Theorizing Criminal Law Reform

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1 Introduction

The traditional or classical picture of criminal law reform has two components. The first component is conceptual. The focus is on legal doctrine as a conceptual structure that must be designed aright — that is, so as to reflect some preferred background set of norms, whether these are viewed as internal or external to law. The second component is empirical. It is understood that criminal law has functions and effects. Criminology or other some social science can provide information about these effects and about the success of criminal law in performing its desired functions. Reform of doctrine can and should be appropriately adjusted on the basis of such empirical information.

Contemporary critical legal and criminological theory repudiate this traditional picture. They repudiate both the ideal of the perfectibility of doctrine and the ideal of value-free social science. Law, it is urged, is no more than a social construction subject to the constraints of power, not of conceptual and empirical purity. Given this diagnosis of criminal law, reform of criminal law via reform of criminal law doctrine is pointless. Criminal law reform has no option but to become radicalized, to serve the interests of the marginalized and the dispossessed.

My focus in this paper is on this latter modality. There is an obvious kernel of truth to the linked ideas that our perceptions of crime in our society are molded by social forces, and that crime does not exist independently of the social structures and processes that help to define and control it. But how do we get from there, can we get

from there to the alleged irrelevance of a focus in criminal law reform on doctrinal reform?

I begin the paper by sketching the traditional picture of criminal law reform and the reasons why this picture is said to be unacceptable. I then present what I think can be properly taken from the critical theorists' focus on social construction. I then analyze the arguments for the radicalization of criminal law reform, and consider what more is needed in order to secure the soundness of those arguments from a starting point of the kernel of truth in the `law as social construction' thesis. I end by considering the real extent of the damage done to the traditional picture of criminal law reform by the arguments of criminal law theory and critical criminology.

2 The Traditional Approach to criminal law reform

a) The Naive Realist View

I begin with what may be called the `simple' or `naïve realist' conception of criminal law reform. The simple conception has two parts: the criminal law as it stands is in some way wrong or unjust; it should be changed, and in the following way. The goal of the present paper is not to disparage or repudiate the simple or naïve realist view of criminal law reform in order to replace it with some much more sophisticated and professional understanding. Rather, my goal is to use the simple view as a benchmark for assessing different theoretical accounts – or perhaps more accurately different presuppositions of different theoretical accounts – of criminal law reform, in order to investigate how and in what way and to what extent those theoretical accounts are credible. It will emerge that theorizing criminal law reform is a complicated and messy business. It is not that as a result we will be better off if we just stick to the simple or naïve realist view. The simple view serves well to remind us what criminal law

reform is in the end all about, even if different theories would seem to argue to the contrary. To understand criminal law reform, we need the simple view appreciated in the light of complex views, and *vice versa*. Neither kind of account will stand alone.

The simple or naïve realist view is already not so simple, in that it embodies a number of presuppositions – (1) that we can identify accurately in the relevant respect the present state of the criminal law; (2) that we can identify accurately relevant standards or norms to which the criminal law ought to conform; (3) that we can identify accurately the ways in which the criminal law does not conform to these standards; (4) that we can identify accurately how the criminal law would have to be changed in order to conform to these standards.

Note that I have phrased these presuppositions in terms of our epistemological capacities. The epistemological level is sufficient to raise all the issues that I want to discuss in this paper: we do not need to become involved with further metaphysical questions about the existence or non-existence of normative realities. Even so, theoreticians are going to complain about these presuppositions: not all such, complaints, however, are material to my project in this paper.

Take presupposition (1), for example, that we can identify accurately in the relevant respect the present state of the criminal law. This presupposition might be questioned out of a pre-theoretical, quite practical concern – the solicitor's concern, we might call it. Archie has a legal problem, and he goes to Betty for advice. She tells him, Sorry: I just can't give you definitive advice. There's this precedent, or this established rule over here; there's that precedent, or that established rule over there; it's not clear which will control your fact situation. The assumption here is that the capacity to identify the state of the law exists and can competently be exercised, but the exercise of it here does not yield determinate results. On the other hand, theoreticians might question such a capacity more fundamentally. They might argue that the law is always

in flux, for example, or is essentially indeterminate; in the nature of the case we can never identify accurately the state of law. Fundamental questions of this kind are closer to my concerns here, and they will reappear in Section 3.

With respect to presupposition (2), that we can identify accurately relevant standards or norms to which the criminal law ought to conform, again there are pre-theoretical ways in which presupposition (2) might be criticized. One might be that there are a variety of norms that validly bear on what the criminal law ought to be, and that it is a mistake to imagine that the application of these norms will always yield a determinate result. Another might be that the matter of the norms to which the criminal law should conform is subject to controversy, or is within the domain of politics. It may be acknowledged that reasonable people are going to reasonably disagree about such norms, and that the selection of the norms that in fact will determine the shape of the criminal law is ultimately a matter of the political process. Sucn an acknowledgment does not raise theoretical issues of relevance here. Suppose, moreover, one took the view that the controversial character of the norms determining what the criminal law ought to be is superficial, and that a serious (`Herculean', as it were) exploration of background political morality would resolve such controversies. Even the question whether such a view was correct would not affect the present project. The present project is abstract enough to need nothing more than the simple idea that there are norms governing what the criminal law ought to be that we have the capacity to discern: the details of what these norms are and how we come to determine them need not be addressed. A similarly minimal interpretation is all that need be given also of presuppositions (3) and (4).

