

Grand Designs: Deconstructing and Reconstructing Criminal Law

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Grand Designs: Deconstructing and Reconstructing Criminal Law

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This paper was presented as part of the 'Re-imagining The Teaching of Criminal Law' workshop, funded by CEPLER and led by Dr Imogen Jones of Birmingham University Law School, held in September 2014.

Imogen's invitation to me was worded like this:

'As one of the academics who originally started to re-think the way that we approach the teaching of criminal law, I wondered whether you might be willing to [reflect] on the legacy of that work and how you see things now.'

I was excited by this. It seemed like an opportunity to try to bring some coherence to the themes in my work. I came up with the title (after watching another repeat of Kevin McCloud's series) before I had started to prepare the talk but I think it is appropriate. I'll be talking later about how Niki Lacey and I came to work on *Reconstructing Criminal Law*,¹ and how we envisioned it.

When I am asked what my specialism is I always say 'Criminal law' but what exactly might that mean? What it means in terms of my teaching is I realise rather different from what it means in terms of my research.

I did teach criminal law to the London external LLB syllabus in my first post at North London Polytechnic (as it then was) in the early 1970s; I taught criminal law tutorials at Newcastle to Bill Elliott's criminal law course mid 70s to mid 80s; ditto at Cardiff for the next 20 years to the course there, save for a couple of years when I was in charge. So my credentials for this task today may seem long standing but they are remarkably thin.

I began writing in that first post at North London Polytechnic, including case notes for the Law Teacher.² Despite having graduated from Warwick, with its emphasis on law in context, or perhaps because of that, this was what I might call my doctrinal phase. I enjoyed the challenges of mens rea, of voluntary acts, of intoxication as a defence or not, of the mental element in murder, but very much from a conventional standpoint now that I look back on

¹ *Reconstructing Criminal Law* Weidenfeld and Nicolson, 1990 (with Nicola Lacey and Dirk Meure); *Reconstructing Criminal Law* Second edition, Butterworths, 1998 (with Nicola Lacey); *Reconstructing Criminal Law* Cambridge University Press 2003 (with Nicola Lacey and Oliver Quick); *Lacey, Wells and Quick Reconstructing Criminal Law*, fourth edition Cambridge University Press 2010, (with Oliver Quick).

² Following the publication of 'Reckless Murder?' (1975) *The Law Teacher* 90-95

it. It is true I was a bit above my station and, rather embarrassingly as I now see it, made comments along the lines of 'we should expect more from the Court of Appeal'.³ So while I was not exactly deferential, I wasn't really moving beyond the internal debates about the meaning of recklessness and the mental element in murder.⁴

I like talking about myself so I could happily spend my time today on a chronological narrative but, as well as being painfully solipsistic I am not so sure that would be very interesting to listen to.

How am I going to go about this? I put the question out on Twitter a couple of weeks ago 'what to say at the Birmingham seminar on Criminal law teaching?' and the first reply was 'teach them that your clients lie to you'. That presupposes I am teaching criminal law to equip students for practice and I have never thought that was my principal aim. But it does show the persistence of the idea that law teaching has a professional or vocational slant. Given I have never qualified to practise law that would make me pretty poorly equipped for my chosen career.

Which leads to another observation which is how much the world of university law schools has (on the surface) changed.

I am going to say something

- about legal education
- about what kind of beast criminal law is
- about substance of criminal law

and then reflect on how 1, 2 and 3 (legal education, the genus and species of criminal law) have affected the teaching of criminal law

1. Legal Education

First and most obviously, universities and the profession were both overwhelmingly male, and in terms of those teaching law, Oxbridge men at that - in 1966 two thirds of all university law teachers were Ox/Cam graduates.⁵ When I conducted my survey of women law professors in the late 1990s I found, not surprisingly, that they came from a pretty narrow band of universities (in fact I think I was one of the few non Oxbridge female law

