Philosophy of Law
An introduction

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13 Crime and modernity

Scandals in criminal justice in the Western liberal democracies today tend to be linked not only with high-profile miscarriages of justice, with outspoken comments by eccentric or controversial judges, with false convictions and the imprisonment or execution of the innocent, but also with standing abuses such as the inappropriate judicial treatment of the mentally ill, or the unfair aspects of standard trial procedures, when they are said to be inherently biased or discriminatory against women or ethnic minorities. Such problems are serious, but the agenda of the theories critical of modernity in criminal law is more probing than this. It is not just that the idealised theory of equal justice for all sometimes comes into conflict with the practice in the criminal courts. Radical critics claim that even in theory the system of criminal justice in modern legal systems does not stand up to examination, because it rests on internally inconsistent foundations and flatly contradictory attitudes towards justice. This constitutes a fundamental challenge to the principles of criminal justice as discussed over the last three chapters. In this final chapter, I will critically assess this challenge.

Enlightened liberalism and its critics

What exactly is under attack here? The first point is that the general framework of the principles of criminal law today is provided by the doctrine of *mens rea* that emerged from the liberal individualism deeply associated with the Enlightenment, and from the English common law tradition. In accordance with the Enlightenment ideal of the rational, autonomous individual, the fundamental liberal assumption behind the *mens rea* doctrine is that every individual who is subject to the sanctions of the legal system is a free, rational agent, self-aware and consciously deliberating and acting on choices, hence presumed to be fully responsible unless proven otherwise. The free rationality of this agent is of special significance to criminal law, because the praise and blame that come with it generate specific conceptions and doctrines of fault and punishment, and it is the absence of this rationality that governs the law on insanity. The second point, as was made clear by the cases considered (Chapters 10–11), is that there is always a tension

between the recognition of *mens rea* as vital to a just legal system, on the one hand, and the judicial and governmental perceptions of the needs of public policy in terms of public health and safety, on the other. The doctrine of *mens rea*, then, is only one component of the system of criminal justice. Some see it as the idealised component, the feature that gives the system its character as an essentially just one, comprising a set of ideals that can be aspired to but not always wholly achieved.

The range of radical criticism

The range of radical criticism of this picture of criminal law as a precarious balance between individual justice and the protection of the public is very broad. Critics have attacked both its general principles and their application in great detail. The criticism ranges from Marxist and Critical Legal Studies (CLS) historical analysis of criminal law as essentially an instrument of class oppression, designed primarily for the protection of private property, to feminist critiques of the masculine assumptions behind its theory and practice, to postmodernist deconstructions of all the doctrines, theories and concepts that sustain criminal law. As with legal theory in general, a critical approach to the concept of the individual as the 'legal subject' is prominent. Deconstructing this subject involves an analysis of privileging and marginalisation. Questions of power are again central, revealing in particular the influence of Marx, Nietzsche and Foucault. Understanding the philosophy of crime and punishment purely in terms of power means not only the unmasking of ulterior motives and drives behind the institutions and ideologies associated with them, but also the reduction of the language of rights, justice and justification to expressions of the hierarchical relations of power in contemporary society. It means that all the liberal assumptions about the courts judging whether or not defendants are responsible for their actions, or juries determining whether or not defendants are sane according to law, or the general defensibility of the rationale behind sentencing, while not exactly meaningless, are at best to be regarded as indications of self-deception, and at worst as the cynical manipulation of public opinion. So let us see how this critical perspective on the criminal law is built up.

The individual and society

For most of the critical theories, the autonomous rational individual presupposed by liberalism is a myth designed to legitimise the state and the legal system. Marx's critique of liberalism and its 'monadic' individual, abstracted from its social relations, is the single most influential idea in modern critical theory. This individual is said to be a relatively recent creation, an artificial construct, projecting the idea of a self-contained, isolated individual person who plays, among other roles, that of the central subject of the criminal law. As a rational, deliberating individual, seeking

only his own interest, he can choose to conform his behaviour to the moral law and the law of the land, or face the punitive consequences. This 'person', it cannot be emphasised enough, is a fiction. The real individual, by contrast, is a concrete person, embedded in a social context of family, environment and social class, exhibiting a unique combination of individuated and socialised characteristics. According to its critics, it is the almost universal tendency of modernity (or, for Marxists, bourgeois ideology) to superimpose this fictitious conception of the individual upon the vast diversity of concrete individuals and thus to arrive at a 'subject' suitable for the purposes of criminal law.