In short, even though the simple or naïve realist view of criminal law reform has presuppositions, these presuppositions in their turn can be simply or naively interpreted. The present paper is directed towards theoretical questions of a different

kind about the theorization of criminal law reform. In particular, I am going to examine what I shall call `The Traditional Philosopher's Picture' and `The Traditional Criminologist's Picture' of criminal law reform. These `Pictures' are characteristically taken by their supporters to be little more than recapitulations of the simple or naïve realist view: they are, however, complex theorizations of that view. They consist in theoretical interpretations of the presuppositions of the view. They seem very natural interpretations, and in the end we will see that they have their place in the theory of criminal law reform. However, that place can only be properly seen once the Traditional Pictures themselves have undergone deconstruction.

b) The Traditional Philosopher's Picture

By `traditional philosopher', I mean one whose interest in criminal law reform is primarily conceptual or analytic. From the philosopher's perspective, the `traditional' or `classical' law reform project focuses on legal *doctrine*. The legal system as a social institution is in an important sense a conservative institution. The forms and doctrines of law are assumed to represent the distilled wisdom of the ages: doctrines have changed, but only within narrow limits. Even if it is true that gambling was once regarded as criminal and is now not, or that the rape of a woman by her husband was once not regarded as criminal but now is, the basic doctrines concerning crime in the common law have not changed a great deal over time. Anyone who has either taught or taken a class in philosophy of law, or jurisprudence, or criminal law, knows the basics (or, `the official basics', if you like) as far as concerns criminal law. The focus of attention is the maxim *actus non facit reum nisi mens sit rea.* Criminal liability requires an *actus reus*, a guilty act, an act that has been defined by law as an offence, and *mens rea*, a guilty mind, an intention or other appropriate mental state to perform the guilty act, signifying fault. The law permits defences of various sorts, divisible into justifications

and excuses. The offences typically discussed in such pedagogical contexts are the familiar ones — murder, sexual assault, theft. And of course there are always attempts and conspiracies, and the mentally gymnastic conundra they pose. The principles of guilt and innocence that can be rationally reconstructed from these sources form the General Part of the criminal law. `The general part consists of a range of doctrines that reflect what it is about the criminal law that is distinctively *criminal*'.[1] The Special Part has to do with the specific offences themselves, the definition of them and problems arising therefrom.[2] The traditional philosopher's criminal law theory is the theory of the criminal law so construed — the detailed articulation of the principles of criminality that constitute the General and Special Parts.

The assumption of this institutional permanence and correctness leads to a picture of law reform as a formal and conceptual analysis of the structure of criminal liability. The idea of `reform' is not purely analytical. The term `reform' presupposes normative standards: there is a way of getting the analytical structure right — that is, so that the conceptual structure of the criminal law properly mirrors the relevant norms of background political morality — and many ways of getting it wrong (the criminal law does not mirror such structures). Developing the correct analytical and conceptual structure for the criminal law is an abstract task for the theoretician. The task may be

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[1]A.P. Simester and Stephen Shute, "On the General Part in Criminal Law," in *Criminal Law Theory: Doctrines of the General Part*, ed. Stephen Shute and A.P. Simester (Oxford: Oxford University Press, 2002), 4.

[2]Cf. R.A. Duff and Stuart P. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005).

one of developing a sound set of general principles for the General Part, or a sound set of more specific principles for the Special Part.

Then there is a second, more concrete but still largely intellectual task — a process which takes the analytic structure just mentioned and checks it against the actual content of some body of black-letter criminal law, the Canadian *Criminal Code* for example. Either the general assumptions of principle that may be extracted from the *Code*, or the structure of some specific *Code* offence, may not conform to the best normative standards. Criminal law reform then amounts to making recommendations as to the changes needed in criminal law doctrine, in order to make doctrine conform to principle.

Within the traditional philosopher's approach a further distinction may be made between those of a formalist, or natural law-ish, or internalist, bent who believe that the relevant normative principles are internal to the concepts being analyzed, and those of a more externalist, or positivistic, bent, who take background political morality in some form to be the source of the relevant normative principles. This distinction, however, is not material to the present paper, however much it might matter in other contexts.

c) The Traditional Criminologist's Picture

One implication of the traditional philosopher's approach to criminal law reform is that what matters most for getting in the real world the desired normative results from law reform is legal decision-making. Legal decision-making is the application of legal rules or norms to fact situations. Get the legal rules right, and, once the facts are in hand, the desired result will follow. This optimistic assumption has been long challenged by Legal Realism. Legal Realists pointed out that much more determined the outcome of litigation than an abstract mapping of rule on to fact situation. Even if (regrettably) the famous claim that judicial decisions may be caused by what the judge

had for breakfast cannot be traced to any real person, still it is clear that Realists all urged greater attention to how social forces might affect legal decisions, both in the taking thereof and in how such decisions actually played out in the real world.

A certain Traditional Criminologist's Picture then emerges of the contribution social science, and especially criminology, can make to law reform. The pattern of thought is this. The law is much more than legal decision-making, as opposed to what the Traditional Philosopher, and traditional doctrine, assumes. The actual effects of a legal rule are often quite different than the intended effects. The actual realities of the legal process are often quite different than we imagine them to be. Social science needs to collect data in order to test our assumptions about laws and legal procedure. Sound legal doctrine needs to be based on sound social-scientific research.

There is a certain complementarity between these two traditional pictures. Social science in such a role is subversive of traditional legal doctrine to the extent that the latter has empirical exposure and makes implicit empirical commitments that it cannot discharge. But social science is not subversive of legal doctrine *überhaupt*. The thought is simply that legal doctrine needs to be empirically sound, rather than empirically weak. The thought is not that there is something disreputable about the very idea of legal doctrine as such. Criminology in this mode supports, rather than undermines, what might be called the Official Version of the law, that it is an impartial, neutral and objective system for resolving social conflict.[3] Social science on the traditional model is just as neutral and objective as law according to its official version. If law and legal doctrine fail to be neutral and impartial, then that is because the social science is not

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[3]Elizabeth Comack, "Theoretical Excursions," in *Locating Law: Race/Class/Connections*, ed. Elizabeth Comack (Halifax: Fernwood Publishing, 1999), 21.

right, not because social science shows, for example, that impartiality and neutrality are inherently impossible.

