Criminal Law for Criminologists

Principles and Theory in Criminal Justice

Noel Cross

ROUTLEDGE

'At last, a text on criminal law written in appropriate language, but also with enough detail, to engage students of criminology and related courses. The book is clearly structured with question breaks and regular recaps that will clearly enhance student understanding'.

– **Dr Ian Marsh**, Liverpool Hope University


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Criminal Law for Criminologists

Criminal Law for Criminologists uses theoretical and practical research to bridge the gap between 'the law in the books' (criminal law doctrine) and 'the law in action' (criminal justice process). It introduces the key policies and principles that drive criminal law in England and then explains the law itself in terms of relevant statute and case law. Starting with an outline of the basic principles and theories of criminal law and criminal justice, the author goes on to discuss:

- Criminal law and criminal justice in a historical perspective,
- General principles of criminal law, including actus reus and mens rea,
- Specific types of criminal offence, including property, homicide, sexual, public order, and drug offences,
- An overview of defences to crime,
- An appendix outlining essential legal skills.

In examining the links between the worlds of criminal law and criminal justice, *Criminal Law for Criminologists* brings a fresh perspective to this field of research. Written in a clear and direct style, this book will be essential reading for students of criminology, criminal justice, law, cultural studies, social theory, and those interested in gaining an introduction to criminal law.

Noel Cross is Programme Leader in Criminal Justice in the School of Justice Studies at Liverpool John Moores University. He became a programme leader in 2011. He has worked at Liverpool John Moores University since 2002. He holds a BA in Jurisprudence from the University of Oxford, an MA in Applied Criminal Justice and Criminology from the University of Swansea, and a PhD in Applied Social Studies from the University of Swansea. Aside from criminal law, his research interests include youth justice, zemiology, and the links between crime and power.


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Chapter 1

Introduction

Chapter overview

Introduction: what is the point of studying criminal law if you are a criminology or criminal justice student?
Approaching criminal law in principle and practice
Approaching criminal justice in principle and practice
Conclusion: a road map for the rest of the book
Further reading

Chapter aims

After reading Chapter 1, you should be able to understand:

- The basic principles of criminal law
- The basic principles of criminal justice
- The key theories which try to explain what criminal law does
- The key theories which try to explain what criminal justice does

Introduction: what is the point of studying criminal law if you are a criminology or criminal justice student?

This book focuses on English criminal law and its relationships to the study areas of criminology and criminal justice. The book explains how criminal law defines crime and also how these definitions compare to developments in criminological theory, and how those involved in criminal justice use criminal law in practice as they respond to crime. Throughout the book, where the text

talks about a defendant or victim in a particular criminal law case, the words 'defendant' and 'victim' will be abbreviated to 'D' and 'V', respectively. When referencing criminal law cases where one party to the case is the Crown, the text simply gives the other party name – so, for example, instead of writing *R v Woollin* [1999] AC 82, the text will just say *Woollin*, and so will the bibliography.

Criminal law defines certain kinds of behaviour as being unlawful and therefore provides a framework and a rulebook for criminal justice agencies who respond to crime in a range of different ways. However, do criminal justice organisations stick to the rules set out by criminal law? How do they respond to the social problem of crime – by using criminal law itself, or by using other values and ideas? The book aims to bridge the gap between criminal law and criminal justice to provide a better understanding of both subject areas while using both theoretical and practical knowledge as a way of bridging that gap.

Some writers (e.g. Hillyard and Tombs 2004; Pemberton 2007) have argued that criminal law is not useful to criminology and criminal justice because it wrongly focuses on individual responsibility and so overlooks social harms committed by states and organisations which are just as socially damaging as individual wrongdoing. In contrast, this book will argue that criminal law and criminal justice need each other to survive and therefore should be studied side by side (Zedner 2011). The gap between them has traditionally been wide in terms of writers on each side overlooking knowledge and ideas produced by the other side (Nelken 1987; Lacey 2007). However, without criminal law, criminal justice's main purpose – enforcement of criminal law – would disappear. In addition, without criminal justice to enforce it, criminal law would lose much of its power to shape and maintain order in society. It is also true that each side has lessons that it could learn from the other. For example, criminology and criminal justice can give criminal law a better understanding of how to work towards a fairer society; and the criminal law can focus criminal justice and criminology's attention on which kinds of behaviour society should and should not regard as crimes (Zedner 2011).