Intentionalism and determinism

One of the central lines of criticism the critical legal scholars of recent times is largely derived from this contrast between the real and fictitious conception of the individual or the person. One prominent criticism is that there is a contradiction at the heart of liberal legal ideology on the question of free will and determinism, as it applies to human action in society. The question concerns the contexts in which people have real choices and those in which they do not. In criminal law, this age-old metaphysical problem comes into sharp focus. The reasonable assumption is that blame and criminal liability are completely dependent upon the presence or absence of these choices, but it is often not clear how to draw this distinction. A prominent CLS criticism is that liberal legal reasoning on these matters is completely confused, to such an extent that it makes criminal law, like every other area of law, radically indeterminate.

There are several versions of this criticism, but Mark Kelman's is representative and has been influential (Kelman 1987). His argument is essentially that in liberal society nearly everyone tends to oscillate between the two poles of 'intentionalist discourse' and 'determinist discourse'. His distinctive thesis is that most people, including lawyers, are drawn simultaneously to both descriptive accounts of the same course of events and find themselves compelled to accept one and suppress the other, while always remaining aware of what has been suppressed. Only at the outer extremes do we find philosophers or lawyers fixing exclusively on one pole or the other, either asserting universal responsibility and blame for all acts, regardless of pressure of circumstance, duress, illness, etc., or at the other extreme denying blame entirely by asserting universal determinism and negating personal agency.

Despite the implausibility of these extremes, what the criminal law is said to do is privilege the intentionalist discourse over the determinist, the latter being subordinated and arbitrarily confined to particular acceptable areas, so that the standing presumption is always one of a perfectly free agent. The fictitious 'monadic' self is imposed when it is thought necessary to uphold an intentionalist discourse, in order to show that free choices could have been made. When such choices are assumed, offenders are legitimately

punishable. A version of the alternative socialised self is substituted when excuses are thought appropriate – so that the self is seen as helplessly caught up in a causal chain of events beyond its control. In the modern liberal mind, there is an uncomfortable oscillation between these two discourses, as if everyone were aware of the arbitrary nature of the division of human action into these two domains. The result is a deep indeterminacy in criminal law as practised in the liberal democracies. This allows the criminal law to become a political battleground between leftist judges who interpret human actions as literally 'products' of their circumstances, thus excusable, and more conservative judges interpreting the same actions as outcomes of the unconstrained individual will.

Nevertheless, beneath the surface of this political conflict, we find agreement on the basic liberal commitment to the idea of the substantiality of the self as a metaphysical entity, a fixity that is only in specified circumstances 'causally dissolved' by the pressures of social life. The realistic alternative obscured by these abstractions, according to Kelman, is to see the self as a 'crossroads, a locus where things occur, a place in which action is just one result of past actions, known and unknown' (1987: 112), a concrete view of the self that is supposed to be neither determinist nor intentionalist, at least in the usual senses of these terms. What we need to consider now is the extent to which this critique can be upheld in relation to the central problems with the doctrine of *mens rea* (as laid out and discussed in Chapter 10).

Free agency, criminal intention and mens rea

According to the critical scholars, then, the main body of criminal law rests upon the assumption of a mythical legal subject, a typical self-sufficient individual who from his position of isolation is able to engage morally with the world beyond his island. He is capable of perfect self-control, is morally equal in standing with all others and in full possession of all his rational faculties. From the standpoint of mainstream jurisprudence, this picture of the legal subject is a caricatured exaggeration of what is a wholly reasonable and necessary normative framework in which to develop general and specific principles of criminal justice. Without such assumptions about individual autonomy and rationality, it would be impossible to justify a system of punishment that respects the rights of the individual. Such assumptions are built into the very idea of criminal justice. For the critical theorist, however, this response misses the point not only about what concrete individuals are really like, but also about the naturalisation of a conception that is really historically specific and relative. The assumptions embodied in the essentially fictitious picture of the individual in society today, far from being natural and inevitable, are said by the critics to be anachronistically rooted in the age in which liberal ideology was born, an age of *laissez-faire* capitalism, colonialism and extreme individualism, in which property-owners constituted a small minority, slavery was still legal and flourishing, starvation wages were

