

Philosophy and 'The Life of the Law'

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Abstract

Focusing on the criminal law, I discuss three ways in which analytical philosophers might contribute to the development or health of the law (and of legal theory). The first is as humble under-labourers, who seek only to clarify legal rules and doctrines, but not to criticise them. This modest conception of the role of philosophy, however, proves to be untenable: clarification must become rational reconstruction—an attempt to make rational sense of the law; and rational reconstruction must involve at least an internal critique, which appraises the law in terms of ends, values or principles that the reconstruction discovers within the law. Such an internal critique must then also point beyond itself, to an external critique that appraises law in terms of the broader and deeper political and moral values by which states should be structured; the paper ends by noting some of the problems that such an external critique faces, and some of the problems that philosophers must face in trying to engage with the world of public policy.

1. Introduction

When Oliver Wendell Holmes said, in one of the most over- and mis-used quotations about law, that '[t]he life of the law has not been logic: it has been experience',¹ he had a specific, limited target in mind. First, his concern was with what law is, not with what it ought to be:

‘[i]n order to know what it is, we must know what it has been, and what it tends to become’—we must know its history as a human practice, and the ways in which it is influenced by the ‘felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men’. Second, as the reference to ‘moral and political theories’ makes clear, he did not take ‘logic’ to encompass all of philosophy. By ‘logic’ he meant ‘the syllogism’, and ‘the axioms and corollaries of a book of mathematics’: what he denied was that law as it is (or indeed, as both he and we might add, as it ought to be) can be derived from any set of general, abstract principles.

We can distinguish two familiar claims about the common law here. One concerns the internal structure of legal reasoning—that it is not typically a matter of applying determinate principles whose criteria of application can be identified and understood in advance of the particular cases to which they are to apply, or of conducting a calculus of costs and benefits; rather, it is a matter of case-by-case reasoning which operates by focusing on the particular case, and discerning relevant (dis)analogies and (dis)similarities between the instant case and other, precedent or imagined, cases.² That claim is important, but is not our present concern. The second claim is more relevant to our present purposes, and concerns the relationship between law and what is external to law: we cannot begin with a pre-legal set of determinate principles or goals, identified independently of the historical context of the legal system to which they are to be applied, and then derive the law from them by a process of syllogistic reasoning or by any other familiar kind of logical deduction. The law is, and cannot (and should not?) but be, the product of a complexity of political, economic, social and personal factors that resist systematization into a system of rational deductions.

Contemporary legal theory offers versions of this claim. Philosophical analysis cannot by itself, theorists insist, interpret the law as it is: we can understand contemporary doctrines and

concepts only by attending to their history.³ Furthermore, ‘critically’ minded theorists argue, what such understanding reveals is not a rational structure of principles from which particular laws or decisions can be derived, but a mess of contradictions and ‘antinomies’, reflecting the deep fissures that underpin the law, which resist rational analysis or reconstruction.⁴ That is one challenge that philosophers of criminal law must face: to show what philosophy (as a discipline distinct from, though inevitably drawing on, history and sociology) can contribute to a critical analysis of law—critical analysis being analysis that takes seriously the law as it is, but that also subjects it to a normative critique which articulates the law as it ought to be.

There is another challenge that appeals to Holmes: a challenge that comes typically from practitioners who interpret his comment about ‘logic’ as a comment about any theoretical or philosophical approach to the law. As they portray it, Holmes’ contrast between ‘experience’ and ‘logic’ is one between practitioners who are steeped in the law, and theorists (especially philosophers) who vainly try to capture law within the formal structures of their rationalist discipline. The practitioners have experience, and do not need theory; they know how (how to argue or decide cases, how to apply the law) even if they do not have the kind of knowledge that, or why, that philosophers might seek (but which, they suspect, is unavailable as well as unnecessary); they have sound (because soundly trained) intuitions and common sense, which are acquired only by practice. Philosophers, by contrast, know little or nothing of the practice of law, and whatever sense they have is far from common. They may be adept at constructing wonderfully complex theories, in which abstract terms are set in neatly ordered relations, and conclusions flow smoothly from axioms and principles: but those theories float free from the (‘real’) in which actual law is made and applied, and have nothing to offer that actual law—they cannot illuminate it, nor can they generate any useful critique of it.

It might be tempting to dismiss this picture as a caricature that expresses the notorious British mistrust of ‘intellectuals’, and the anti-theoretical attitude that that mistrust generates.

But philosophers have sometimes invited such a dismissive portrayal in the way they theorise the law: they have sometimes been prone, for instance, to offer analyses of legal concepts that pay no serious attention to their legal role—as if a concept’s meaning could be independent of its use in particular human practices; or to offer normative principles without adequately attending to the character of law as a human institution set within a political context. Whilst (some) legal practitioners might be too quick to dismiss philosophy and its practitioners as irrelevant to their concerns, (some) philosophers have been too slow to recognise that those who would do ‘philosophy of X’ must first make sure that they have an adequate grasp of X.

