Introduction

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The invitation to edit a collection of new essays on philosophy and the criminal law aroused both excitement and anxiety. The past three decades have seen an upsurge of interest among both philosophers and lawyers in philosophical issues connected with the criminal law – perhaps more in Britain than in the United States. This was clearly related, within academic philosophy, to the revival of political and social philosophy; and, among lawyers, to the strengthening of more theoretical perspectives on the criminal law informed by a range of other disciplines, including philosophy. Against this background, the prospect of editing such a volume was exciting, but it also aroused anxiety about how such a volume should be focused, given the wealth of possible topics that could plausibly be included.

I made three editorial decisions that helped to determine the shape and contents of this collection. The first was to interpret 'philosophy' in a generously inclusive sense. I would look for essays that would take a theoretical and critical – as opposed to, for instance, a purely empirical or doctrinal – perspective on the criminal law, without worrying too much about whether the writers or their essays would count as 'philosophical' in a narrow professional sense. But as well as considering substantive theoretical issues connected to the criminal law, the essays should also have something to say about the very enterprise of theorising, or philosophising, about the criminal law. For in this as in other philosophical contexts, we must face questions not only about the particular substantive topics under philosophical discussion but also about the philosophical activity in which we are trying to engage. Just what should its aims and methods be? What kinds of result should it seek? What is its relationship to, and what kind of impact (if any) should it have on, its subject matter? Of the five essays in this volume, Nicola Lacey's, and the early parts of Douglas Husak's and Alan Norrie's, address this issue most directly; but in different ways, each of the essays has something to say about it.

The second decision was to ask the contributors to focus their essays on the 'general part' of the criminal law, in order to give the volume a reasonably

determinate – although still very broad – focus. The 'general part' of a system of criminal law is meant to contain those general principles of criminal liability that apply, if not to *all* particular offences, at least to most of them (section 2 of John Gardner's essay offers a useful classification of the various elements of the general part). Modern textbooks that deal with the general part thus typically include under that heading such items as the 'act requirement' (the main focus of Husak's essay); a general *mens rea,* or 'fault', requirement, together with definitions of the standard species of *mens rea* (intention, knowledge, recklessness, and negligence); causation; such general defences as insanity, infancy, automatism, mistake, duress, and necessity; and the general inchoate crimes of attempt, conspiracy, and incitement (see Articles 2–5 of the *Model Penal Code;* Part I of the English Law Commission's Draft Criminal Code Bill).

Each of the items in that list has been the focus of controversy amongst legal theorists, and some of those controversies figure in the essays in this book (for example, in Husak's critique of the 'act requirement' and in Alan Norrie's discussion of intention). But the orthodox conception of the general part (a conception expressed in such standard textbooks as Williams's *Criminal Law: The General Part,* Smith and Hogan's *Criminal Law,* and Ashworth's *Principles of Criminal Law*)[1] has recently come under attack from two different directions.

On the orthodox view, a system of criminal law can claim to be coherent, rational, and principled only insofar as it is structured by an extensive general part. For it can count as a *system* of law at all (as distinct from a set of discrete and disconnected rules), let alone as a rational and principled system of law, only insofar as its definitions of particular offences (forming the 'special part') are governed and structured by certain general principles; and the role of the general part is precisely to lay down such principles. Of course, the offences defined in the special part will differ from one another in their material or substantive character, dealing as they do with different kinds of harm or wrong. But their definitions should display a common form or structure, provided by the general part. For instance, they should respect the 'act requirement' by specifying the particular kind of 'act' that constitutes the *actus reus* of the offence. They should respect the general requirement of 'fault' or *mens rea* and specify the particular *mens rea* requirement in terms of the concepts defined in the general part. Furthermore, only a system of law structured by such a general part can satisfy the 'rule of law' requirements of certainty and consistency.

Now this conception of a 'rational and principled' criminal law is, of course, an ideal – an ideal that any existing system of law no doubt falls well short of actualising.[2] But on the orthodox view, it is an ideal towards which the law can properly aspire, and one that is at least implicit in our existing systems. They do not merely purport to be rational and principled; that could be mere rhetoric or, in a pejorative sense, rationalisation. They are (although imperfectly) actu-

ally structured by such general rationality-ensuring principles. In criticising aspects of the existing law as being irrational or unprincipled (a kind of criticism that such orthodox theorists are very ready to offer), we are thus criticising it in terms of its own internal values and aspirations. Despite the admitted and manifold defects in our existing criminal law, we can therefore engage, with reasonable hope of some success, in a process of 'rational reconstruction'[3]: a process of trying to render the law more consistent, rational, and principled, in terms of the values and principles that are already internal to it.