paid to legally free labourers and women of all races had virtually no rights. The new conception of the individual was an idealised character drawn from the educated, privileged élite. This was the age in which the principles of liberal justice took shape and it has left a lasting mark upon them (Norrie 2001).

The function of the *mens rea* doctrine stipulating conditions of responsibility is to distinguish those who are to be blamed for their harmful and criminal acts from those who are not. In the case of mental illness, it also distinguishes the fully from the partially responsible, or those who are less than fully culpable. Generally speaking, the defendant is required to have acted freely, knowingly and intentionally. On the specific question of freedom and unconstrained action, it is in the context of the defences of necessity and duress that the central tensions in the attitudes of the law come into sharp focus. In the classic case of *Dudley and Stephens* (1884), the 'freely' chosen actions of the starving sailors who murder the cabin boy are both condemned and mitigated. There was and remains a deep ambivalence about their guilt or blamelessness and about whether a private defence of necessity should be available at all. In such cases, there is usually a conflict between sympathetic public opinion and the harsh rulings of the courts, but there are also divisions within legal opinion. In a more recent incident, a decision not to prosecute survivors of the *Herald of Free Enterprise* (1987), when there was evidence that a man inadvertently obstructing their exit had been deliberately killed in the scramble to escape the sinking ship, seems to have been prompted by the realisation that under existing law they would have no defence to a charge of murder, and that this would be widely regarded as unacceptable (Smith 2002: 273), given the circumstances that many lives had been saved at the expense of one, who was going to die anyway. As noted in Chapter 10, the recent ruling (*Re A*, 2000) on the case of the conjoined twins indicates that the law might be shifting in a direction more in line with public opinion.

For the CLS critics, this legal uncertainty is symptomatic of the deep confusion and incoherence of the criminal law (Norrie 2001: ch. 8). Situations of extreme necessity or duress – as in the case of *Lynch* (1975), in which the defendant was forced at gunpoint to assist in a murder – are said to explode the myth of the rational, autonomous subject, but at the same time the courts are more disposed to find them guilty than not guilty, for reasons of expediency. The idea that people in such extreme situations of need or danger can be viewed in terms of the Enlightenment ideal as autonomous agents in full possession of their rational capacities, making carefully reasoned decisions, is seen as completely unrealistic. Such agents, the critics say, do not exist anywhere outside of the philosophical and legal imagination, let alone in the middle of an emergency. In Kelman's terms, the courts and lawmakers have readily at their disposal the discourses of intentionalism or determinism, so that the actions of the defendants can be set within the framework of either voluntaristic decisions or of a chain of events beyond the agent's control, according to the inclination of the judges or drafters of the law.

Intention and insanity

Intention and motive

With this kind of critical approach, all the elements of the *mens rea* doctrine fall under scrutiny. The concept of intention in particular is deconstructed to show how it has developed to serve particular political objectives. According to Norrie, the artificial distinction between intention and motive was originally drawn in such a way that any aspect of poverty could be eliminated as a defence, no matter how extreme the circumstances of cold or hunger, so that the threat to property would be defused, leaving the common law with a distinction that would be applied indiscriminately (2001: ch. 3), from relatively trivial offences such as criminal trespass, to the most serious such as treason and murder. With the separation of intention and motive, the most relevant aspect of a defence to criminality is said to be removed, resulting in a prominent principle of law that flatly contradicts its own proclaimed concern for individual justice. In excluding motive as a defence, the criminal law divests itself of the only element that could make coherent moral sense of criminal justice.