What then can a properly informed philosophical approach to the law, one informed by a grasp of the actualities and contingencies of the law, offer to those who practice law as judges or lawyers, or those who administer the law as officials, or those involved in making the law as civil servants, policy makers and legislators (and on any plausible view judges)? What can such a philosophical approach offer citizens who take an educated interest in what purports to be their law? Part of philosophy’s contribution is of course to educate those who will become practitioners, officials, civil servants, policy makers and legislators (and citizens): to educate them not about the law itself, but in the ‘transferable skills’ that make philosophy graduates such usefully (albeit not always conveniently) critical members of whatever organisations they join. Our concern here, however, is with the kind of direct impact that philosophers of law should aspire to have on ‘the life of the law’.

I will focus here on the criminal law, and discuss three ways in which philosophers could contribute to it. The first is the most modest kind of under-labouring, which seeks to analyse, but not to question, legal concepts, rules and doctrines. The second is more ambitious, since it takes a more critical approach to the law as it is; but its critique remains an internal one which criticises the law in terms of ends, values or principles that can be discerned within the law as it is. The third is more ambitious yet, since it subjects the law to external critique—a critique

that appeals to ends, values and principles grounded in political or moral theory rather than in the law itself. Some such critique is, I will argue, essential; but the questions of what form it can properly take, and of how it can be grounded, are notoriously difficult.

2. From Under-Labourer to Internal Critic

Locke's underlabourer was 'employed ... in clearing the ground a little, and removing some of the rubbish that lies in the way of our knowledge'.⁵ Now underlabourers might be thought to be both humble (as Locke portrayed himself) and heteronomous: they are the servants of the 'master-builders whose mighty designs ... will leave lasting monuments to the admiration of posterity'; whilst their task is to clear the rubbish, it is for the master-builder rather than for the underlabourer to decide what counts as 'rubbish' and as 'clearing the ground'. On such a view, the philosopher's task is modestly important, but extremely limited. In relation to law, philosophers (at least, those of an analytical persuasion) might properly be asked to provide analyses of problematic concepts—either of extra-legal concepts which are used in or adapted by the law, or of specifically legal concepts; but they will follow a deferential version of the slogan that meaning is use,⁶ and seek only to explain the concept as it is actually used by the practitioners of the game of law. They might be asked to clarify ideas, principles, doctrines, or to help with the formulation of statutory definitions and specifications (exercising some of those transferable skills that, we assure our students, will make them employable); but since philosophy 'leaves everything as it is',⁷ it will not be their job to try to influence the law or its development (any more than it would be proper for the underlabourer to seek to influence the master-builder or to contribute to the planning of the building).

That might seem, even to the most modest of philosophers, to understate the nature and

importance of their potential contribution (it is much more modest than Locke's conception of the underlabourer). Their contribution surely need not be just to provide a clearer analysis of what practitioners already do and mean: it can also be to help them to avoid confusions or incoherences that hinder the law's rational development and application; and providing such assistance involves not merely the exercise of certain distinctive transferable skills, but the application of substantive philosophical doctrines and theories. It also involves criticising as well as analysing: it must expose practitioners' confusions or incoherences. So, for just one instance, a philosopher might try to explicate the concept of intention as it figures not just in our extra-legal discourse, but in the criminal law; but it will soon become evident that such an account cannot merely analyse existing usage, since that usage has been for so long beset by confusion. If we ask whether foresight of *X* as a (virtually) certain effect of one's action, what Bentham unhelpfully called 'oblique' intent,⁸ counts as an intention to bring *X* about, we may be told that given proof of such foresight, a court may 'infer' or 'find' an intention to bring *X* about, which implies that such foresight does not itself constitute intention;⁹ but both judicial dicta, and the absence of any indication of what more must be 'found' or 'inferred', suggest that the courts were treating such foresight as a species of intention.¹⁰ Philosophers are well-placed to expose, and to help to remedy, such confusions, drawing on ordinary techniques of conceptual analysis, and on philosophical discussions of intention.

This more critical kind of labour still fits Locke's description of the underlabourer, whose task included clearing away or cleaning up the various 'learned but frivolous use of uncouth, affected, or unintelligible terms', the '[v]ague and insignificant forms of speech, and abuse of language', that encumbered the pursuit of knowledge—a task that required them to 'break in upon the sanctuary of vanity and ignorance' and to expose the confusions of 'those who will not take care about the meaning of their own words, and will not suffer the significance of their expressions to be inquired into'.¹¹ The underlabourer, it appears, can recognise rubbish

for herself, and may have to correct the master-builder about what counts as rubbish. Perhaps the underlabourer now becomes a civil servant: not yet a Sir Humphrey Appleby, whose aim is to manipulate his supposed political masters in line with his own agenda, but a civil servant as the rhetoric of government portrays her—one whose accepted responsibility is to assist the elected government in carrying through its agenda. A good civil servant of this kind provides incisive analyses, and clarifies the options amongst which political choices must be made. So too, philosophers can offer analyses of such concepts as intention, and clarify the choice that courts or legislators must make between a broader and a narrower legal concept of intention; but, on this view, it is no part of the philosopher's responsibility to offer a view on which concept the law *should* use. Even if a clear, unitary concept of intention can be identified in extra-legal usage, the law is not bound to follow such usage; how intention should be defined in law depends on the purposes for which the concept is to be used in that context—an issue on which the philosopher as conceptual analyst has no distinctive expertise.