The unified model of the relationship between criminal law doctrine and criminology that emerges from these traditional conceptions I shall call the `Research Assistant', or RA model. The task of social science is to do the empirical work that will confirm or disconfirm the instrumentalist implications of any proposed reform to criminal law doctrine. The theoretical question I am interested in is this. In many ways, this traditional picture of criminal law reform has been strenuously attacked and vilified in much recent legal and criminological theory, and it has been assumed that the RA model has to go as well. But is that true? Do we in fact have to revise fundamentally our conception of criminal law reform if we repudiate the traditional picture? Is the RA model inextricably linked to the traditional picture, to stand or fall with it? Or can a suitably revised RA model survive the critique of traditional law reform?

3 The critiques of traditionalism

Both dimensions of this traditional picture have come under severe attack. With respect to legal doctrine, critical legal theory in the form of the Critical Legal Studies movement strenuously argued that analytical jurisprudence greatly overestimated the tidiness of legal doctrine. Two classic `Crit' pieces are illustrative. Duncan Kennedy in 1976 argued that private law doctrine is inherently contradictory.[4] Private law revolves around two conceptual axes — that of Form and Substance, and that of Individualism and Altruism.

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[4]Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685–1778.

Individualism tends to be associated with form and with rules; altruism tends to be associated with substance and with standards, norms that are vaguer and more open-ended than rules. A superficial ideal for the law is to find the right balance in any given area of doctrine of each polarity or axis. This ideal is spurious, as the axes are fundamentally contradictory. Private law is a site for the conflict between individualism and altruism, not for a resolution of the conflict. Mark Kelman five years later wrote about criminal law that the core of the criminal law in practice are a variety of what he called `interpretive constructs' — powerful concepts or images that structured courts' readings of the facts, rather than having their applicability revealed by the facts.[5] Thus the alleged `givenness' behind the idea of an accused person being `guilty on the facts' is spurious.

Note that these critical arguments if sound are not threats to the idea promoted by legal positivism that the existence and content of laws is to be established by a test of social fact, rather than a normative test. In fact the arguments represent in a sense a somewhat quirky version of the social fact thesis. The critical arguments if sound repudiate what I have called the official version of the law —the idea that the law is an impartial, neutral and objective system for resolving social conflict. If private law has the inherently contradictory character that Kennedy says it has, for example, then any legal decision applying private law will not be impartial, but will represent a value-laden choice of the incompatible versions available. Any verdict of guilty under the criminal law, if Kelman's argument is sound, will impose a value-laden interpretation

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[5]Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review* 33 (1981): 591–673.

on proffered facts, and will not be a neutral and impartial application of a rule to those facts.

Sociological criminology analogously was revealed to have `positivist' background assumptions, in the sense of scientific, not legal, positivism. If legal doctrine was to be validly reformed, arguments for reform had to be based on facts about human behaviour and human nature. Theories and hypotheses had to be formulated with empirical import, and the validity of that empirical import tested. Such a methodology was classically exemplified in what has been called the `penal-welfarist' phase of penal policy-making. The presupposition of placing emphasis on the rehabilitation of prisoners was that there existed a body of psychological and sociological knowledge of human behaviour that could be brought to bear on the understanding and modification of prisoners' attitudes and behaviour.

Positivist social science of this behaviouristic form came under attack from different directions. Some of them were general in scope applying to any science — for example, the argument that positivist methodology presupposed a rigorous distinction between theory and observation, whereas no such distinction could be reliably made. Other criticisms were specific to the social, or human, sciences. It was urged that the special character of the human mind and of human societal interactions and arrangements ruled out purely objective scientific study. Understanding human behaviour, rather, is more a matter of sympathetic interpretation than neutral observation.

In various ways, and for various reasons, then, theorizing the criminal law and criminal law reform lost its analytical and positivistic innocence. Reform of the criminal law and of the penal system could no longer be plausibly represented as the revision and emendation of doctrine based on sound conceptual analysis and sound social science. The story as I have presented it so far, however, has been told simply in

technical terms. Little or nothing of what I have said constitutes a *political* critique of the law and of law reform. `Little' perhaps is better than `no', since the claim that the criminal law fails to live up to law's official version of itself is a normative, and so if you like political, critique — but just so far an open-ended one, leaving many options for its substantive completion. It is important to make this point, not so much because I rely on it explicitly in what follows, but because the core point is of a piece with the central theme of the remainder of the paper. The political critique of the criminal law that figures so prominently in critical legal theory and critical criminology may have emerged from prior views about the methodology of criminal law reform, but it is not entailed by those views. Positivism in social science and analytical jurisprudence both may be misguided in the way that they implicitly approach criminal law reform, but that in and of itself does not imply that critical legal theory and critical criminology are correct in their politicized accounts of the criminal law.

4 The social construction of law

We move closer to political critique of traditional law reform when we ask the question, If the analytic and positivist accounts are not correct, what abstract or theoretical account of criminal law is correct? The mistake, it is claimed, of analytic and positivist approaches to theorizing the criminal law, and so to criminal law reform, is to think that there is a truth about the relevant normative concepts that doctrine should reflect, and a truth about human behaviour that criminology as a social science should reflect. Neither of these theoretical assumptions, the argument goes, can be sustained. The criminal law is simply a set of social constructions.