The next section of this chapter introduces basic principles relating to criminal law in England in terms of what criminal law is and what makes it distinctive as a social phenomenon.

Approaching criminal law in principle and practice

Defining criminal law

Farmer (2008) argues that there are two main approaches to defining criminal law. The first approach is that criminal law is made up of behaviours which can be seen as moral wrongs against the community (e.g. Duff 2007), or behaviours for which it is the community's job to punish and which deserve the powerful response of a criminal conviction (Lamond 2007). The first

problem with this view is that 21st-century criminal law extends beyond behaviours which the public agree should be considered crimes (like murder and rape) to include behaviours which are less obviously morally wrong, such as using a mobile phone while driving. The second problem with this view is that it assumes a strong consensus in society about what is and is not morally wrong – a consensus that is not present in modern societies like England today (Wilson 2012). This does not mean that criminal law never reflects public morality – only that we cannot fully explain modern criminal law using moral beliefs (cf. Devlin 1965).

The harm principle is an alternative approach to the idea of criminal law reflecting community values. The harm principle argues that criminal law does, and should, target behaviour that causes physical harm, psychological harm, or serious offence to another person (Feinberg 1984). As with the morality approach to law, one problem with the harm principle is that it cannot explain everything that criminal law currently defines as a crime. The harm principle seemingly cannot explain what Ashworth (2008) calls the preventive function of criminal law – the law's labelling certain kinds of behaviour as carrying a risk of social harm or danger and therefore deserving of public condemnation and punishment. Nor can the harm principle explain the increasing number of regulatory offences within criminal law. One example is entering into an arrangement with someone you have reasonable cause to believe is under age 16, where the arrangement gives that person the chance of winning an animal as a prize (Animal Welfare Act 2006, s.11(3)). This does not mean that we should assume that criminal law never regulates behaviour that is objectively harmful (Hall and Winlow 2015: 89). However, criminal law's scope is so wide that it is now difficult to see which types of behaviour are most harmful to society simply by looking at criminal law. A final problem with the harm principle is that it is vague and does not give any guidance about how to weigh the seriousness of different kinds of harm, how to judge them, or how to balance them (Harcourt 1999: 193). Some critical criminologists, for example Pemberton (2015), take a very different view of harm as a trigger for social response, but their ideas about harm do not come from the law itself. Instead, Pemberton and others take a wider approach to defining social harm based on harmful events that prevent humans from flourishing and which are the product of human action or inaction (Yar 2012: 63). These harms can be damaging to physical or mental health, damaging to a person's autonomy, or relational (i.e. about social exclusion or discrimination), but are preventable through political and economic decisions about social conditions and are often the direct result of capitalist political economies (Pemberton 2015: 9–10). On this view, harm goes far beyond what criminal law would define as harmful, to include issues such as poverty, racism, and social exclusion (ibid.).

The second definition of substantive criminal law, drawing on the work of Williams (1955), is that it is simply the part of the law that deals with behaviour defined as criminal, and results in punishment by the State when

a person is found guilty of breaking the law. In other words, criminal law is different from other kinds of law (like civil law, which deals with other forms of behaviour that result in some form of compensation after a finding of guilt) because it uses a different procedure to respond to people who break it. Criminal law accepts that it is fragmented and diverse in nature. However, it uses the criminal justice process to impose consistency and objectivity on itself and to present an image of itself to society as being consistent and objective (Farmer 1996). This hides the reality that criminal law is not as objective or standardised as it presents itself to be (Norrie 2014). In fact, criminal law has a range of functions. Some of these functions are instrumental, such as the idea of the rule of law discussed next; some are ideological, such as the prioritising of the interests of the powerful in society over those of the powerless (Lacey 1993). The following chapters of this book identify these functions, as criminal law and criminal justice are analysed as part of the same social process of criminalisation (Lacey and Zedner 2017), or regulating bad or risky behaviours.