Intention and recklessness

CLS critiques of the common law tests for recklessness tend to focus on the unsettling of criminal law in recent decades on the question of whether the test should be subjective or objective for all offences. To reiterate, if the test is subjective, the prosecution has to prove that the defendant was actually aware of the risk implicit in the action that caused the harm. The 'subjectivity' is relative to the actual state of mind. If the test is objective, the prosecution only has to prove that the defendant ran an obvious risk that should have been apparent to any reasonable man/person. According to the subjective Cunningham test (1957), the jury had to be satisfied that the defendant had actually seen the risk and proceeded regardless. With the establishment of the Caldwell test (1982), the stringency of this requirement was relaxed for offences against property, so that the jury had to be satisfied that either the defendant saw the risk or the risk was of such a nature that as a rational agent he should have seen it. The implication was that if he closed his eyes to the obvious risk, he was as guilty of acting recklessly as if he had actually seen it. Finally, the so-called 'Caldwell lacuna' or loophole concerns cases that neither the subjective nor the objective test seem to cover. When the defendant does see the risk of, for example, pulling the trigger of an apparently unloaded gun, but then disregards the risk for what he erroneously believes to be good reasons and proceeds to run the risk, it cannot be proved with either test that he is guilty of recklessness.

The controversy that the *Caldwell* ruling caused has had several dimensions. Many have seen it as an application of common sense to an area of law that had been long overdue for reform. Given the difficulty of seeing into the

defendant's mind, especially to determine such an intangible and passing state of mind as recklessness, rather than the more enduring intentions that leave marks on the person's behaviour, the serviceability of the reasonableness standard was obviously an attraction. The plain fact that this would make it easier to get convictions, though, counted both in favour of the new test and against it. It was argued by critics that it would open the door to unlimited injustice in obtaining automatic convictions regardless of the subjective qualities of the defendants in each case, given that the reasonableness test was applied to young people and schizophrenics to whom it was completely inappropriate. It also raised some odd anomalies, such as the implication that personal injury would be easier to raise a defence against than criminal damage. If A recklessly takes out B's eye with an air-rifle and damages B's spectacles in the process, the application of the Caldwell test would result in the conviction of A for the damage but not for the injury, thus raising a fundamental doubt about the distinction. Some have responded to this by arguing that Caldwell should be universalised and applied to all offences, a suggestion that has so far been wisely resisted. Its introduction in the first place was also criticised at the time for pre-empting the authority of Parliament, which it was claimed had ruled out such a test. It was also criticised for blurring the distinction between recklessness and what was traditionally seen as the less culpable category of inadvertent negligence.

The wrangle over these two tests, which matches quite closely the similar dispute over the tests for the *mens rea* for murder, has been criticised by CLS scholars on numerous grounds. The main point in Norrie's historical analysis (2001: ch. 4) is his argument that the Cunningham and Caldwell versions of recklessness rest upon concepts of subjectivity and objectivity that are juxtaposed against each other rather than synthesised (thus allowing space for the Caldwell lacuna to appear), and that they are limited and distorted conceptions, the inadequacies of which can be explained by the nineteenth-century attempts to positivise the criminal law by eliminating the moralistic language of the common law, which had made it increasingly difficult for juries to determine guilt. The heritage for modern criminal law is an overrestricted concept of subjectivity and an overbroad concept of objectivity. The concept of subjectivity as embodied in Kenny's 1902 definition of malice and the *Cunningham* ruling is too narrow because it excludes what should properly be seen as subjective (such as the failure to take proper care by an agent who is well capable of it, even if he gave it no thought), rather than being shifted to the realm of objective negligence or recklessness. In Duff's colourful example, the bridegroom who 'genuinely' forgets to attend his own wedding is subjectively guilty; there is no need in such cases to resort to the imaginary 'reasonable man'. This narrowness in turn provokes the overextended concept of objectivity, counting as 'objectively' culpable what really could have been avoided. The result is a depth of conceptual confusion in the law that cannot be untangled by formulating ever more refined tests for recklessness. What is required is a genuine synthesis in a unitary understanding of recklessness in relation to intention, within the context

of a social consensus on the kinds of risks that it is justifiable to take. Without such a consensus, there is no possibility of such a synthesis.