However (as civil servants often find) this very limited role cannot be sustained: one who takes her underlabouring role seriously will inevitably be driven to expand it, and to become a more ambitious (albeit still internal) critic of the practice that she seeks to serve.

The reason for this is simply that philosophical analysis cannot be limited to the analysis of concepts as distinct from the practices and structures of thought within which the concepts operate; indeed, once we recognise the implications of 'meaning is use', we must recognise that conceptual analysis itself must be an analysis of concepts as they are used, and thus of of the practices and structures of thought (the language games and forms of life) within which they are used. A philosophical analyst must therefore strive for a larger understanding of the criminal law as a distinctive normative practice:¹² she might begin, for instance, with the concept of intention as it figures in criminal law; but that will lead her, if her analysis is to address the analysandum adequately, to look at the offence definitions within which the

concept figures, and at the larger structures within which those definitions are set; which will lead her, if her starting point is criminal law of the Anglo-American kind, to examine the orthodox distinction between ‘*actus reus*’ and ‘*mens rea*’ as the two central aspects of crimes, and the significance of intention as a species of *mens rea*; which will lead her to examine the general principles of criminal liability that underpin this structure.

Once analysis takes us this far, however, it must become a process not merely of analysis of what is unproblematically presented to us, but of rational reconstruction.¹³ What we find is not a self-explanatory practice whose logical structure and normative foundations are at once clear, but a complex array (in more pessimistic moods one might talk of a mess) of doctrines, statutes, declared rules or principles, decisions, and judicial arguments—all reflecting not the calmly detached reasoning of a system-building philosopher, but the various contingencies of the historical processes that have formed any system of law, and the conflicting influences on its development. The task (a task which proponents of ‘Critical Legal Studies’ might assure us is impossible,¹⁴ but which is at least worth trying) is then to try to make normative sense of this material: to fit it together into a rationally ordered normative whole that can be shown to express coherent principles and values, and to be adapted to the pursuit of identifiable ends. (That is not to say that a fully rational reconstruction must produce a normative structure that is free of all conflict: once we recognise the reality of conflicting, incommensurable values, we must recognise that conflicts or ‘contradictions’, even those between which only uneasy compromise 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.¹⁵)

That task of rational reconstruction is not (yet) fully Herculean, since it does not involve the construction of a political theory:¹⁶ but it is at least proto-Herculean, since its completion requires the (re)construction of a complete system of criminal law. Such a reconstruction will

inevitably require construction rather than just excavation or repair, blurring the always less than sharp distinction between ‘discovery’ and ‘creation’: the underlabourer might not have become a master-builder who starts from scratch with a grand design, but will certainly have to engage in some quite radical rebuilding. It will also, of course, require a substantial theory of mistakes: not only will particular judicial decisions turn out to be wrong, i.e. inconsistent with the doctrines, principles or rules that rational reconstruction shows to be implicit in that 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. Two examples will illustrate this point.

Consider first s. 57 of the Terrorism Act 2000, defining an offence whose formal title is ‘Possession for Terrorist Purposes’.

- (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (3) In proceedings for an offence under this section, if it is proved that an article—
 - (a) was on any premises at the same time as the accused, or
 - (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.¹⁷

Someone whose ambitions were limited to describing the law could simply note that English law includes this offence, and perhaps note some of the ways in which it differs from other criminal offences—for instance in that it requires the defendant to disprove criminal purpose

rather than requiring the prosecution to prove it,¹⁸ and makes it easier than do many other offence definitions for the prosecution to create a presumption of possession. Those who hold to a Benthamite distinction between ‘expository’ and ‘censorial’ jurisprudence will no doubt want to move beyond the description of such a law to a critique of its merits; but that critique, they will argue, must be grounded in values extrinsic to the law itself (for true Benthamites it must of course be grounded in the principle of utility—though it is not clear what judgment on this statute would then emerge). There is also room, however, for an internal critique that appraises the statute in the light of principles and aims that can be found in, or reconstructed from, the law itself. The relevant principles and aims here include the declared aim of this clause, the mischief of ‘possession for terrorist purposes’; the often declared general principle that criminal guilt requires both an *actus reus* and a *mens rea*—though the internal critic must also recognise the extent to which that principle is breached by our existing laws;¹⁹ and the Presumption of Innocence, the ‘golden thread’ that runs through ‘the web of the English Criminal Law’, according to which ‘it is the duty of the prosecution to prove the prisoner’s guilt’ beyond reasonable doubt—guilt being understood to include both *actus reus* and *mens rea*.²⁰ Since this clause of the statute is aimed, as its heading makes clear, at those whose possession is for terrorist purposes, the Presumption of Innocence will require the prosecution to prove such purposes; but the statute relieves the prosecution of any such probative burden, instead requiring the defendant to adduce evidence of the lack of such purpose; the clause is therefore objectionable in terms of principles that supposedly inform our criminal law itself.²¹