³ 'Perfectly Simple English Manslaughter' (1976) 29 *Mod LR* 474-8

⁴ 'The Death Penalty for Provocation?' [1978] *Crim. LR* 662-672; 'Whither Insanity?' [1983] *Crim. LR* 787-797; 'The Mental Element in Murder 1974-83: Lighthouse Some Good' [1984] *Crim LR* 652-663

⁵ 'Exceptional women or honorary men? Notes from the Women Law Professors Project' *Current Legal Problems* vol 53 OUP 2000 181-205

professor at that time), and a large proportion were privately educated.⁶ For top jobs not much has changed. The Social Mobility and Child Poverty Commission has said elitism is so embedded in Britain 'that it could be called 'social engineering'. We still see a seamless transition from public school to Oxbridge to top jobs.

71% of senior judges, 50% of members of the House of Lords and 45% of public body chairs were educated privately.

Oxbridge accounts for 75% of senior judges, 38% of members of the House of Lords and 44% of public body chairs. [see Chart 'The Thin Red Line' at end of paper]

The report says the judiciary is the most privileged professional group. About 14% of judges attended one of just five independent schools -Eton, Westminster, Radley, Charterhouse and St Paul's (the boys school...).^7

We can surmise that this over representation of men and those from privileged backgrounds would influence the perspective from which law in general and criminal in particular, might be approached. When Derek Morgan and I wrote the editorial introducing ourselves as the new editors of *Legal Studies* in 1999, we observed that we were the first *co-editors* (a tradition which has continued), we included the first *female* editor and were the first editors not to be primarily educated at Oxford or Cambridge.⁸ We remarked how the revolutions in legal thought, in globalisation, in feminism, had hardly touched the fundamentals of the law school curriculum. This is still true, especially in the foundation units, such as criminal law.

We commented:

'[S]tudents at UK law schools will by the end of their first year have been assimilated in to a way of thinking about law which is rule-bound and rational, partial and positivistic.' (p.3)

What then of the impact of socio legal studies? Hasn't its development allowed a 'breakout from the claustrophobic world of legal scholarship and education' as Roger Cotterell put it in 2002.⁹ He argued that in the 60s and 70s it was regarded as suspect to 'draw seriously on knowledge - fields beyond the contents of the law reports and the fortress walls of law-as-discipline were well guarded.'

My argument is that the fortress walls – though they may now be virtual rather than in the form of printed material – are in fact still there. I also argue that the teaching of criminal law, the default model, if you like, remains impervious to what Andrew Clapham identifies as

⁶ 'Women law professors – negotiating and transcending gender identities at work' (2002) 10 *Fem LS* 1-36

⁷ <http://www.theguardian.com/society/2014/aug/28/closed-shop-deeepy-elitist-britain#start-of-comments>

⁸ (1999)19 *Leg Studies* 1-5

⁹ 'Subverting Orthodoxy, Making Law Central: A View of Sociological Studies' (2002) 29 *Jnl Law and Soc* 632, at 633

the four forces or themes that characterise modern law: Globalization, privatization, fragmentation, and feminisation.¹⁰

The *modern* version of Glanville Williams' *Learning the Law* is a handbook for the aspiring law student edited by three members of the Cambridge Law Faculty, 'What about Law?'¹¹ *What about Law?* takes the seven core or foundational subjects and provides a vignette on each. It talks about reading a case (p 12) long before it mentions reading a statute, which it does under a general subheading of interpretation (p.22). This introductory chapter concludes

'Learning law is about lots of reading: cases, statutes, textbooks, academic articles, but is also about thinking: what is the relevant legal rule here? Does it apply to this case or can it be distinguished? Should it apply? If not, why not, and what rule should apply instead. All lawyers [everyone?] need to think – logically, clearly critically.' (p. 31)

But does legal education provide the tools with which to ask those critical questions- does reading cases, and interpreting statutes actually do that? You may argue that we give students 'critical commentary' to read, case notes in the *Criminal Law Review* perhaps..., but do we attempt to provide any other tools to understand the phenomenon of law?