The decision in *R. v. G. and another* (2003) (see Chapter 10), overruling *Caldwell* for cases of criminal damage, was at least in part a response to the relentless criticism by 'subjectivists' that it had opened the door to ever-increasing complexity on the law on recklessness, and to serious injustice to young offenders and the mentally unsound. This reinstatement of the subjective test without any revision or readjustment, however, will almost certainly perpetuate the problems in the more typical cases featuring adults of sound mind who claim never to have seen an obvious risk in their behaviour. The switch from the objective to the subjective does nothing to counter the criticisms that either test taken in isolation is inevitably defective.

Intention and foresight

As is well known, the *mens rea* for murder, resting on tests to distinguish it from manslaughter, underwent regular reassessment and adjustment in the second half of the twentieth century. At the heart of the problem in this area lay a collision of views on how the guilty mind in cases of homicide should be established, in terms of what was intended and what the defendant foresaw. The eventual, more or less stable outcome of the disputes and reversals on this question was a test for murder that incorporated both the subjective and the objective test, in as far as it retained the fundamental *mens rea* principle that the actual state of mind in terms of intention and foresight had to be proved, but also allowed the jury to infer actual intention (to cause at least grievous bodily harm) from what was objectively foreseeable by 'the reasonable man', along with the rest of the evidence.

There have been many detailed criticisms of this and subsequent minor adjustments to the law on this issue. CLS criticisms have been mixed, but the general tenor of the criticism is that the uncertainty and wavering are symptomatic of a deeper malaise in the law, that they point to an indeterminacy that opens the law to political manipulation. Norrie's argument (1993: 52–7) is that the perpetual narrowing and broadening of the definitions of intention and foresight have served the purpose of enabling the judiciary to switch almost at will between the requirements of individual justice and the interests of state policy and social control. The elaborate pretence of following legal logic is designed to bridge the gap between legal ideology and the social reality, given that the facts of all the cases of homicide under consideration over these years are so radically different.

Critical perspectives on criminal law and insanity

In mainstream jurisprudence, the orthodox framework for the law relating to insanity is, as its critics point out, predominantly rationalistic. The fundamental idea governing legal thinking in this area is that individuals beyond

the age of majority who lack reason (the great Enlightenment virtue) are not legally responsible – they are legally insane. This, it should be remembered, does not necessarily mean that they are medically insane, or that all those found medically insane are legally insane. Insanity is defined as a distinct legal category. It is a question of what the law is to regard as the kind of mental impairment that will be accepted as negating responsibility. It was partly the recognition of the unrealistically strict dichotomy between the presence and absence of the faculty of reason that led to the 1957 introduction of the distinct defence of diminished responsibility through impairment of the mind, thus allowing a gradation of insanity and responsibility. Nevertheless the concepts of the reason and rationality of the individual remain at the centre of legal thinking in this area.

Twentieth-century medical research and psychiatric theorising on sanity and madness underwent transformations more far-reaching than at any earlier times, but it occupies a domain quite distinct from that of the law. In general cultural terms, the impact of modern theories of the unconscious on the understanding of madness has still not been fully absorbed. More radical anti-establishment theories derived from existentialism and existential psychoanalysis (such as the anti-psychiatry movement), or the philosophies of Nietzsche and Foucault, have deeply influenced criticisms of the social and legal treatment of the insane. Scientifically and medically, however, there is no real consensus on even the most basic features and causes of mental disorders. There is no common thread running through the radical critiques of the modern treatment of insanity, but a number of features are prominent. Most are united in the claim that the medical heritage of the Enlightenment is anything but humane and 'enlightened'. On the contrary, it is seen as the increasingly repressive and dehumanising exercise of institutional power for the sake of social control, rather than the well-being of the patient. One of the basic beliefs behind many of these critiques is that the rationalistic language of the law on insanity and responsibility carries all the uninterrogated assumptions of modernity. From this point of view, the labelling of some people by others as 'insane' is the focal point of a power struggle, through which the self-designated 'sane' dominate and exclude others. 'Sanity' itself is as much a construct as 'insanity', identified as its assertion is with the excessively rationalistic mind. Madness is seen as a holistic condition, which cannot be diagnosed or treated as a malfunction in one isolated aspect of the whole person, such as the capacity to reason.

