law are to do with whether the procedures for determining guilt or innocence are appropriate.

## *Principles of liability*

Along with substantive rules of conduct, criminal law contains principles of liability which indicate who or what can be held legally responsible for conduct which infringes its substantive rules and how their responsibility is affected by various circumstances. Most basically, it contains principles of capacity. Only certain entities are deemed to be within the ambit of regulation through the criminal law. The entities that are included vary between different historical periods and different countries. So, for instance, inanimate objects which cause death have been put on trial in ancient criminal law systems (Hyde, 1916). And, in medieval Europe, animals were sometimes subjected to criminal prosecution and punishment (Evans, 1987 [1906]). Contemporary English criminal law regards inanimate objects and non-human animals as lacking the capacity required to be subject to regulation through criminal law. This does not mean, of course, that they are not subject to regulation (many animals get trained and controlled and animals that behave badly and cause us harm and trouble are dealt with); rather their conduct is regulated through other mechanisms.

Amongst human beings, young children are generally considered to lack 'criminal capacity'. Again, this does not mean that nothing will happen to a child

below the age of criminal capacity who engages in the sorts of behaviour prohibited through criminal law. Rather, it simply means that they will not be subject to intervention through the mechanism of criminal law. Ideas about the precise age at which human beings acquire criminal capacity vary significantly over time and between countries. In England and Wales the official age is currently ten, in Belgium 18 and in Scotland eight.[2] Other human beings who are regarded as lacking criminal capacity include those adjudged to be insane at the time they committed an act which would otherwise be an offence.

The other significant entity which is subject to the regulation of contemporary criminal law (since around the middle of the nineteenth century) is the corporation: a legal person with no physical existence (Ormerod, 2005: 235). The development of the idea that a corporate body has duties to comply with the rules of criminal law and can be prosecuted and punished for failure to comply is bound up with the fact that, in modern society, a great deal of harm and injury results from the actions of corporate bodies. Perhaps less obviously, it seems to be bound up with the notion that these bodies have minds of their own, which are not reducible to the minds of individual human beings who contribute to corporate activity. As such, they are considered to be entities which are capable of being *addressed* by the law (see Chapter 6).

For those entities which have criminal capacity, a further question arises of whether they should be held responsible for engaging in conduct prohibited by criminal law given the circumstances under which they engaged in it. The key issue here tends to be the extent to which the person whose conduct is in question had a reasonable opportunity to do something other than the act which – it is alleged – is a criminal offence. So, for instance, human beings are animals that respond instinctively to physical stimuli. Sometimes, instinctive or almost instinctive bodily movements may result in the sorts of 'conduct' that criminal law prohibits. For example, if a person (D) is walking near the edge of a cliff and slips and is about to fall off the edge, it is virtually instinctive to grab something that will prevent them from falling. If that something is another person (V), and if as a result V is pulled over the cliff edge and dies, but D somehow survives, then the question arises of whether D (presuming their story is believed) should be able to avoid criminal liability for the death of V. D's argument, in essence, would be that because their conduct was instinctive it was involuntary and so without fault and that it should not therefore be condemned as criminal.[3]

The above example is fairly straightforward; although various complexities could be introduced. (For instance, if D had ignored various warnings that walking near the edge of this particular cliff was highly dangerous and not allowed, does D's 'prior fault' affect their criminal liability for V's death? Is D's argument one of necessity rather than involuntariness, and if so can necessity ever be a defence where the charge concerns killing? See Chapter 4.) There are however, much more complex situations encountered by criminal law. A person will often

engage in conduct prohibited by criminal law but argue that they had no reasonable opportunity to behave otherwise for a variety of reasons. For example, they might argue that they were acting under superior orders, out of necessity, whilst subject to various forms of coercion and pressure, in self-defence, as a result of some psychological compulsion which they were helpless to control, or due to some profound mistake about the nature of their actions. All of these situations raise complex questions about whether the actor should be held criminally responsible for their actions, i.e. whether their actions should be condemned as criminal and the actor punished as a criminal.

## *Purposes of criminal law*

Criminal law has been shaped by various ideas about its purposes. Some of these ideas are compatible with each other; some are in tension with other influential ideas and these tensions manifest themselves within the criminal law (Duff, 2002a).

One patent purpose of criminal law is to control the conduct of persons. More specifically, criminal law tends to be concerned to prevent conduct which directly or indirectly causes substantial harm, trouble or annoyance to other members of society where such conduct lacks justification. Criminal law might be understood then as one institution which constructs outer limits of permissible behaviour in society – and polices those limits by imposing painful sanctions and social stigma on those who cross them. Provided people stay within certain outer limits, the criminal law is not really interested in how members of society live their everyday lives. That is to say, criminal law is not in general the sort of institution that tends to be concerned to regulate the tiny details of everyday behaviour (e.g. it is not usually concerned to control wrong-doing which does not concern the wider public, nor to punish bad manners or unhygienic habits). Still less is it usually concerned with people's thoughts. People can imagine all sorts of mischievous acts without attracting the attention of criminal law; to attract such attention they must at least attempt to act on these thoughts either directly or by inciting or conspiring with others. As we shall see, however, some critics think that criminal law *does* tend to intrude too deeply into the details of our lives. Also, as Foucault (1977) among others has argued, those who are found guilty of transgressing the limits set by criminal law are sometimes subjected to sanctions which do not simply inflict pain but are designed to reshape the habits, routines and ultimately the personalities of transgressors.