Moving from legal education to criminal law.

2. What kind of beast is criminal law?

Whether it can be separated from the criminal justice system as a whole is of course one of the key questions behind our topic today. In her recent inaugural lecture at NYU Rachel Barkow advances an interesting perspective on the criminal justice system, claiming it is a regulatory system and, as such, can be improved by applying what we know about regulation. 'Too much about today's criminal justice system is driven by the emotions provoked by individual acts'. She pointed out an absolutism in the regulation of criminal behaviour that does not exist in other forms of regulation. Her comments apply as well here as in the US:

'One story, and politicians are willing to take an entire program down without considering whether the program, on net, brings more benefits than it has costs and whether it reduces risks overall. So the end result is we don't have a rational discussion about whether, on balance, a particular program is a good idea.... We don't approach any other area of government regulation this way.'

¹⁰ *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006.

¹¹ Catherine Barnard, Janet O'Sullivan and Graham Virgo eds Hart, 2007

With at least 95 percent of convictions occurring outside of a trial, the police, prosecutors, and judges wield enormous power in a massive regulatory system with little in the way of checks and oversight and as she says, 'Like any other regulatory system, these are vested and powerful regulators and they might fail to appreciate that there are tradeoffs and downsides when they pursue their goals'.¹²

It has always struck me as odd that US law schools and our own seem to take such a different stance on the relevance of evidence and procedure in the study of law. There may well be explanations in terms of the much more vocational slant to US law programmes but those are insufficient to answer the charge. How much value is there in teaching general principles such as mens rea and actus reus (terms I prefer to avoid in favour of mental and conduct elements) without considering discretion to prosecute, the choice of charge, the mode of trial, the rarity of the contested trial, and so on. Although having said that, the criminal law syllabus itself, in a randomly selected leading US Law School looks very familiar. This is the George Washington Criminal law JD course:

An overview of the criminal justice system; dimensions of the problem of crime and goals of penal sanctions. An examination of what conduct should be made criminal and what sanctions should be applied. The theoretical anatomy of a criminal offense (elements of mens rea and actus reus), the general principles of criminal liability, and the various defenses. Special problems [sic], such as conspiracy, inchoate crimes, causation, insanity, and complicity, are subjected to detailed analysis.

This approach clearly privileges the general principle over the specific offence. Fundamentals are dubbed 'special problems'. It neatly sidesteps a major challenge: how do we know what the criminal law is? This leads to my third question.

3. What is the substance of criminal law?

As Chalmers and Leverick's recent work shows it is not possible to keep track of the plethora of criminal offences in any meaningful way.

'The fact that we know so little about how many criminal offences exist might suggest that those of us who teach criminal law do so with a rather sketchy knowledge of what the criminal law actually is'.¹³

One answer would be that for the purposes of teaching criminal law it would be enough to say that we can make a choice, we can select, so long as we do not mislead our students in to thinking they 'know' criminal law in its entirety. But should we not spend some time on criminalisation?

¹² <http://www.law.nyu.edu/news/Rachel-Barkow-Segal-lecture>

¹³ Chalmers and Leverick 'Tracking the Creation of Criminal Law offences' [2013] *Crim LR* 545

And having done that, the question of what to select is still there. It would still be there even if we were confident that a source of all known criminal offences existed.

Do we select on the basis of how many offences are recorded by the police? This would not give any insight in the vast numbers of so called regulatory offences prosecuted by specialised agencies.

We might want to take more note of frequently prosecuted offences - indeed I suggest we should- but that does not mean ignoring what we might call latent, ie rarely prosecuted offences. These nonetheless impose costs on government, on those who seek to comply and could lead to injustice on those few occasions when they are deployed, as Chalmers and Leverick point out (at 558). Indeed as sharp eyed criminal law teachers we may be alerting future prosecutors to the existence of obscure offences and cause their resurrection.