One kind of attack on this conception of the criminal law as being (in genuine aspiration, and to some degree in actual achievement) rational and principled has come from those associated with or sympathetic to the Critical Legal Studies movement. These critics argue that the criminal law (or at least those existing systems of criminal law, particularly the English and the American, on which discussion tends to focus) is not and cannot hope to become a system coherently structured by rational principles. For the law, and the 'liberal' ideology that informs the contemporary enterprise of 'rational reconstruction', is 'simultaneously beset by internal *contradictions* . . . and by systematic *repression* of the presence of these contradictions.'[4] The point is not merely (as even the most optimistic of rational reconstructers would admit) that the criminal law involves *conflicting* principles and values, between which some compromise or balance must be struck. It is, rather, that no such (rational, principled, or stable) compromise is possible. We should understand the law not (even in its aspirations) as a system of rational principles but rather as the site of various political and social conflicts – conflicts that are concealed rather than resolved by the attempt to identify or reconstruct the 'rational principles' of criminal law. What is required, such critics argue, is a process not of 'rational reconstruction' but of radical deconstruction. Norrie's essay offers a version of this kind of critique, though he prefers to talk of 'antinomies' rather than of 'contradictions.' But he rejects the purely destructive 'trashing' typical of some proponents of Critical Legal Studies[5] in favour of a more constructive attempt to identify and to make better sense of what is genuinely valuable in the 'liberal' tradition that he criticises. Lacey also emphasises one theme that is central to much of this kind of critical writing: the importance of understanding legal doctrines and principles, not as ahistorical expressions of supposedly timeless values or truths but as rooted in, and taking their meaning and significance from, specific historical contexts (from which it follows, of course, that 'contradictions' must also be understood as contingent conflicts). Both Husak's and Gardner's essays implicitly reject this kind of radical critique in identifying certain general principles by which, they claim, the law is (or could and should be) structured. My essay offers a direct response to the charge of 'contradiction' that Norrie has argued in his *Crime, Reason and History:* a response which seeks to rebut that charge, but also to show that it points the way towards

certain deep and genuine problems with the preconditions of criminal law – with the kinds of social and political condition whose existence is necessary for the criminal law to have legitimacy.

The second kind of attack on the orthodox conception of the role and significance of the general part comes from those who agree that the criminal law should (and sensibly can) aspire to be 'rational' and 'principled', but differ from orthodox theorists in what they take that aspiration to involve. In particular, as Gardner's essay shows, they argue that a system of criminal law can be appropriately 'rational' and 'principled' *without* being structured by an extensive general part. For, Gardner argues, rationality need not be a matter of following highly general principles: The general part can (and should) thus be far more modest in its scope than orthodox theorists suppose, without this undermining the rationality of the special part (and see section III of Lacey's essay for a sympathetic discussion of recent moves away from the idea of a unitary general part).

My third editorial decision was to try to use this volume to bring about a more fruitful dialogue between 'critical' theorists who attack the idea that the criminal law is (in actuality, or even in genuine aspiration) rational and principled, and their opponents. As both Lacey and Norrie note early in their essays, it often seems as if 'critical' theorists and their 'liberal' opponents (although both these labels are prone to misuse, especially when being applied to theorists by those who oppose them) are talking at or past rather than to each other. Each side rejects utterly, and sometimes with contempt, what the other believes. The engagement between them is barren and destructive rather than constructive, and it generates the strong suspicion that those fervently committed to one side or the other have not done justice to those whom they criticise – that they have created easy targets for themselves by oversimplifying or distorting the others' views. A more open-minded discussion, in which opposing views are attended to more carefully than is all too often the case in these debates, might lead at least to a greater mutual understanding, and perhaps even to a realisation that there is *something* worth listening to in what the others have to say. Both Lacey and Norrie, who might be described as critically sympathetic to some of the central ideas of the radical critics, aim to assist such a dialogue, as does my essay.[6]

The contributors all provide explanatory introductions to their own essays, and I have tried to indicate how the different essays relate to the general theme of this volume. I should, however, say a little more about each of the contributions here.