Second, consider the often asserted slogan that criminal liability requires an act: a slogan that is taken not merely to describe our systems of criminal law, but to express a normative principle by which they are structured.²² A purely descriptive theorist must recognise that our existing laws often impose criminal liability without a suitable act, unless we are so to stretch the meaning of ‘act’ that it becomes an empty truth that liability always requires an act.²³ We

might then look to philosophy for an analysis of the concept of an act—itself no mean task;²⁴ and we might, shifting into censorial mode, look for principled grounds on which we could either reaffirm the act requirement or argue that it should be abandoned—perhaps in favour of a ‘control’ requirement according to which what criminal liability requires is not an ‘act’, but an event or state of affairs over which the alleged offender has control.²⁵ Some seek those grounds outside the law, in moral or political philosophy, and we will see in the next section that an adequate critique of the law cannot remain purely internal: but before we leap to the external standpoint, it is worth asking whether we can find within the criminal law, i.e. within this existing practice, the resources to provide an account of action and to render it plausible to assert, if not a strict act requirement, an ‘action presumption’ that criminal liability must normally be for an action that impinges on the world.²⁶ In offering such an account, the theorist must draw on philosophy of action, and criticise the conceptions of action prevalent amongst judges and legal theorists; but she will still claim to be (re)constructing the criminal law from within, rather than constructing a new system from without.

(I have focused here on aspects of the substantive criminal law, but a similar process of rational reconstruction must also be applied to other dimensions of criminal law, for instance to the criminal process and criminal punishment. The task again is to ask what rational sense these features of a system of criminal law can make; and whilst the process must begin with the actual practices that are to be rationalised, and must remain true to what come to be seen as their central or essential features, it will also involve the articulation of ends and principles that are (at most) only implicit in our actual practices, as well as potentially radical critiques of other features of those actual practices that are inconsistent with those ends and principles. We might argue, for instance, that the best way to understand the criminal trial, at least in an ‘adversarial’ system, is not merely as an attempt to establish the truth, or to identify those who are eligible for punishment, but as a process that calls a defendant to answer to a charge

of criminal wrongdoing, and to answer for that wrongdoing if it is proved against her.²⁷ Such an account is grounded in features of our existing practice of criminal trials—for instance in the rules concerning the defendant’s presence at and ability to participate in the trial; but it brings into sharp critical focus other aspects of the criminal process—of its formal structure, or of the ways in which it actually operates—which inhibit that purpose. Some such aspects might be rationalised as reflecting independent values that constrain our pursuit of the aim of calling alleged wrongdoers to answer; but others will not permit any rational reconstruction, and must be rejected as being inconsistent with the internal aims of the criminal process.)

The enterprise of rational reconstruction, and the internal critique of the criminal law that it generates, are important undertakings: they challenge the criminal law to be true to itself, whilst helping to (re)construct the self—the aims, principles and values—to which it is to be true. They are also, however, essentially incomplete undertakings, for so long as they seek to work only within the law: both reconstruction and critique must move from what is within the law to what is outside it.²⁸

3. From Internal to External Critique

A rational reconstruction of the criminal law must, for two related reasons, look beyond the law itself; the critiques that it generates must therefore also appeal to values lying beyond the law.

First, reconstruction requires an idea of the purposes that are to be served by that which is to be reconstructed: if we are to rationally reconstruct *X*, we must know what *X* is for. If our aim is reconstruction, rather than building anew from scratch, we will look for clues to those purposes within the law as we have it; but those purposes will concern the role of the criminal

law in a larger context. The most obvious such larger context is political: the criminal law is part of a legal system which is part of the formal apparatus of a state; rational reconstruction of the criminal law must therefore reconstruct it in ways that make it apt to play its proper role as part of that apparatus—which forces us to ask what that ‘proper role’ could be. But, depending on how we initially understand the criminal law from within, the larger context might also be moral. If the criminal law presents itself as being concerned with wrongdoing and with guilt, and unless it can be argued that legal wrong and legal guilt have nothing at all to do with moral wrong and moral guilt, criminal law must be appraised in the light of extra-legal conceptions of wrongs and of guilt: we must ask whether what it portrays as criminal wrongs can plausibly be seen as moral wrongs, and whether its criteria of criminal liability are consistent with plausible moral criteria of culpability.

Second, the aim of rational reconstruction is to make sense; when what is to be rationally reconstructed is a normative practice, the sense to be made is normative sense. This is not to say that the reconstructor must articulate purposes and values that she herself endorses; one can make normative sense of what one rejects, and make ‘detached normative judgments’ about a practice in which one does not participate, or to which one refuses allegiance.²⁹ But the criteria of sense cannot be purely internal to the practice of which sense is to be made (we do not make sense of the beliefs of someone suffering from delusional paranoia by showing merely that they are internally consistent and satisfy the person’s own purported criteria of rationality): if our reconstruction is to be properly rational, it must produce something that ‘reasonable’ people could accept—a structure informed by purposes and values which, whilst they might not command our assent, at least demand respect. Or perhaps that is too naive a view, unless we espouse some version of Natural Law which either denies the title ‘law’ to utterly unjust systems, or denies that an unjust system could display the internal rationality that constitutes the ‘inner morality of law’:³⁰ can we not rationally reconstruct a repugnantly

unjust and oppressive system of law, thereby articulating with revealing clarity the utterly unacceptable goals or principles by which it is structured? Perhaps we can: but in so doing (which is the truth in Natural Law theory) we would be articulating goals which are claimed to serve some aspect of the common good of the polity whose law it is, and principles which are claimed to be just; we would therefore be exposing that system of law to critical appraisal in those terms—a critical appraisal whose relevance could not be denied.