4. The implications of this for criminal law teaching

Thus far we can detect three nascent themes:

The changing world of universities, with more diverse student and staff. I have noted before that the first time I was taught by a woman was when I did the London LLM. Refer Clapham *feminisation*

The changing world of legal scholarship, more theoretical, more specialised, contrasted with the enduring 'attraction' of the rule bound, the Latin phrases, and the positivistic. Refer Clapham *fragmentation, globalization*

The changing political economy of crime, criminalisation, regulation, Refer Clapham *fragmentation, privatization, globalization*

Each of these has of course affected how we teach, so for example the kind of casual sexism that accompanied much university life is less obvious. But my point here is how little they have affected *what we teach*. It is true that the main common room debate when I started teaching at Newcastle in the mid 1970s was about the pointlessness of criminalising rape in marriage for example, yet now we talk about it in terms of judicial versus legislative law making, or in relation to human rights.

I could list some things we now include which we didn't before, such as the rise and rise of human rights, and possibly more procedure and evidence, corporate liability.

Then there are some things (I hope) we teach differently –

Rape/sexual offences, consent ¹⁴

Offences against person: domestic and race violence

¹⁴ RCL 1990 Chapter 5 was entitled 'Constructing Bodily Autonomy'

Then there are things that have stayed the same:

Actus reus/mens rea; Intoxication; mental disorder; defences; homicide; property; inchoate offences; participation

I don't know what everyone teaches across our 100 plus law schools but I am going on the text books and crammers, not a lot has changed from the Smith and Hogan template. And I recall that when RCL first came out the criminal law convenor at Cardiff wouldn't include anything from it because that would mean changing the course...

Ben Fitzpatrick has written interestingly on the role of criminal law in legal education and as part of the QLD.¹⁵ If we have a QLD then I would argue criminal law should be part of it. If we don't have a QLD I would argue criminal law should be part of a degree that calls itself law, or 'law and...'

Why- because it is the dominant image of law and those who are taking their learning beyond crime novels, tv and film need to understand some of the ways in which this image is distorted. Distorted from what you may ask?

Good question: the answer 'distorted from reality' or 'from the way it really is' is clearly no answer at all since that what it is, or what something is, is not capable of precise determination.

'Distorted' from its place in legal system as a whole is a better answer; again, there is no clear answer to what that place is, but at least in the study of aspects of criminal law, procedure, prosecution and punishment, we scratch below the starting surface, even if it is only a tiny scratch.

The everyday of the criminal justice system is processing and disciplining 'others'. And it was with this in mind that Niki Lacey and I set out to compile a very different take on criminal law in *Reconstructing Criminal Law* which we first worked on in the late 1980s. By then I had developed a distaste for Smith and Hogan – or rather evangelical subjectivism,¹⁶ the (assumptions behind the) code project¹⁷ and the invisibility of women in law.¹⁸

I was beginning to question the regulatory law/real criminal law distinction, and the individualism in the rhetoric of criminal law: a rhetoric which ignored participation (joint

¹⁵ <http://benfitzpatrick2.wordpress.com/2013/12/17/should-criminal-law-be-part-of-the-qualifying-law-degree/>

¹⁶ 'Swatting the Subjectivist Bug' [1982] *Crim LR* 209-220

¹⁷ 'Codification of the Criminal Law: Restatement or Reform?' [1986] *Crim L R* 314-324

¹⁸ I committed my thoughts on this to publication a little later in 'Working out women in law schools' (2001) 21 *Legal Studies* 116-136. See also 'Law Reform, Rape and Ideology' (1985) 12 *Jnl of Law and Society* 63-7; 'Domestic Violence and Self-Defence' (1990) 140 *New Law Journal* 127-8; 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] *Crim LR* 503-515

enterprise and so on is not new!),¹⁹ conspiracy, and then combining this with the sidelining of business crime led to another interest, the corporate offender.²⁰

In all this I was essentially reacting to events, to the writing of others, but I suppose what it does show is the kind of thing that was attracting my attention was always some kind of counter to orthodoxy, a sense that assumptions and presumptions abounded in the way criminal law was expounded by the doctrinal leaders of the late 20th century.