Lacey's aim is to undermine the distinction, or bridge the gap, between 'critical' theorising about the criminal law and the kind of 'philosophical' theorising that 'critical' theorists attack. There is an important role for philosophical

analysis of and theorising about the criminal law and its doctrines – a role that 'critical' theorists are often too quick to dismiss. Such analysis and such theorising must, however, be sensitive (more sensitive than it too often is) to the actual character of that which is to be analysed or theorised. It must attend to the historical and contingent nature of the criminal law and its doctrines, and to its character as a human practice or form of life – which is to say that it must be informed by central features of 'critical' theorists' methodology. It should also attend to the full scope of the criminal law; part of Lacey's target is the tendency amongst criminal law theorists to focus too selectively on certain limited aspects of the criminal justice system. Criminal law theorising must also be more genuinely interdisciplinary than it often tends to be: An adequate (interpretive *and* critical) theoretical approach to the criminal law must draw on the resources of a range of related disciplines. Lacey develops this general argument about the nature of criminal law theorising by discussing some developments in the history of theorising about the general part. She sketches some of the ways in which conceptions of the general part and its significance have changed over the past 200 years, and some of the current moves away from an ambitious conception of an extensive, unified general part. This discussion can be seen as exemplifying the method of theorising for which she argues: an interpretive analysis of legal doctrine (and, in this case, of legal theorising about legal doctrine) that is sensitive to its historical contingency and to its social and political context.

Husak's essay falls squarely within the tradition of theorising about the general part that 'critical' theorists aim to undermine. Indeed, one can see part of its implicit purpose as being to show how that tradition of theorising, which aims to identify the general principles by which our criminal law is and/or should be structured, is still viable. His specific target is the 'act requirement' – the (supposed) requirement, asserted by many theorists, that criminal liability must be for an act. He points up some of the difficulties in deciding what it means to say that liability is *for* an act; and he argues that we will make better sense of the law by replacing the act requirement with a 'control requirement', according to which criminal liability should be imposed only for states of affairs over which the defendant had control. This will also, he argues, further the general project of 'integrating the criminal law with moral philosophy' by making the conditions of criminal responsibility more closely akin to those of moral responsibility. His essay can be seen as a paradigm example of rational reconstruction. As he makes clear in section II of his essay, the claim that criminal liability requires control is not a purely descriptive claim about our existing legal systems, since it is not disproved by the discovery of cases in which liability is imposed for something over which the defendant had no control. Nor is it a purely evaluative claim that the law *should* be structured by such a requirement. It is, rather, the claim that the control requirement can best ratio-

nalise (in the nonpejorative sense) existing legal doctrine and practice; and such rationalisation is a process both of (descriptive) interpretation and of (evaluative) justification.

Norrie's concern is with certain fundamental 'antinomies' that, he argues, undermine 'liberal' theorising both about punishment and about the conditions of criminal liability. The central antinomy he identifies is that between the 'ideal' and the 'actual.' The key aspect of that antinomy is the profound tension that exists between the 'ideal' conception of the individual as a responsible agent (and offender) on which liberal thought depends, and the actual character of the political and social contexts within which individuals act – and by which their actions are structured and driven. Liberal theory needs the ideal individual, an autonomous agent abstracted from any concrete social context, as the agent who can justly be held liable, and be punished, for his or her wrongdoing. But at the same time it must, if even modestly honest, recognise the radical gap between the ideal responsible individual thus conceived and the actual nature of agency in a conflictual and unjust society. Norrie identifies a deep tension of this kind in classical and contemporary theorising about punishment and in contemporary discussions of intention as a central determinant of criminal liability. However, whereas other critical theorists might aim to do no more than identify the deep 'contradictions' that thus undermine a liberal ideology of law, Norrie has a more constructive purpose. He goes on to argue that we can develop a more adequate conception of the individual agent by drawing on Harré's 'social constructionist' psychology, which locates the individual firmly within, as partly constituted by, the social. Such as account would not dissolve the antinomies of liberal thought. But it would make explicit, and also intelligible, those 'ambivalences' about individual responsibility that liberal thought represses; and it might thus open the way to a more adequate (though also more untidy and far less comfortable) understanding of criminal liability.