The standard and burden of criminal proof

An example of the distinctive nature of criminal law procedure lies in the standard of proof needed to find guilt in each case. Criminal law establishes guilt by evidence of guilt beyond reasonable doubt. The civil law establishes guilt by evidence of guilt on the balance of probabilities, which requires a lower standard of proof and therefore less evidence indicating guilt than proof beyond reasonable doubt. Linked to this is the idea of the burden of proof being on the prosecution in criminal law (*Woolmington v DPP* [1935] AC 462). This means that D is innocent until the police and prosecutors have enough evidence to prove beyond reasonable doubt in court that D is guilty of all the different elements of the criminal charge(s) brought against them. Traditionally, this means that they will have to prove the guilty conduct (actus reus) specified by the definition of the offence and also the guilty state of mind (mens rea) which is specified. The principle is the foundation of the adversarial system of criminal justice that exists in England, where the prosecution and defence compete against each other to persuade the courts that their evidence is more convincing than the other side's.

Criminal law and punishment

Criminal law is distinctive from other types of law not simply because it imposes punishment on those who break it. This also happens in other types of law, as well as elsewhere in life, such as when a referee sends a player off the field in a football match for breaking the rules of the game. What makes criminal law distinctive is that it also 'labels' people as being criminal, communicating the message to them that they have broken the moral rules of

the community through the process of conviction (Duff 2001, 2007). The intention of criminal law is therefore to create stigma through conviction and punishment for prohibited behaviours (Ashworth 2000).

Criminal law and the rule of law

The principle of the rule of law is also fundamental to understanding English criminal law and criminal justice. Under the rule of law, no one can be punished unless they have breached the law as it is clearly and currently defined and they have been warned that the conduct they have been accused of is criminal (*Rimmington* [2006] 1 AC 459). The breach must also be proved in a court of law. Finally, everyone (including those who make the law) is subject to the rule of law, unless the law itself gives special status to an individual or group (Simester et al. 2016: Chapter 2).

Sources of criminal law

Criminal law in England comes from three main sources. The first is common law. This is law that judges make and develop when they decide cases, in line with the rules on precedent. Precedent means that a particular court has to follow an earlier court's decision based on the same law and the same facts as the case it is currently deciding and made at a higher court level or (usually) at the same level as itself. However, a court does not have to follow decisions made at lower levels. The diagram that follows shows the structure of the appeal process in England and how precedent works:

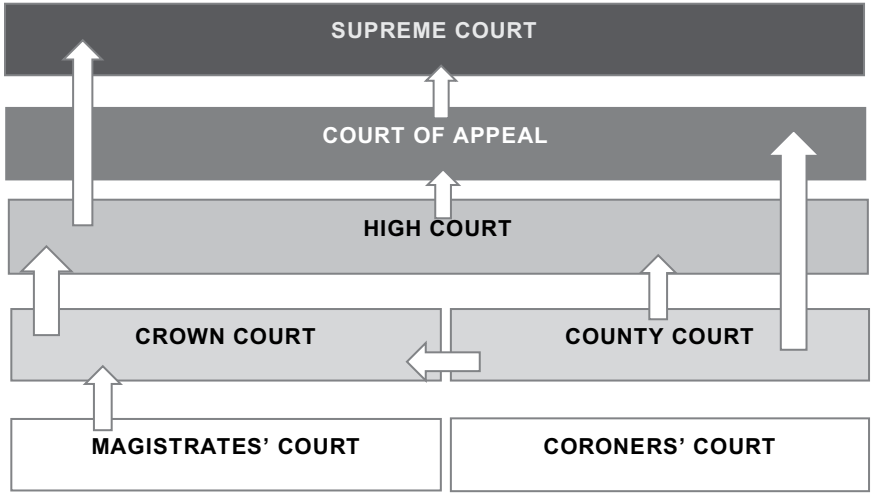

Figure 1.1 The English court appeal system

The second source of criminal law is statute law. This is law that Parliament creates and implements in the form of Acts of Parliament, or statutes. Statute law can decriminalise old offences, create new offences, re-define or change criminal offences that already exist, or bring together old pieces of legislation on the same topic. All new criminal offences must now be created by statute law, not by the courts through the common law (*Jones and Milling* [2007] 1 AC 136), although courts used to be able to use common law to create offences, and some offences (such as murder) are still defined by common law today. However, even where a statute defines a criminal offence, courts will often decide the details of that offence through their own case-by-case decisions, especially where there is some confusion over what a statute means in practice.