How did RCL come about? Niki approached me to ask if I was interested in working with her on a Law in Context book on Criminal Law. I had just moved to Wales and was about to have my third baby; [*I had a flashback of giving a paper at the SPTL in Sept 1985 on the Code Project, heavily pregnant and in dungarees. Oh dear*]. We met mainly in Oxford or London but sometimes in Wales, surrounded by children. That baby (Lydia) was three when we published the first edition and famously chose the pink and black cover colours. Niki and I exchanged drafts over the summer when she was in France, first by letter, then by fax and eventually we caught up with email for subsequent editions. We discovered that we were both good at meeting publication deadlines. Weidenfeld were astonished when we delivered on time but that was our naivete, not realising this was most unusual...*I initially wrote that we were insecure but Niki commented that in some ways it is amazing how confident we were and that insecurity seems to grow the longer we are in the academy.* I think it is more a constant oscillation if I'm honest. Have you noticed too that the further we progress the more we expect people not to meet deadlines- tell that to students!

Reconstructing Criminal Law sought to address some of those issues, to include topics that had not been seen as part of the criminal law syllabus. I would say that whereas Niki came to the subject via a highly developed theoretical grasp I came to theory from the opposite direction. I knew what I wanted to include but did not have a theory to explain it. I don't know whether she would agree with this but that is how it seems to me now. [*Her response on reading a draft of this talk was typically generous- 'as ever I think you undersell your distinctive take by implying it was un- or a-theoretical - why let obsessive systematisers like me own the label of theory??!!!'*]

I am clear though that *Reconstructing Criminal Law* was a Grand Design. It was attempting to produce something new not for the sake of it but because there wasn't anything available that represented criminal law as we understood it, or asked the questions about criminal law

¹⁹ 'Rethinking Aiding and Abetting' (1990) 140 *New Law Journal* 265-6; and later 'Girls, Gangs and Fears' in Bibbings and Nicolson *Feminist Perspectives on Criminal Law*, Cavendish Press 2000, 123-137

²⁰ 'The Decline and Rise of English Murder: Corporate Crime and Individual Responsibility', [1988] *Crim LR* 788-801; *Corporations and Criminal Responsibility* Clarendon Press 1993, second edition 2001.

that we wanted to ask.²¹ I am still asking those questions and I do see the posing of questions as the most exciting aspect of the privilege of being an academic.

An example of the Niki thinking can be seen in this passage early on in RCL demonstrating the general idea of criminal law as one normative system among many others:

‘Let us, therefore, revise our starting point so as to think of criminal law as a social normative system: in other words, as a system which operates within a particular social space by setting down standards of conduct, and by enforcing, in distinctive ways, those substantive standards or norms.’²²

It has been refreshing to re-read the first 7 pages of the first edition which are definitely Niki’s words:

‘We want to articulate and a different set of questions about who has the *power* to define criminal deviance and about the ways in which legal definition of certain behaviours as criminal operates as an ‘objective’, depoliticised construction of those behaviours as deviant.’

So criminal law cannot be plucked off the shelves like a product and tested to see if it does what it says on the tin. In order to identify and select the standards of conduct that can be enforced through criminal law sanctions, we need to know what is distinctive about criminal enforcement as well as why those sanctions are justified.