However, even those who deny so very modest a necessary connection between law and morality, and insist on a classical positivist's logical separation, also insist on the importance of censorial jurisprudence. Given the role that the criminal law plays in our lives; given its claims on our allegiance or our obedience; given its coercive, potentially oppressive character as an arm of the state: we cannot but subject it to a critical scrutiny grounded in moral and political values independent of the law itself. We might begin with a rational reconstruction that offers only an internal critique, but we cannot rest there; we must ask whether the system that we reconstruct is acceptable in terms of the deeper values that should inform the state's dealings with its citizens. The criminalization of homosexual activity between consenting adults might be consistent with the values and principles internal to the local legal system; but liberals will argue that it is objectionable nonetheless—whether because such conduct is not even wrong, or because even those who regard it as morally wrong should also recognise it as a private matter that is not the state's business. A particular legal system might weaken or even reject the Presumption of Innocence, and regularly require defendants to prove their innocence; but we would rightly argue that such a system, however internally and rationally coherent, is still objectionable for just that reason.³¹ A further task for normative philosophers (along with many others, of course) is to help to clarify the grounds on which such external critiques can be founded, and indeed to help to carry them through.

When we ask about these grounds, we confront some all too familiar controversies about the ‘objectivity’ or otherwise of moral and political values. At one end of a long spectrum, we find those who combine a robust moral (and metaphysical) realism with a version of Natural Law theory, and look to establish certain universal, ahistorical truths about the proper aims of the criminal law and the proper criteria of criminal liability. For Michael Moore, for instance, the basic position is quite simple (although the development of a full theory of criminal law is much more complex): criminal law is a ‘functional kind whose function is to attain retributive justice’, by ‘punish[ing] all and only those who are morally culpable in the doing of some morally wrongful act’;³² we can look to philosophy of action to tell us what an act is,³³ and to moral philosophy to tell us which acts are morally wrong; and we can therefore, in principle, appraise each and every system of criminal law by the same objective, universal standards. At the other end, we find those who espouse some version of wholehearted relativism, according to which not only is any system of criminal law a product of the historical contingencies of its time and place (which no one could deny), but any attempt at critical appraisal of any system of criminal law is the product (or, as some would put it, ‘nothing more than’ or ‘merely’ the product) of the critic’s contingent time, place and intellectual context. This is not the place to rehearse such controversies, save to note that neither end of the spectrum is plausible. Robust universalism of Moore’s kind ignores the way in which normative concepts and normative theorising must be grounded in and are intelligible only within human practices, while radical relativists ignore the extent to which human practices, human forms of life and language, are porous—the extent to which conversation and argument is possible between them. We begin to theorise in and from a particular context: we begin with a particular ‘we’ among whom the theoretical conversation takes place,³⁴ and a particular, contingent, subject matter on which the conversation is focused (in this case, perhaps, the system of criminal law in which we find ourselves). We then find, however, if we raise our eyes from what is immediately before us,

and open our ears to other voices, that the ‘we’ can be expanded to include people from other contexts, other different (but not alien) forms of life, other languages; that we can expand the subject matter of our conversation—for instance to include other systems of criminal law, and other political systems; and that rational discussion, argument, criticism and even agreement can transcend many of the contingencies on which relativists focus. We might even aspire to articulate values or norms that are ‘universal’ in the sense that we can assert their claims on anyone with whom human conversation is possible—which will also be to appeal to the idea of a normative community of humanity.³⁵

For present purposes, however, no such universalistic ambitions are necessary:³⁶ we can generate a radical enough external critique of our criminal law without looking beyond those political and moral traditions within which we find ourselves. In particular, we can generate such a critique by asking what kind of criminal law could be apt for a polity that is properly structured by the values and idea(l)s of liberal democracy: what kind of criminal law could be consistent with, or indeed expressive of, those values and idea(l)s? To answer that Herculean question will of course involve engaging with the various controversies about how we should identify and understand the values and ideals of ‘liberal democracy’: theorists of criminal law cannot simply pick a political theory off the shelf of the philosophical supermarket. But they might well not have to take determinate stands on all those controversies, since different versions of liberal democratic thought are likely to converge on answers to at least some questions about the proper aims, scope and structure of the criminal law.

This is not the place for a detailed development of a liberal democratic theory of criminal law: all I would suggest here is that the idea of citizenship is likely to play a central role in such a theory. We should ask what kind of criminal law could be appropriate as the ‘common law’ of a polity of equal citizens: what kind of criminal law could they accept, and impose on each other and themselves as their law?³⁷ If we also accept a conception of criminal law as a

set of practices whose central identifying feature is a focus on the identification and formal condemnation of wrongdoing,³⁸ we can start to draw out some important implications about the scope, structure and aims of the criminal law. We can ask what kinds of wrong should be the business of the wrongdoer's fellow citizens, simply in virtue of their shared membership of the political community—and criticise criminal laws that do not mark out genuine wrongs. We can ask how offences should be defined so that they pick out what can be recognised as wrongs by citizens, and ascribe liability only when condemnation is deserved. We can ask what kind of criminal process could be apt for citizens (to which, as noted above, one answer is that it should be a process that calls citizens to answer charges of public wrongdoing). We can ask what modes of punishment, with what aims, it could be proper for citizens to impose on each other, or to accept for themselves.