The third source of law is law that develops from the obligation of substantive criminal law to comply with European human rights law as contained in the European Convention on Human Rights ('ECHR' hereafter). Since Parliament passed the Human Rights Act 1998, individuals have the right to complain to courts in England when they feel that substantive criminal law has breached their human rights. The occurrence of miscarriages of justice, for example, where a person is convicted and punished for a criminal offence which they did not commit, involves serious breaches of human rights and has been seen as being a normal and routine feature of criminal justice today (Naughton 2007: 4). Because of the Human Rights Act, courts must interpret statute law in a way that is compatible with human rights legislation (s.3). Key ECHR provisions that are relevant to criminal law include:

- Article 2 (the right to life);
- Article 6 (the right to a fair legal hearing and the presumption of innocence for defendants); and
- Article 7 (the right to know exactly what the offence someone is accused of involves in terms of criminal behaviour, and the right not to be convicted under law which was not in effect when the act being punished was done).

S.6 of the Human Rights Act requires public authorities, including the police, the Crown Prosecution Service and the courts (discussed next) to act in a way which is compatible with the ECHR and also allows common law to be changed in line with the ECHR (*H* [2002] 1 Cr App Rep 59).

The Brexit referendum of 2016 resulted in a majority of participants voting in favour of the United Kingdom leaving the European Union. As such, there is considerable uncertainty over whether the ECHR will continue to influence English criminal law, and over how (if at all) the ECHR will influence that criminal law. It is important to remember, though, that the ECHR is part of a different legal system, managed by the Council of Europe, to the European Union.

Substantive criminal law, in all its forms, develops through the decisions of individuals and organisations. Therefore, what counts as 'crime' can and does change over time. For example, the Coalition Government created an estimated 1760 new criminal offences in England, Wales, and Scotland in 2010–11 alone (Chalmers and Leverick 2013: 550). This apparent expansion in criminal law's reach has led some writers to argue that criminal law criminalises too much (e.g. Husak 2008).

On the other hand, there are types of behaviour which used to be crimes but which no longer are. Examples include the Sexual Offences Act 1967, which partially decriminalised homosexual behaviour between adult men and a wide range of historical offences, such as eavesdropping, scolding, and wearing felt hats, all of which were crimes during the late 16th century (Sharpe 2014: 73–4). From these examples, it is clear that crime itself is a social construct (Reiner 2007: 25–6). No behaviour is criminal until an individual or group of people decides to make it criminal (Christie 2004). As a result, the boundaries of criminal behaviour have changed constantly over time, in line with changes in public opinion, political parties' views, and social and economic conditions (Lacey 1995; Duff et al. 2010). Sometimes these changes occur in a principled and rational way, but, more often, such changes have caused confusion and inconsistency in criminal law (Sanders et al. 2010: 8), and most key writers agree that criminal law has more than one function (e.g. Fletcher 1978; Ashworth 2008). The book will focus on criminal law's historical development in various places throughout this book, particularly in Chapter 2.

Study exercise 1.1

Using Internet resources and statute books, find three examples of offences that have been decriminalised and three examples of offences that have been created in England since 1997. Why do you think each of these offences was criminalised or decriminalised? Do you agree with the decision to criminalise or decriminalise each one?

Theories of criminal law

Clarkson (2005: 254–67) summarises the key theoretical approaches to the purposes of criminal law, as follows:

- The 'law and economics' approach, which states that criminal law is there to deter 'economically inefficient' acts which do not help the economy (e.g. stealing a car rather than buying one), and to regulate such