We might start, as Sullivan and Simester²³ do (p. 2) by discussing ‘the harmful nature of the prohibited event’. But the inadequacy of harm as an explanatory or a normative model is soon clear, so much so that S and S rapidly defer it only to return much later in a chapter sandwiched between one on fraud and one on an overview of defences. Yet the introductory chapter moves apace to the centrality of punishment and censure to criminal law – which dodges one of the central arguments about harm- and then they nail their colours firmly to the mast of the analytical equation that criminal law consists in *actus reus* plus *mens rea* minus defence.

This is where I think RCL made a bold but also highly necessary departure from ‘standard’ legal text books. One of the reasons for that departure was our recognition that this mode of analysis only worked if it were applied to a relatively narrow range of offences and defendants. It worked (kind of) with homicide, offences against the person and property offences. But it didn’t help to explain, nor introduce students to, the many public order and preventive offences; it didn’t help with the widening ambit of liability via participation offences; it rendered strict liability in to a kind of dead end along with rafts of specific

²¹ The chapter headings evidence this- Approaching Criminal Law; The State of Order; Drink, Drugs and Due Process; Making a Killing: Conceptions of Violence; Constructing Bodily Autonomy, Property and Propriety.

²² Now p. 5 in 4th edition.

²³ Simester and Sullivan, *Criminal Law: Theory and Doctrine*, 3rd edition, 2007

regulatory offences. By introducing regulatory law, we were able to point up the narrow police based conception of law enforcement embraced by traditional textbooks.

We made problems for ourselves in branching out in this way – or in Grand Designs mode by demolishing what was there and rebuilding a visionary house? - and I don't think we have succeeded in persuading many others. Indeed, the idea that criminal law should be or can only be taught via general principles, especially the abstractions of actus reus and mens rea (both often widely misunderstood) is one that appears to have lodged itself in the minds of many students before they even study criminal law.²⁴ The criminal law canon is an extraordinarily powerful one.

What is its appeal? It satisfies the 'law as a mystifying, latinised' language, that students are being inculcated in to this mystery and 'knowledge'. It serves as a distraction from the harder task of understanding that these are analytic devices.

It leads to an ability to chant (a bit like reciting the times tables without knowing what the numbers represent). Hence the common mistake of thinking that 'actus reus' is itself an act, or that 'intention' is a free floating concept, or that any understanding we have of both elements derives from the increasingly statutory definitions of specific offences, or that appellate cases tell us much about criminal law as practised and imposed every day.

It is apposite to end with some words about the Birmingham Centre for Contemporary Cultural Studies whose influence was recently explored by Laurie Taylor in two Radio 4 programmes.²⁵ He points out that the Centre was founded by Richard Hoggart fifty years ago to move away from traditional cultural thinking, with its emphasis on the importance of "high culture," toward a focus on contemporary "lived experience" and popular culture. It seems to me there is a clear parallel in the way some of us now approach the teaching of criminal law, taking it from the high culture of appellate case driven doctrine, to a more lived experience, whether lived by offenders, those prosecuted, convicted, sentenced and by victims.

The aim of cultural studies proponents such as Hoggart and Stuart Hall in focusing on mass media and popular song was to develop a critical language that would spread throughout society. It seems to me that we can see a cross fertilisation of ideas in which some legal scholars began to develop a very different approach to law, whether via law in context, or more through sociological and philosophical theories. The process is two way in the sense that more attention is paid to presenting courtroom and police dramas as 'authentic' and through drama documentaries. In the same way that the cotton wool in which 'culture' had been wrapped – to be experienced in Glyndebourne and through books reviewed in The

²⁴ A contradiction that may be explained as a participant in the Workshop suggested, by the increasing number of law students who have studied A level law.

²⁵ <http://www.bbc.co.uk/programmes/b03cf03d>. Thank you Lydia Morgan – not just a book cover stylist!- for alerting me to this and its relevance for this paper.

Times – has been loosened so too the study of law has been opened up. In both cases, there is still however a preference for tradition and reversion to the norm.

I believe it is our duty as academics to resist that reversion.

Table 1 The thin redline