Plausible answers to these questions will, I am sure, point up the need for radical reforms to the scope of our criminal law (primarily, though not always, by reducing its scope); to the ways in which many offences, and defences, are defined; to the structure and operations of the criminal process; and to our system of criminal punishment. But they will also point to a further set of critical issues, concerning not the internal structure, content or operations of the criminal law, but the conditions of its legitimacy. If the criminal law binds us as citizens; if a criminal trial calls a citizen to answer to her fellow citizens for an alleged wrong that is their business in virtue of their fellow membership of the polity; if criminal punishment is, at least in crucial part, a way in which the polity communicates to a criminal wrongdoer the censure that his crime deserves: then a condition of the legitimacy of the criminal law's claims, of the criminal trial and of criminal punishment is that those who are supposed to be bound, to be called to account or to be punished are indeed citizens—and are treated as such by those who would now subject them to trial and punishment. Suppose now that we come to recognise that all too many of those who appear in our criminal courts to be convicted and sentenced belong

to social groups that have suffered—more usually through indifference than through malice—various kinds of systematic and unjust disadvantage; that they have been, in fact if not by design, systematically excluded from many of the rights, benefits and opportunities that other citizens enjoy. The unjust disadvantages they have suffered might not justify or excuse their crimes;³⁹ but it undercuts the standing of the polity, of their fellow citizens collectively, now to call them to account or punish them for those crimes.⁴⁰ If this is our position now, it raises serious questions about how we can work towards a criminal law that can adequately justify its demands to those on whom they are imposed.

A philosophical approach to the criminal law can (indeed, must) take us from the modest ground-clearing of an under-labourer to more ambitious enterprises of rational reconstruction, which must lead to an internal critique of the criminal law as we find it, appealing to the ends and values that can be discerned in or constructed from the law itself. That internal critique must turn into an external critique which appraises the law in the light (initially) of its proper role within a political community, and of the political and moral values appropriate to that community. Such an external critique will, we can expect (given both the fallibility of human institutions, and the messy history of actual systems of criminal law), bring out clearly much that is wrong with our existing systems of criminal law, as well as suggesting (as constructive critique should suggest) ways in which those systems should be reformed;⁴¹ but it will also raise serious questions about the extent to which the legitimacy conditions of the criminal law's demands on many of those whom it claims to bind are satisfied.

4. Who's Listening?

A philosophical approach to the criminal law can generate these kinds of critique; it can offer suggestions for radical reform;⁴² it can raise questions about legitimacy. But who will listen, and who should listen, to such critiques, suggestions and questions? We can talk to each other (and to ourselves), we can talk to theoretically minded academic lawyers, we can talk to our students: but how can we, how should we, engage with the world in which laws are passed, policy is made, and the criminal law actually operates?

Philosopher-kings are fortunately a fantasy (and philosopher-prime-ministers do not have the same ring), and while there might be some scope for direct conversation with members of the legislature and with policy makers, philosophers will usually have more chance of making their voices heard through a range of governmental and non-governmental bodies lying at at least one remove from direct legislation and policy formulation. The Law Commission is one such body, but there are plenty of other, often less official, institutes, think tanks, policy fora and the like to which philosophers can hope to contribute. How far their contributions make a difference obviously depends on others' willingness to listen; but two points are worth noting here about how philosophers should present themselves.

The first is obvious and familiar—that it is difficult, but vital, to find ways of presenting the arguments that do not misleadingly oversimplify them, but that nonetheless make them accessible to those who lack both formal philosophical training and time. Philosophers, with some notable exceptions, are not often good at this, but it is a skill that we need to acquire if we are to have the right to expect a serious hearing in public debate.

The second point concerns the role of ideal theory. A common criticism of philosophical normative theorising is that it produces what might well be beautiful idealised theories—but that those theories lack practicable application to the actual world: their actualisation would require a world so different from our own, inhabited by beings so different from us, that they can have nothing useful to say to us. There is real force to such criticisms of philosophical

theorising that forgets what it is supposed to be theorising about, but that should not dissuade philosophers from offering ideal theories which are avowedly distant from our actual world and our actual institutions; for such ideal theorising plays a vital role both in the critique of existing practice and in any attempt to reform it.

Suppose that we come to believe, on the basis both of the kind of rational reconstruction discussed above in s. 2, and of the values that we take to inform an appropriate idea of liberal democracy, that the substantive criminal law should ideally define as crimes any wrongs that are ‘public’ in the sense that they properly concern all citizens; or that a criminal trial should ideally be a process through which citizens are called to answer charges of such wrongdoing—a process that treats and respects them as responsible members of the political community; or that criminal punishment should ideally be a process that communicates a moral message of censure to the wrongdoer, and that seeks a repentant response from him. We must also then recognise not only that our existing systems of criminal law fall very far short of such ideals, but that once we attend to the likely effects of attempting to actualise such ideals, we will see that we should not even try to actualise them directly or completely—that any actual policy or practice must mark a series of more or less uncomfortable compromises with ‘the real world’. Nonetheless, we should not for that reason abandon the enterprise of ideal theory, or begin rather than end by compromising: for the ideal theory, if it is properly grounded in values that demand our allegiance, will both form the necessary basis of our critique of our existing practices, and provide the essential starting point for reformatory endeavours. Indeed, if we are to compromise, we must first know what we are compromising: which is to say that we must try to articulate the ideal before we ask whether and how it must be compromised.