In a banal sense, the criminal law is an artifact, because law of any kind is artifactual. Acts or omissions in real life are not in themselves or as they occur `crimes'.

They may be in themselves long or short, harmful or harmless, foolish or sensible, occur at night or on Tuesday, and the like. But they are not in themselves `crimes'. An act/omission -- a taking of someone else's property with the intention of taking it, for example — is a `crime' because an official organ of the state (usually, the legislature, but occasionally a court) has defined a criminal offence that makes that act/omission into an official or legal crime.

> Everyone commits a theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or his property or interest in it.

That is the formal definition of (one form of) theft in s.322 (1)(a) of the Canadian *Criminal Code*. That definition is what makes Anita's making off with Bernard's bicycle, intending not to bring it back, into a *crime*.

Here we have a first and basic instance of the artifactuality of crime, which is simply a reminder as to what law is. Law itself is a human artifact. Laws construed as rules are made by human beings — enacted by the legislature, or formulated by courts. That includes the criminal law. Intentional killing may be morally abhorrent in and of itself. But it is not a crime until the law defines it as a crime. So murder as a *crime* is a human artifact, a *legal* construction, if you like.[6]

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[6]I am thinking here of Nicola Lacey's distinction between legal and social constructions: Nicola Lacey, "Legal Constructions of Crime," in *The Oxford Handbook of Criminology*,

Those who insist on the criminal law being seen as a social construction have in mind, however, something more than this banal point. `Crime does not exist independently of the social structures and processes that help to define and control it'.[7] Unreflective public opinion would likely converge on the following as paradigm crimes — murder, manslaughter, sexual assault, robbery, arson, assault, kidnapping, burglary, theft. These are the familiar kinds of offences against personal and property rights. So, if one saw Charlie raining punches and kicks down on Dennis in the street, describing what one saw as an `assault' seems as natural as calling that object over there with four legs, a seat and a back a `chair'. Already, whether the object over there is a `chair' is already not so straightforwardly a fact. It might look very like what in our culture would be the paradigm example of a chair, but it might not be. It might be an avant-garde work of art. It might be a religious object from some quite different culture. When we turn to Charlie raining punches on Dennis and our immediately deciding we are observing a *crime* in progress, matters are different again from the chair example. It is not just that `crime' is a legal category and we have no way yet of knowing whether Charlie is legally sane, or has a valid legal justification or excuse. We might not be watching a crime at all, but a scene from a movie being shot, for example, or a piece of performance art.

The point, however, is not simply that, in calling what we see a `crime', we are stating a conclusion which might not be true, and for which we really ought to have

3rd edn, ed. Mike Maguire, Rod Morgan, and Robert Reiner (Oxford: Oxford University Press, 2002), 264.

[7]Law Commission of Canada,
http://www.lcc.gc.ca/en/themes/crime/crime_about.asp

more evidence before we express an opinion. The point is why we would immediately leap to the conclusion that we are watching a crime in progress. We identify what we see as a crime in progress, because we are conditioned or socialized to see such a happening as a crime. Crime is not an inherent property of individual actions or states of affairs, but a status conferred on those individuals and states of affairs by those who make and enforce rules, especially legal rules. Our current conceptions of what is criminal and what is not are historically contingent: that is, they are artifacts not only at a particular point in history, but of the particular configuration of social forces operating at that point of history.

Nor do we need simply to be aware that our notions of crime change and evolve. We need to be aware how they change and evolve. Our notions of crime are developed through our experiences, as well as through our interactions with our family, friends and other people whom we encounter in our daily lives. We also derive our notions of crime from sources such newspapers, television, radio, books and films. We receive messages about crime and unwanted conduct through these various sources, which in turn help shape our perceptions about what is and is not a crime.

The proper strategy of law reform therefore, it is said, must be to investigate and interrogate, not the doctrines of criminal law, but society's *practices of criminalization*. The term `criminalization' has two different but associated meanings. To criminalize a certain act is to pass a law making performance of that act a crime. Such a passing, though, is also to criminalize persons, to make certain people into criminals. Crime is not a behaviour or a set of behaviours identified in isolation, but is rather a process. `The criminal law must be understood as something that society *does*,'[8] and it is a

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[8]Louis D. Bilionis, "Process, the Constitution, and Substantive Criminal Law," *Michigan Law Review* 96 (1998): 1302.

complex `something'. `What we are dealing with is a complex and dynamic process of categorisation and discrimination rather than a static practice of deductive reasoning from premises set by a legal definition.'[9] It may seem as though a study of criminalization and criminality is a study of actors and actions the outer limits of which are set by legal doctrine, by legal definition. But that is not so. The focus must instead be on the complex social practices whereby not only through the formal mechanism of legislators passing, criteria applying and police enforcing laws but also through the informal mechanisms of media both journalistic and entertainment, schools, churches, families, clubs and societies, corporations, water fountains, pubs, common rooms and coffee shops, our ideas of what is a crime and who is a criminal develop and harden.

> The frontiers of crime are not determined by specific, identifiable acts of law-creation, or even of authoritative legal interpretation. The boundaries of what we might call `practical criminality' have as much to do with enforcement and application practices as with crime-defining, law-creating acts — what we might call `formal criminality'.[10]

I happen to think that some form of social-constructivist account of the criminal law is correct, and that criminal law reform must take that result on board. To urge that point, however, is not the goal of this paper. Rather, I want to pursue two questions that will turn out to have some connection. The first is this. The implications of adopting a

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[9]Nicola Lacey, "Contingency and Criminalization," in *Frontiers of Criminality*, ed. Ian Loveland (London: Sweet and Maxwell, 1995), 8.