If controlling wrongful conduct is a core purpose of criminal law, important questions arise about the relationship of criminal law to other interventions which have a similar purpose and about the precise role which criminal law does and should play in the regulation of wrongful conduct. Again, there is a

variety of ideas about such issues. In some, criminal law is a vital but secondary mechanism of crime control: people learn to behave correctly through other mechanisms, e.g. they absorb ideas about honesty from the wider culture so that, even if they thought themselves extremely unlikely to be subject to criminal sanctions, they would still refrain from dishonest acts such as stealing. In such thinking, these other mechanisms occasionally fail for one reason or another, and criminal law is necessary to deal with the results of these failures. There are other ideas in which the criminal law plays a more basic role in shaping human conduct. For example, the regular punishment of offences and the discussion this provokes might be thought to play a vital role in implanting in people a deep sense of the wrongfulness of certain types of behaviour (Braithwaite, 1989).

There are other ideas about the purpose of criminal law which do not see controlling conduct as its sole or even central purpose. For instance, the purpose of criminal law is sometimes explained as being to ensure that those who act wrongly receive the pain which is their just desert. This may incidentally prevent them and others with similar motives and opportunities from committing further offences. But, some suggest, these control effects are useful by-products and not the main purpose of punishing criminal law-breakers. Rather, having some mechanism to ensure that people get what they deserve (be it punishment or reward) might be regarded as an end in itself in a society committed to the value of justice.

Another increasingly prevalent way of thinking about the purpose of criminal law is to regard its main function as being to communicate censure of wrongdoing (see Chapter 4). Criminal law has also been thought of as a means of providing redress for those harmed by wrongful conduct of others. On one view, those injured or threatened by wrongful acts have a natural entitlement to take retaliatory or defensive action. However, to have an orderly society, it is necessary that they forgo self-help and delegate this entitlement to some central authority which then incurs an obligation to inflict retributive suffering on those who commit criminal wrongs.

There are various other views about the purpose of criminal law which are more counter-intuitive than those outlined above. Jareborg (1995), for example, argues that an important purpose of criminal law is to cool down conflicts by providing a formal alternative to spontaneous public reactions to criminal behaviour, thereby protecting suspected offenders (and others) from violence. Also, many sociologists argue that the criminal law has real purposes which are somehow hidden from those who operate and observe it. The most famous example of this is Durkheim's (1960) suggestion that crime and the social reaction to it can help to strengthen social bonds within a community by providing a focus for group moral feelings (cf. Garland, 1990: chs. 2 and 3). In a somewhat similar vein is Foucault's suggestion that criminal law performs the important

function of creating a steady supply of criminals who are useful to society in various ways (Foucault, 1977; cf. Garland, 1990, chs. 6–7).

## Critiques of criminal law

Given the range of purposes and expectations that criminal law is expected to fulfil and meet, and that many of these are in tension with others, it is hardly surprising that criminal law is often subjected to criticism. Much of this criticism does not call into question the necessity or ultimate value of the institution, but rather points to certain shortcomings that need to be corrected. However, there are some critical themes which appear in discussions of criminal law - especially in criminology and the social sciences - which do raise more fundamental questions about the institution's inevitability or worth. In this section we describe some of these themes. Whilst they overlap a great deal, we will somewhat artificially describe them as distinct themes.

What we aim to depict are broad critical attitudes rather than specific criticisms published by particular authors. That is to say, to a large extent what we are describing are caricatures, but caricatures which we find prevalent within criminology and social science (i.e. although in print they are often expressed in a more guarded form, the caricatures are closer to the spontaneous reactions of many academics and students). With regard to these critical themes, we have two aims which pull in opposite directions. On the one hand, we find these critical themes very useful for sensitizing us to certain dangers and limitations of the institution of criminal law. On the other hand, we think there are valuable aspects of criminal law that are sometimes overlooked, under-appreciated or misunderstood by critics of the institution.

### *The libertarian critique*

This critique accepts that people need to be protected by some entity from injurious and wrongful behaviour of others. Hence, it accepts that an institution bearing some resemblance to criminal law is a social necessity. It suggests, however, that the actual institutions of criminal law that we have, tend significantly to exceed these minimal protective functions. Criminal law tends to interfere without warrant in people's freedom to decide how to conduct their lives.

Criminal law is often criticized, for instance, for interfering with matters of 'private morality'. It prohibits behaviour which does not patently cause harm – or at least harm to non-consenting others – but is simply regarded by a majority (or perhaps even an influential minority) of members of society as distasteful,