Ideal theory is, perhaps, the hallmark of normative philosophical theorising, and the main contribution that it can ultimately make to public policy. The task is not to abandon the ideal in the face of messy actualities or practicalities: it is to show first how the ideal is grounded in

values and principles that are discernible in existing practice, and then how we can begin to work back from the ideal towards an improved actuality.⁴³

NOTES

- ¹ Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), p. 1; further quotations in this paragraph are from the same page.
- ² Compare John Wisdom's remark 'at the bar of reason, always the final appeal is to cases' ('A Feature of Wittgenstein's Technique', in *Paradox and Discovery* (Oxford: Blackwell, 1965) 90, p. 102); see 'Philosophy, Metaphysics and Psycho-Analysis', in his *Philosophy and Psycho-Analysis* (Oxford: Blackwell, 1953) 248, pp. 248-54.
- ³ See, e.g., Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1996); Nicola Lacey, 'Contingency, Coherence and Conceptualism: Reflections on the Encounter between "Critique" and "the Philosophy of the Criminal Law"' in R A Duff (ed.), *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press, 1998) 9, "'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, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory' 64 *Modern Law Review* (2001): 350.
- ⁴ See, most notoriously, Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' 33 *Stanford Law Review* (1981): 591, and other products of the heyday of Critical Legal Studies; and less dramatically but more usefully, Alan Norrie, *Crime, Reason and History* (2nd ed; London: Butterworths, 2001), and *Law and the Beautiful Soul* (London: Glasshouse Press, 2005).
- ⁵ John Locke, *Essay Concerning Human Understanding*, 'Epistle to the Reader'.
- ⁶ Ludwig Wittgenstein, *Philosophical Investigations* (trans. G E M Anscombe; Oxford: Blackwell, 1963), §43.

- ⁷ *Op. cit.* §124.
- ⁸ J Bentham, *An Introduction to the Principles of Morals and Legislation* (ed. Burns & Hart; Oxford: Oxford University Press, 1996), ch. VIII.6.
- ⁹ See *Moloney* [1985] AC 905, at 929; *Nedrick* [1986] 1 WLR 1025, at 1028; *Matthews & Alleyne* [2003] WL 117062, paras. 43-5.
- ¹⁰ See e.g. *Moloney* [1985] AC 905, at 929; *Woollin* [1999] AC 82, at 93. For critiques, see Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' *Modern Law Review* 56 (1993): 621; Jeremy Horder, 'Intention in the Criminal Law – A Rejoinder' *Modern Law Review* 58 (1995): 678; Alan Norrie, 'After Woollin' *Criminal Law Review* (1998) 532; David Ormerod, *Smith & Hogan: Criminal Law* (12th edition; Oxford: Oxford University Press, 2008), pp. 98-101; Andrew Simester and Robert Sullivan, *Criminal Law: Theory and Doctrine* (3rd edition; Oxford: Hart Publishing, 2007), pp. 126-30. Compare too the confusions caused by the courts' (mis) use of the idea that an agent should not be convicted of a criminal attempt if he had done 'all that she intended to do' without committing the offence he was accused of attempting: see Antony Duff, *Criminal Attempts* (Oxford: Oxford University Press, 1996), pp. 98-106, 206-19).
- ¹¹ Locke, *loc. cit.*, n. 5 above.
- ¹² A further question, which I touch on later but cannot pursue in detail here, concerns the extent to which one can seek an analysis of 'criminal law' as such, or only of this or that particular system of criminal law.
- ¹³ See Neil MacCormick, 'Reconstruction after Deconstruction: A Response to CLS' *Oxford Journal of Legal Studies* 10 (1990) 539.

- ¹⁴ See n. 4 above; in response, see John Finnis, ‘On “The Critical Legal Studies Movement”’, in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence*, 3rd Series (Oxford: Oxford University Press, 1987) 145; and MacCormick, *op. cit.* n. 13 above.
- ¹⁵ See further Antony Duff, ‘Principle and Contradiction in the Criminal Law: Motives and Criminal Liability’, in Duff, *op. cit.* n. 3 above, 156.
- ¹⁶ See Ronald Dworkin, *Law’s Empire* (London: Fontana, 1986), esp. chs 7-10.
- ¹⁷ See also s. 58, for the offence of collecting, recording or possessing ‘information of a kind likely to be useful to a person committing or preparing an act of terrorism’.
- ¹⁸ The apparent harshness of this aspect of s. 57 is, however, moderated by s. 118(2): if the defendant can ‘adduce[] evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not’; what appears in s. 57 to be a probative burden turns out to be no more than an evidential burden.
- ¹⁹ See e.g. Andrew Ashworth and Meredith Blake, ‘The Presumption of Innocence in English Criminal Law’ *Criminal Law Review* (1996): 306.
- ²⁰ *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey); and see art 6(2) of the European Convention on Human Rights.
- ²¹ I have drawn here on Victor Tadros and Stephen Tierney, ‘The Presumption of Innocence and the Human Rights Act’ *Modern Law Review* 67 (2004): 402; see also Victor Tadros, ‘Rethinking the Presumption of Innocence’ *Criminal Law and Philosophy* 1 (2007): 193.
- ²² See e.g. William Wilson, *Criminal Law: Doctrine and Theory* (2nd edition; London: Longman, 2003), pp. 72–94; Wayne LaFare, *Criminal Law* (4th edition; St Paul, Minn.: West Group), pp. 301–10; Joshua Dressler, *Understanding Criminal Law* (4th edition; New York: Lexis, 2006), pp. 91–109.