[10]Lacey, "Contingency and Criminalization," 8.

social constructionist account of criminal law and criminal law reform are widely held to be inevitably political, and broadly-speaking left-political. But is this true? I don't mean merely, Is it true that, when you adopt the social constructionist perspective, you will see that the criminal justice system is in fact no `justice' system at all, but the creator and sustainer of a whole variety of social injustices? That's as may be. I mean rather, Is it true that acknowledgment of the socially constructed character of law *entails* or *necessitates* adopting a left-critical normative perspective on the criminal law? Once criminal law reform has been theorized in social constructionist terms, then only left-leaning reform recommendations are possible. The second question is this. I introduced earlier what I called the RA model for the relationship between criminal law doctrine and criminology. What happens to the RA model if we take on board a social constructionist account of criminal law reform? Does it have to be abandoned, or merely revised? I will deal with these issues in that order.

5 Why focus on practices of criminalization?

Consider first the thought that criminal law reform, and serious study of the criminal justice system in general, should focus, not on doctrine narrowly conceived, but on `practices of criminalization'. As said, I am willing to accept this thought as methodologically sound. Note though that such soundness is neither an implication of nor a proof of the thesis that criminal law is socially constructed, at least not in a sense of that thesis that makes it stronger than simply the view that criminal law should be seen as a social institution or social phenomena, not merely a technically legal institution or phenomenon. Criminology as a social science need not be constructivist, and it could still be important to study practices of criminalization even if criminal law

doctrine reflected transcendental truths. So where can the focus on practices of criminalization come from?

The best immediate argument would seem to be empirical: `Look and see'. These are simply the lessons of Legal Realism. The legal system, and a fortiori the criminal justice system, IS a social institution. Its officials are human beings, men and women with all the strengths and weaknesses of humanity (`neither devils nor angels', as HLA Hart famously remarked). Insofar as laws, and *a fortiori* criminal laws, emanate from political institutions, the creation of laws will be subject to political forces. Laws, and a fortiori criminal laws, are interpreted, applied and enforced by human beings in social roles, who will then be as subject to social forces as any human being doing anything anywhere. A judge, say, can treat a defendant, or a peace officer treat a suspect, as simply a legal object and not an individual person -- just as a surgeon can treat a patient as simply the next hip replacement on the OR schedule and not a person. Whether from the point of view of professional ethics these are defensible stances are complicated issues: perhaps such a mode of address can be justified on grounds of efficiency as long as the system overall takes individual needs seriously, and perhaps not. It is patently obvious, though, that it would be a mistake to think that there was nothing to the criminal justice system except the interaction of judge and defendant, or peace officer and suspect, just as much as it would be a mistake to think that there is nothing more to the health care system than the interaction of surgeon, physician, nurse and patient. The recommendation to focus on practices of criminalization is at bottom no more, and no less of course, a recommendation to look holistically at criminal justice, to see various discrete moments in the operation of the criminal justice system as at best conceptually discrete, not functionally or socially or politically or psychologically discrete, and maybe not even conceptually discrete. As such, the recommendation is simply

methodological: in and of itself it is neutral as to substantive norms for criminal law reform.

6 Practices of criminalization as practices of power

It may be argued, though, that once a person adopts the holistic *gestalt* of seeing the criminal justice system as a set of practices of criminalization, then it becomes just as immediately obvious that practices of criminalization are practices of *power.* Again, a `Look and see' kind of argument seems inevitable. One could try to argue the thesis more discursively by urging that it follows from practices of criminalization being essentially political that they are practices of power, or from their being essentially social that they are practices of power. But it seems to me that the same kind of holistic *gestalt* is needed to see the alleged fundamentally political character or fundamentally social character: so I don't see that there is any gain by these moves.

The meaning of `practices of power' needs a brief explanation. Terms like `power', `influence', `cause', `effect' have a tendency to be interpreted in terms of intentional agency. If Andrew influences Brian, it must be because Andrew *intends* to influence Brian. If Andrew intends to influence Brian, then Andrew can be personally criticized or blamed for influencing Brian, if influencing Brian turns out to be the wrong thing to do. Terms like `power', `influence' and so on need not imply agency of this blame-attracting kind. Considering an engineer explaining how an internal combustion engine works. She may say, `The power of the exploding mixture of air and gasoline drives the piston down'. There's no agency there, or agency only in a metaphorical sense. The engineer is simply identifying the components of a system, the forces operating on those components, and the way that those forces operating on those components in that configuration produces certain results. In emphasizing the way in

which social power and social forces affect how a criminal justice system operates, one need intend thereby no attribution of malign or blameworthy agency, but intend simply in the manner of the hypothetical engineer to be explaining how the system works, to be explaining what might be called the `system hydraulics'.

An internal combustion engine, however, is a relatively simple system, with one source of power: not so the criminal justice system. The idiom of `system' is familiarly applied to our practices of criminalization, and for a good reason. There are many, many sub-practices within criminal justice — `the criminal law can and should be understood as part of an integrated process of criminalization.'[11] Among these practices are sub-practices as to how cases are selected for trial and processed after conviction, as to the operation of rules of evidence and procedure, as to the institutional structure of criminal courts, and sub-practices incorporating all stages from the articulation of offences through investigation, diversion into processes other than formal criminal law, prosecution, trial, sentencing, and the operation of incarceration and parole. But these practices are all interlinked: what happens at one stage affects what happens at another; what values rule one stage typically rule others as well.

This conception of power is associated with the work of Michel Foucault, and has been named the `practice conception' of power.[12] According to this conception, as Lacey puts it, power subsists, less tangibly but no less influentially, in a wide array of discourses and practices spreading throughout the social body. In this sense, power not owned or wielded by any one agent or institution: rather, it has productive *effects* via

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[11]Nicola Lacey, "Responsibility and Modernity in Criminal Law," *Journal of Political Philosophy* 9 (2001): 258.