My essay responds to some of Norrie's earlier arguments about the essentially 'contradictory' character of our criminal law. I take as my focus the orthodox doctrine that 'motive' is irrelevant to criminal liability – a doctrine that, Norrie has argued, is one site of the deep contradictions that infect liberal legal ideology. I also, however, offer a more general discussion of what should be meant by saying that some human practice (such as a legal system) is 'rational' and 'principled', or 'contradictory'; and I argue that 'critical' theorists tend to operate with an oversimple conception of rationality and are too quick to identify 'contradictions' where one should rather identify serious, but not rationality-threatening, conflicts. As far as the doctrine about the irrelevance of motive is concerned, I argue that the law is not internally contradictory in the ways that Norrie claims to identify. We can make rational and principled sense of the doctrine, as a doctrine about the proper task of adjudication, resting on an account

of the proper separation of powers between the legislature and the courts. However, I also suggest that the critical theorists' charge of 'contradiction' does point us towards some deep problems with our criminal law, problems that have to do not with its *internal* coherence or consistency but with the essential *preconditions* of its legitimacy as a system that claims authority over all members of the society.

Finally, Gardner's essay mounts the second kind of attack that I noted previously on the orthodox view that an extensive general part is needed to make the criminal law 'rational' and 'principled.' He shares with orthodox theorists the ambition of making the law 'rational' and 'principled' – supported, that is, by good reasons, and structured, *when this is appropriate,* by principles that are themselves rationally justified. But he attacks the assumption, which he thinks informs much orthodox theorising about the general part, that the law is rational only insofar as it is principled – only insofar, that is, as its special part is structured by highly general principles (and definitions) that form the 'supervisory' and 'definitional' aspects of the general part. He argues that that assumption is mistaken (as is the related assumption that a Dworkinian distinction between 'principles' and 'policies' is exhaustive as well as exclusive), since it ignores the reality and significance of action-reasons (as distinct from outcome-reasons) that are *neither* instrumental reasons of policy *nor* reasons of principle. He traces the assumption that non-instrumental reasons must be reasons of principle to certain Kantian ideas, and in particular to the conception (which Kant shared with many of his opponents) of well-being as an essentially *passive* matter. He offers instead a more Aristotelian *active* conception of well-being, which will give nonprincipled action-reasons their proper place. He then applies this set of ideas to the criminal law. A recognition of the importance of action-reasons that do not depend on general principles should, he argues, lead us to rethink, and significantly reduce, the scope of the general part of the criminal law, with a corresponding increase of diversity in the special part.

I should, finally, express my thanks to those who have helped bring this project to fruition: in particular to Jules Coleman, the series editor, for his help and encouragement; but especially to the other contributors to this volume. It has been to a significant degree a cooperative enterprise. We all read, and exchanged written comments on, one another's first drafts. We met for a day in London to discuss the drafts and comments – a day that was stimulating and fruitful and as a result of which several of the papers were radically rewritten (and I think all were significantly improved). I hope that the result of all this is a collection of essays that resonate constructively with one another and that will give some idea of the character (and the liveliness) of contemporary philosophical debates about the criminal law. It should also show how much interesting and exciting work there is to be done.

Notes

1 G Williams, *Criminal Law: The General Part* (2nd ed.; London: Stevens 1961) (and see his *Textbook of Criminal Law* (2nd ed; London: Stevens 1983), Part I; J C Smith & B Hogan, *Criminal Law* (8th ed.; London: Butterworths, 1996) Part I; A J Ashworth, *Principles of Criminal Law* (2nd ed.; Oxford: Oxford University Press, 1995), chs. 4–6.

2 More precisely, the systems of law on which British and American theorists focus, i.e. English and American law, fall thus short. One general question which divides theorists is that of how far we can talk about the structure, or the basic principles, of 'criminal law' as such; or how far any analysis must be focused on particular, and historically contingent, legal systems: this is one focus of Lacey's paper, and also informs much of Norrie's work (see *Crime, Reason and History* [London: Weidenfeld & Nicolson, 1993]).

3 See D N MacCormick, 'Reconstruction after Deconstruction: A Response to CLS', (1990) 10 *Oxford Journal of Legal Studies* 539–58.