Some of the CLS writers have drawn extensively upon these sources to present a picture of English and US law on insanity that is sharply at odds with the mainstream interpretation. The most cogent of these accounts is developed by Norrie, who focuses on the concepts of rationality and power. Citing Foucault's histories of the early modern transitions in the treatment of madness (Foucault 1967) and the new practice of confinement of the insane, in conjunction with the rise of psychiatric science, Norrie identifies the struggle for power between the psychiatric and legal professions as the key to

understanding contemporary law on insanity. The real struggle, he says, is seen in the advance of scientific psychiatry invading the domain of lawyers, whose professional interest lies in retaining control over the definition of insanity. Historically, the conflict developed in the nineteenth century when the focus on moral education and reform of the asylum inmates gave way to the emergence of scientific medical expertise in theories of underlying organic causes behind the various types of mental illness. Although the two professions were united in their interests as agents of social control in their own respective domains, they came into inevitable collision over their fundamentally opposed approaches to insanity. If, for a scientific psychiatrist, insanity is a matter of physiological causation in the brain, the medical evidence takes the matter out of the hands of the court (as was evident as early as the cases of *Hadfield* (1800) and *M'Naghten* (1843)).

Furthermore, the organic causes could attack the will or the emotions as much as the cognitive abilities, thus potentially rendering the legal rationality tests virtually irrelevant. This is why in Britain the legal profession has resisted encroachment by psychiatry upon the law on insanity. The causal physiology is seen as a threat to the liberal conception of the rule of law, with its presumption of the liberty of the individual, which was increasingly regarded as an object of scientific control and manipulation. It is also seen as having implications throughout the criminal law, in as far as 'sickness' models of crime were applied, negating the very idea of individual responsibility and retributive punishment. In the USA, by contrast, psychiatry has made greater inroads into the legal domain, since the Durham ruling in 1954, creating the 'product test' for insanity, according to which the defence has only to prove that the criminal conduct was caused or produced by the mental disorder. Irresistible impulse has also been incorporated as a complete defence, in the USA and elsewhere, rather than as a mitigating defence as in Britain.

The overall point of this account is that, if the current state of the law on insanity is shaped by this professional power struggle, the official version of the function of the law, in terms of individual justice and public safety, is nothing but a legitimating ideology. Norrie illustrates this by linking insanity and mental illness in general with social and economic status. It is not so much that its distribution is directly caused by factors of class, sex and race as that there is a deliberate and explicit legal strategy to decontextualise all forms of madness by focusing exclusively on the question of presence or absence of rationality in the individual, removed from the environment in which the condition developed. As in every other area of law, individuals are regarded by liberalism as self-enclosed 'monads', in abstraction from the social relations within which they have their true meaning.

Feminist criticisms of criminal law

One of the most obvious facts about crime is that most of it is committed by males. There is therefore insufficient evidence for the comparison of treatment

of male and female defendants in the criminal courts to substantiate any strong conclusions about the fairness or unfairness of this treatment. Feminist research in this area focuses more on the general experience of the criminal law by women, who are of course no less the victims of crimes than males. The research has revolved around male sexual violence against women, in particular, domestic violence and rape. Apart from this focus on issues of special significance and concern to women, however, feminist jurisprudence also extends to critical analysis of the general concepts and principles upon which the criminal law rests, including the doctrine of *mens rea* and the principles behind the legal defences.

As in other areas of law, the question of judicial impartiality and even-handedness features prominently in the feminist criticisms. Almost the defining characteristic of the liberal ideal of justice is the principle that it is unfair to apply different rules to different classes of people, whether this involves gender, social class, race or any other irrelevant feature. The principle of applying the same rules to males and females is seen as a question of basic equality and justice. It would be unfair, for example, for the *mens rea* for murder or the test for recklessness to be different according to the sex of the offender. The problem for feminist critics is their perception that this apparent balance does not lead to fairness at all. On the contrary, it is argued, this formal equality, if uncritically and rigidly applied, can reinforce the substantive unfairness that is already present in criminal law, embedded in the legal concepts. In real life, a difference between a typical woman's options and those of a typical man can make the operation of legal principles completely unfair. This argument can be illustrated with the two central examples, domestic violence and rape.