[12]Lacey, "Contingency and Criminalization," 13.

the operation of practices and discourses. Rose more metaphorically has put the matter this way:

> The control of conduct [is] now immanent to all the places where deviation could occur, inscribed into the dynamics of the practices into which human beings are connected. ... Control society is one of never-ending *modulation* where the modulation occurs within the flows and transactions between the forces and capacities of the human subject and the practices in which he or she participates. Control is not centralized but dispersed; it flows through a network of open circuits that are rhizomatic and not hierarchical.[13]

The thought here has two parts. First, even if we restrict reference to the formal apparatus of the state, the criminalizing power of the state is not confined to the formal authority of Parliament and courts. Rather, it is diffused `rhizomatically' throughout the criminal justice system. Prison guards, parole officers, peace officers, by-law officers, regulatory agencies and their employees, prosecutors, clerks, private security companies and guards to whom tasks have been outsourced, all are sources of state criminalizing power: all have the power to criminalize, to declare an individual a criminal. Moreover, and second, these formal agencies exist within social structures and discourses about crime of informal and multifarious but influential kinds. These social structures exercise criminalizing power as well: all can influence perceptions of what is

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[13]Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (New York: Cambridge University Press, 1999), 234.

a crime and who is a criminal. Practices of criminalization seen as practices of power constitute a criminal justice system of extraordinary complexity.

We still however seem to be following a trajectory of ever more sophisticated methodologies for the comprehension of criminal law seen as a social institution. The combination of the two Traditional Pictures is too simplistic in its focus on doctrine and empirical research instead of practices of criminalization. The conception of law as a social construction and the focus on practices of criminalization are too simplistic in their omission of a criminology of power. Still, we have not yet demonstrated any necessity for a left-critical political perspective. It may be true that critical criminology, especially Foucaultian critical criminology, has brought to light facts relevant to criminal law reform that were left undisturbed by mainstream criminology and criminal law scholarship. Critical criminology may think that it would not have been able to reach those insights if it had not made the assumption that the criminal law is a social construction (e.g.), but the argument for that is at the most an empirical one about peoples' thought-processes. It is not an `in the nature of the case' argument.

7 Taking power seriously

Such a modest conclusion, however, arguably cannot be sustained. The step from seeing mere practices of criminalization to seeing practices of criminalization as practices of power is seen as crucial to left-critical conceptions of criminal law reform since it makes available an impressive argument against the traditional picture of criminal law reform. The argument if sound would seem to take us closer to the inevitability of radicalized criminal law reform. The argument goes as follows.

There is a very traditional conception of the source of power for the legal system that obscures the complexity of power. This is the conception of the source of state

power as being unitary, the sovereign — not necessarily a single monarch, but in a parliamentary democracy Parliament, or perhaps citizenry who elect Parliament. Parliament, and the courts operating under the final authority of Parliament, are the sources of the formal rules and doctrines of the criminal law. It is as if, just as a highly complex electronic system such as a computer only works once it is plugged into a source of electric power, so the criminal justice system only operates because of the authority of the sovereign. This model though is just another version of the traditional or `classical' emphasis on legal doctrine. Parliament and the courts operating under its final authority are the sources, not of criminalization overall, but merely the formal rules and doctrines of the criminal law. In order to understand power compatibly with the emphasis on the social structures and processes that define and control criminality, power has to be reinterpreted.

On the `classical' model of parliamentary power over the criminal law as unitary and sovereign, the choice to criminalize or not appears as a power-producing choice, not a choice that is the effect of power. But on the practice conception of power, the appearance of free choice, of choice external to the criminal justice system and affecting it but not being affected by it — this appearance is exposed as an illusion. Parliament is part of the criminal justice system construed as a system of diffused power. Its decisions will have an effect, of course, but those decisions are also affected by the antecedent distribution of power within the system, which in the end is the political and social system as a whole.

I call this argument `impressive' for the following reason. The contrast between traditional doctrine-based criminal law theory and critical criminal law theory is often put this way. Traditional criminal law scholars, even if they acknowledge that moral ideas to do with fairness and wrongdoing lie in the background of criminal law doctrine, take the idea of 'crimes' as given by acts of law-creation. Critical criminal

lawyers assume that the power and meaning of criminal laws depend on a more complex set of processes and underlying factors than the mere positing of prohibitory norms to be enforced according to a particular procedure. Traditional scholars remove from the legal and reform agenda both political and criminological issues: critical scholars foreground them.

As a characterization of what has happened in criminal law scholarship in the last few decades, that is pretty much accurate. But one feels inclined to respond, So what? This difference between traditional and critical criminal law scholarship can be easily explained. The critical scholar's work is driven by a political commitment and the traditional scholar's work by an analytic one. Both are valid choices. It is as proper to be a-political about criminal law doctrine and reform as it is to be political. Some economists are more politically driven than others, some parish priests are, some bus drivers are. It is all very well to sound clever and say that the choice to be a-political is a political choice. But why is it?

The argument just given tries to state why. The traditional or `classical' emphasis on legal doctrine in criminal law reform makes a political statement in that it assumes all that matters is the power of the state to enact and apply laws. The continued adherence to the project of perfecting analytically or conceptually the normative content of the law is an inherently political project because it is an inherently conservative project. It takes the form of claiming that what we have always had we should continue to have. It can only be justified by continual arguments that show the changes in social conditions that have undoubtedly occurred and will keep occurring do not necessitate any changes in the basic doctrinal scheme for the criminal law. That is a political issue, an issue of political morality, and, at least from the perspective of the left, a sadly mistaken political view. It seems then that the interpretation of practices of criminalization as practices of power is not a matter merely of methodology.