4 M Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987), 3.

5 See M Kelman, 'Trashing', (1984) 36 *Stanford Law Review* 293–348.

6 Both Norrie and I engage directly with some of the other's previous work. We planned at one stage to add to each of our papers a brief response to the other's criticisms of our earlier work. But, whilst we each certainly benefited from the other's comments on drafts of our papers, we decided against publishing such further responses: partly for reasons of time, but also to avoid adding further layers of argument and counter-argument to papers which were already long and complicated.

1

Contingency, Coherence, and Conceptualism

Reflections on the Encounter between 'Critique' and 'the Philosophy of the Criminal Law'

NICOLA LACEY

> Aristotle *himself has said,* speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics.
>
> William Blackstone, *Commentaries on the Laws of England* (1765–9), Volume 1, p. 27

> Human life and philosophical explanations of it move in different planes till the explanation has become so complete as not to interfere with the thing to be explained. When they coincide, they cannot affect each other.
>
> James Fitzjames Stephen, *A History of the Criminal Law of England* (1883), Volume II, p. 84

> [T]he degree of systematization of a discipline is the prime index of the state of knowledge of its subject matter.
>
> Jerome Hall, *General Principles of Criminal Law* (1960), p. 12

Each of these contrasting reflections expresses a different view of legal theory. In this chapter, I consider the relationship between two particular approaches to criminal law theory: 'critique' and 'the philosophy of criminal law.' Whilst the title of my chapter presupposes an opposition between the two, it is in fact one of my main purposes to question that opposition. It is, of course, an opposition which bears some real relationship with the positions held by protagonists in the debate canvassed by Antony Duff in his introduction to this collection. In recent years, a number of British and American writers working within a 'critical' tradition have questioned the basis of 'philo-

I should like to express my gratitude to Lindsay Farmer, Elizabeth Frazer, Alan Norrie, and Lucia Zedner, whose close readings of earlier versions of this chapter were of enormous help in revising it; and to all my fellow contributors in this collection for their constructively critical responses to the first draft. Much remains with which each of these people will disagree, but their contributions undoubtedly improved both the quality of the argument and the clarity with which I have been able to formulate it.

sophical' theories of criminal law which emphasise and seek to elaborate upon its 'principled' nature.[1] In particular, they have questioned such theories' assumptions about the place of rationality, coherence, and systematicity as features of and ideals for both theory itself and criminal law doctrine – the intellectual framework within which the practice of criminal law is taken to be organised. Thus both the Aristotelian assimilation of jurisprudence and ethics cited approvingly by William Blackstone and Jerome Hall's equation of enlightenment with systematization have become particular targets for critical attention.[2]

At root, the critical argument is one with which, curiously, James Fitzjames Stephen might well have found himself in (at least partial) agreement:

> [I]f 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.[3]

If, as Alan Norrie suggests in this passage, the underlying state of criminal legal practices is in fact one of conflict and incoherence, a doctrinal framework or a theory which suppresses this in its movement of intellectual rationalisation cannot meet the test with which Stephen follows up the statement quoted above: 'One test of the truth of a philosophical explanation of human conduct is its complete harmony with human feeling.'[4] Yet such a test raises the further questions of the nature of the relationships between a theory and that which it purports to illuminate, and between theoretical and practical viewpoints and knowledges. As Jeanette Winterson puts it: 'The earth is round and flat at the same time. This is obvious. That it is round appears indisputable; that it is flat is our common experience, also indisputable. The globe does not supercede the map; the map does not distort the globe.'[5] The possibility has to be considered that Stephen's 'human feeling' – that feeling which structures and characterises not only the theorisation of criminal law but also the enunciation of criminal law doctrine by criminal lawyers themselves – itself suppresses or fails to acknowledge conflict and contradiction. And this possibility, too, has been the focus of critical analysis which has concerned itself with the political reasons underpinning a practical or intellectual commitment to order, consistency, and system.[6]

In this chapter, my enterprise is to use certain aspects of the debate between 'philosophers' and 'critics' as a starting point from which to draw out some general issues about the nature of 'theorising' or 'philosophising about' criminal law and criminal justice. In particular, I want to ask what we can learn about the intellectual, political, and practical significance of the notions of 'coherence' and 'systematicity' from an examination of the changing patterns of ratio-