- ²³ By saying, for instance, that ‘an act consists of events or states of affairs for which a person might be held responsible’ (Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), p. 56: for apt criticism see Douglas Husak, *Philosophy of Criminal Law* (Totowa, NJ: Rowman & Littlefield, 1987), p. 108.
- ²⁴ A crucial question here will be whether such an account should be of act(ion) generally, or of a concept of action that might be apt for the criminal law: contrast Michael Moore, *Act and Crime* (Oxford: Oxford University Press, 1993); Jennifer Hornsby, ‘The Poverty of Action Theory’ *Philosophical Inquiry* 21 (1999): 1.
- ²⁵ See e.g. Husak, *op. cit.* n. 23 above, ch. 4; Andrew Simester, ‘On the So-called Requirement for Voluntary Action’ *Buffalo Criminal Law Review* 1 (1998): 403.
- ²⁶ See Antony Duff, *Answering for Crime* (Oxford: Hart Publishing, 2007), ch. 5.
- ²⁷ See Antony Duff, Lindsay Farmer, Sandra Marshall, Victor Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007).
- ²⁸ The commentators on this paper question the clarity of the distinction between ‘internal’ and ‘external’ critique—as well as the value of any critique that is purely internal. Both points are well taken: all I can say here is that even if an ‘internal’ critique can have real value only when applied to systems that satisfy at least some modest ‘external’ demands of normative reasonableness, and even though the distinction is at best a fuzzy one, it is still helpful to distinguish different kinds or styles of critique in this way.
- ²⁹ See Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), pp. 153-9.
- ³⁰ As Lon Fuller notoriously claimed in *The Morality of Law* (2nd edition; New Haven: Yale University Press, 1969).

- ³¹ Hence, of course, the importance of such supra-national provisions as the European Convention on Human Rights.
- ³² Michael Moore, *Placing Blame* (Oxford: Oxford University Press, 1997), pp. 33-5.
- ³³ See Moore, *op. cit.* n. 24 above.
- ³⁴ And the identity and scope of this ‘we’ can of course be problematic, whether the community in question is a moral, a political, or an intellectual community.
- ³⁵ Which is one way of understanding both the idea of ‘human rights’, and the International Criminal Court’s claim to jurisdiction over, *inter alia*, ‘crimes against humanity’—crimes ‘that deeply shock the conscience of humanity’ (*Rome Statute of the International Criminal Court*, 2002, Preamble).
- ³⁶ Though they do become relevant if we want to consider the claims to ‘universal jurisdiction’ that national systems of criminal law might make, as when the Criminal Justice Act 1988 (s. 134) declared torture to be a crime under English law, triable in English courts, wherever, by and against whomever, it was committed (see *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte* [2000] 1 AC 147).
- ³⁷ For the conception of ‘common law’ that is relevant here, see Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986), chs. 1-2; Roger Cotterrell, *Law’s Community* (Oxford: Oxford University Press, 1995), ch. 11.
- ³⁸ This is what distinguishes criminal law from non-criminal systems of ‘administrative’ offences such as the German system of *Ordnungswidrigkeiten* (on which see Thomas Weigend, ‘The Legal and Practical Problems Posed by the Difference between Criminal Law and Administrative Penal Law’ *Revue Internationale de Droit Pénal* 59 (1998): 67.
- ³⁹ Which is often the focus of discussions of the problem of penal justice in contexts of social injustice: see e.g. Richard Delgado, “‘Rotten Social Background’: Should the

Criminal Law Recognize a Defense of Severe Environmental Deprivation?' *Law & Inequality* 3 (1985): 9; Barbara Hudson, 'Beyond Proportionate Punishment' *Crime, Law & Social Change* 22 (1995): 59.

⁴⁰ See further Duff, *op. cit.* n. 26 above, pp. 191-4.

⁴¹ Some will argue, of course, that the proper conclusion of a suitably radical critique will be that we ought to abandon, rather than try to reform, the criminal law—that such a critique will show criminal law itself to be inconsistent with the humane values by which we should conduct our political and social lives; we cannot engage with such abolitionist arguments here.

⁴² This is not to suggest that philosophers are, in virtue of their philosophical capacities, qualified to propose complete codes, statutes or policies: such proposals must also depend on the technical expertise of lawyers, on the predictive capacities of social scientists, and on a range of empirical skills that bear on making any policy operationally effective. The philosopher's central task is to help to identify the ends that we should pursue, and the values that should constrain our pursuit of them.

⁴³ Thanks to the British Academy, and to the organisers of the British Academy workshop on Philosophy and Public Policy at which a draft of this paper was delivered; and thanks to John Tasioulas and Victor Tadros for their comments on that draft—comments to which I have not been able to do justice here.