8 Moral soundness and political legitimacy

Undoubtedly, there are traditional doctrinal criminal law scholars who do look upon the proper design of criminal law doctrine as merely a technical and conceptual problem. But it seems manifestly unfair to say that the traditional doctrinal approach to criminal law reform must be normatively insensitive. Many contemporary analytic scholars with an ultimately doctrinal focus are deeply concerned about the moral standing of the criminal law. Much of it revolves around the idea of `the moral limits of the criminal law', to echo the title of Joel Feinberg's famous treatise.[14] The `moral limits' can be examined in very broad terms — the morally proper limits to criminalization as such, for example, or for the moral principles around which a truly just system of criminal punishment should be designed. Or the `moral limits' can be examined in very close-grained terms — the morally proper standards for the criminalization of attempts, for example, or for the interpretation of the traditional common law defences taken severally. Such scholars focus on the *moral soundness* of the criminal law, rather than its political legitimacy. Or rather, they view the problem of the legitimation of the criminal law as being exactly the problem of the moral soundness of criminal law procedure and doctrine — an analytic and conceptual problem insofar as it is a problem of the isomorphism or lack of between two conceptual schemes, the legal and the moral.

But for the rival approach, the *political legitimacy* approach, moral soundness is not enough. It is hard to make sense of why that should be, unless political legitimacy

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[14]Joel Feinberg, *The Moral Limits of the Criminal Law. Four Volumes* (New York: Oxford University Press, 1984–88).

functions as an independent demand on criminal justice systems. In this context, the thesis that practices of criminalization are practices of power is crucial. Power in the sense used here is blind to issues of legitimacy: the power relations in a society are just how it is in that society, that society's system hydraulics. If, then, a society is to enjoy political legitimacy the exercise of power in that society must be judged against standards of political legitimacy. Critical legal theory and critical criminology then urge that the practices of criminalization in contemporary neo-liberal democracies face a crisis of legitimacy. The criminal law represents paradigmatically the coercive power of the state. Liberalism standardly regards the exercise of the criminal law power against citizens as justified because (in part: the whole story is a lot longer) the act that attracted the coercive restriction of liberty was *voluntary*: hence the centrality of doctrines of *mens rea*, justification and excuse and the like to criminal law. The social conditions faced by those most commonly on the receiving end of the criminal law's coerciveness — the poor, the young and the racialized; the atrocious conditions in which most of Canada's aboriginal peoples live is a prime example — give rise to a legitimation crisis because it is not at all clear any longer how accurate it is to insist that the actions of theirs that attracted the attention of the criminal law were fully voluntary and thus their convictions justified.

A variation on the political legitimacy argument is the thesis that the foundation for genuine criminal *justice* must be a deliberative democracy based on discourse ethics, especially on the principle of discourse ethics that rules should be those that are actually consented to by all those likely to be affected. From the perspective of both critical legal theory and critical criminology, this principle is violated by contemporary criminal justice systems in that they are sites for exclusion and for the exercise of power, not for inclusion and parity of participation in democratic discourse.

Here we see again the force of the assertion that our practices of criminalization are practices of power. A truly legitimate criminal justice system will be one that mitigates the effects of power. Criminal law reform must acknowledge that the socially constructed character of criminal law makes the criminal law in place at any given point in the life of a society simply a resolution of the moments or forces of power at work in that society at that time. Power distorts legitimacy because it distorts patterns of consent, of the consent that creates legitimacy. Counteracting the effects of power requires taking seriously the position — the needs, interests and opinions — of those oppressed by power: the marginalized, the racialized and the dispossessed.

In the talk about the criminal law needing to be `legitimate', there are two strands. There is the strand where `legitimacy' is parsed more narrowly as simply conformity to a set of moral standards, whose independent justification is not addressed. Or rather, it is addressed only to the extent that traditional liberal principles are assumed without independent justification. I have called this the *moral soundess* approach. Then there is the strand where the legitimacy in question is taken in a much more political sense: the needed legitimacy is explicitly *political legitimacy*. This approach takes more seriously the fact that the imposition of the criminal law is an exercise of *state power*, and needs to be justified in those terms. If the issue of justification is looked at this way, then issues of inclusion and exclusion, of power and powerlessness, become more sharply relevant. There is a difference here between a liberal communitarian foundation for criminal justice and a foundation rooted in ideas of democratic political justice. The difference is between a more abstract idea that everyone counts for one and so everyone must be included, and a more concrete or focussed or specific idea that the imposition of coercive state power has especially to be justified to the person who is on the receiving end of said exercise.

If the analysis of Sections 7-8 is correct, then the pivotal assertion for defending left-critical conceptions of criminal law and criminal law reform is the interpretation of societal practices of criminalization as practices of power. This interpretation leads directly to two allegations of major differentiations between traditional and critical approaches to the theory of criminal law reform. The first demonstrates that the focus on legal doctrine, not practices of criminalization, in the context of power is a political act. The second demonstrates that the focus on moral soundness, not political legitimacy, in the context of power is a political act.

The `practices of power' interpretation only throws into relief, however, how the step to it from the methodological recommendation to focus on practices of criminalization, not doctrine, is simply intuitive. It has no argumentative foundation in the methodological recommendation itself. It may of course be established by arguments of a different kind, but whether that is so is beyond the scope of this paper.

9 The RA model revisited

According to what I have termed the RA model, the task of social science is to do the empirical work that will confirm or disconfirm the instrumentalist implications of any proposed reform to criminal law doctrine. In the Traditional View, this model is instantiated via a strictly doctrinal approach to criminal law reform coupled with a positivistic approach to social science. On the social constructionist view of crime and criminal law, however, an instrumentalist role for social science conceived in such terms is ruled out. Can the RA model survive suitably reformulated? Does it even need reformulation?

There seems to be no question that criminal law reform as conceptualized by critical legal theory and critical criminology satisfies what I called at the beginning the

Naive Realist view. That is, critical scholars point out ways in which the criminal law is in some way wrong or unjust, and should be changed. In saying exactly *how* the criminal law is wrong and unjust, critical scholars make two essential specifications to the Naive View — the focus of attention must not be criminal law doctrine, but rather social practices of criminalization, and the norms to be assumed and deployed emerge from the perception of those practices of criminalization as practices of power. So one might say, then, that a Naive Realist RA model is not threatened by critical legal theory and critical criminology.

Moreover, the holistic study of social practices of criminalization, however much it may in methodology differ from empirical social science based on a positivist conception of scientific method, still appears able to be cast in the role of Research Assistant. Consider, for example, David Tanovich's recent critique of the Canadian criminal justice system, *The Colour of Justice*.[15] The core of Tanovich's argument is not, I think (I hope ...), trivialized by being put this way. The norms of Canadian criminal law do not appear to be racially biased: they are after all the familiar norms of western liberal democratic criminal justice systems. But the fundamental justice or otherwise of the Canadian criminal justice system does not depend on the content of the formal norms. Rather, it depends on the operation and effects of the practices of criminalization in Canada, of which the formal norms are only a small part. Those practices are full of racial bias and injustice: they oppress Canada's racialized minorities. To back up these assertions, Tanovich provides much empirical evidence about Canada's practices of criminalization, with references to criminological studies and the like. He goes on to

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[15]David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, Inc., 2006).

make recommendations about how various aspects of these practices should be changed.

An emphasis on social construction and practices of criminalization, on the other hand, threatens the RA model through its very holism. Holistic hypotheses and theories tend to be at a high level of generality that defies empirical support. Practices of criminalization are large enough in themselves anyway. They also exist alongside and relate in an intimate albeit complex way to a variety of other - political, economic, moral, psychiatric, religious, educational, familial – normative, labelling and sanctioning practices.[16] Among theoreticians, discourse about crime and practices of criminalization in a context of holistic methodology need not be especially grounded. But as a component in criminal law reform theory must come down from the clouds, and it can do so without ceasing to be holistic and focused on practices of criminalization.

A different kind of challenge to the RA model has been posed by Lacey. On the Traditional View, it is clear that criminal law doctrine takes priority over social science research — hence the idea of a research *assistant*. As Lacey sees it, the methodological shift to a focus on practices of criminalization reverses this priority: `legal philosophers are indeed intellectually dependent on sociologists of law'.[17] One might call this the TA

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[16]Nicola Lacey, Celia Wells, and Oliver Quick, *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process*, 3rd edn (Cambridge: Cambridge University Press, 2003), Chapter 1.

[17]Nicola Lacey, "`Philosophical Foundations of the Common Law': Social not Metaphysical," in *Oxford Essays in Jurisprudence: Fourth Series*, ed. Jeremy Horder (Oxford: Oxford University Press, 2000), 39.

model (Teaching Assistant), rather than the RA model. However, it is not clear what force this change really has. It has force against the RA model as the Traditional View interprets it — against the idea that the familiar doctrinal structure and content of the criminal law is fundamental and at its core unchanging. But if we abandon that idea in favour of an acknowledgment of the centrality of practices of criminalization and the fluid character of such practices, the insistence on the priority of the social seems now to have nothing to be insisting against. Lacey herself in fact has more recently described the relation between analytic and sociological jurisprudence as one of mutual dependency.[18] That implies more research collaboration than research assistance.

9 Conclusion

I began this paper with the gulf between, on the one hand, traditional models of criminal law reform based on a focus on doctrine and on criminology as instrumentally related to reform, and, on the other hand, contemporary left-critical views of law reform as properly motivated only by a concern for the marginalized, the powerless and the dispossessed. It is not hard to discern an incompatibility between these views, in the sense that one does and one does not place doctrine in a central position. My project in this paper, though, was to go beyond the apparent incompatibility and investigate how far the repudiation of the traditional models rested on solid ground, and how far-reaching were the implications of any such ground if discovered. I focused the investigation on two questions. First, does acknowledgment of the socially constructed

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[18]Nicola Lacey, "Analytical Jurisprudence Versus Descriptive Sociology Revisited," *Texas Law Review* 84 (2006): 948.

character of law entail or necessitate adopting a left-critical normative perspective on the criminal law? Second, what happens to the RA model if we take on board a social constructionist account of criminal law reform? The back-story to these questions is that I accepted the contention of critics of the Traditional View that the focus of criminal law reform should be social practices of criminalization, rather than doctrines of criminal law.

With respect to the first question, I argued that a left-critical perspective on criminal law and criminal law reform could be validly derived from a perception of practices of criminalization as practices of power, but not from the recommendation to focus on practices of criminalization in itself. The acknowledgment of the role of power in the sense understood here seemed left as intuitive, or at least requiring argumentative support from a different source.

With respect to the second question, the social constructivist approach to criminal law displaces legal doctrine from a position of centrality to criminal law reform. Insofar therefore as the validity of the RA model depends on foregrounding doctrine, the model must be abandoned. On the other hand, the most appealing picture of the relation between the analysis of doctrine and the study of social practices of criminalization, insofar as that relation is central to criminal law reform, is one of mutual dependence and collaboration. The analytic study of legal doctrine — especially via what I termed the `moral soundness' approach — has its place in criminal law reform, as long as it is constrained by and consents to co-operate with critical criminology's emphasis on social practices of criminalization.

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