As a social problem, violence against women in the home has traditionally been treated as a domestic issue, reinforced by the private–public distinction in law. Criticism of this distinction is the basis of the feminist analysis of this problem. Wives and partners of violent males have had very little substantial protection from the criminal law. The main criticism lies in the disparity between the low levels of prosecution of male perpetrators of violence and the treatment of women who react violently against it. In cases of murder in response to long-term domestic violence, one point at issue concerns the possible defences, which include the complete defence of self-defence (leading to acquittal) and the partial defences of provocation or diminished responsibility, which are the two 'mitigating' defences leading to reduction of the charge of murder to a conviction for manslaughter. Self-defence is defined so narrowly, in particular with the stipulation that it must be a response to an immediate threat to one's life that it is almost impossible to run as a defence, especially given the relative physical power of the average male and female. The alternative defences, provocation or diminished responsibility, are regarded as inadequate because they only mitigate the offence, and are inherently biased against women by virtue of the standards of reasonableness that they rest upon.

The main criticism, though, addresses the distinction between intention and motive, which we have already seen criticised by the critical legal scholars. The feminist arguments against the exclusion of motive from the defences in criminal law are that it works against female defendants because it deprives them of any reasonable line of defence to the kind of crime that is almost exclusive to women. In cases of murder in response to long-term abuse and violence, the conceptual separation of intention and motive is said to be unfair, because it abstracts one discrete mental state (whether they meant to kill) from the other, morally crucial one, of why they formed the intention, or what drove them to it. The law is designed to exclude motivation by despair, which is the most common female reaction to such a situation.

The law on rape is one of the most contentious issues, because feminists argue that it is here that all the gender-bias, both overt and covert, comes sharply into focus. As is well known, cultural prejudices about female sexual behaviour and norms of femininity colour the atmosphere of rape trials. Attempts at character assassination are commonplace and there is an imbalance between attitudes towards male and female sexual histories. In short, the much-reported experience of rape victims is that it is they, rather than the accused, who are on trial. In the feminist critical writings on the law on rape, the problem of consent in relation to *mens rea* has been central. This problem has several dimensions, but there are two important points to concentrate on here. Part of the definition of rape is sex with one of the parties withholding consent. It was ruled in *R. v Olugboja* (1982), a case in which two women were terrorised into submission, that consent was no defence to rape. This was a clarification of the law that meant in effect that it was actual consent under duress of threats that was no defence, that submission did not imply consent and that the prosecution did not have to prove that the victim physically resisted. On the question of whether the defendant 'believed' that the woman was consenting when she clearly was not, however, recent law has been much more problematic.

In an earlier case (*D.P.P. v. Morgan*, 1976) Lord Hailsham notoriously ruled that a man who genuinely but mistakenly believed that a woman was consenting to sex was not guilty of an offence. His argument that the principles of *mens rea* had to be applied evenly regardless of gender sounded entirely fair and reasonable. As in other non-sex-related cases involving males or females, the subjective test of recklessness had to establish the actual state of mind of the defendant at the time of the offence, rather than the objective test of what it was reasonable to believe. Thus, it had to be established that a man charged with rape did actually believe or realise that the woman was not consenting, regardless of how unreasonable this belief might be. The objective standard, he said, would undermine the presumption of innocence. Among the numerous feminist criticisms of this ruling, some have focused on the sudden readiness of a male judge to abandon the cherished standard of the reasonable man in a context in which its application

would favour female victims (Barnett 1998: 277). Others have argued that existing law did not in fact dictate the selection of the subjective test for this type of offence, and that the underlying principles would equally have allowed the imposition of the objective test. Each of these interpretations is questionable, given the state of the law at that time on recklessness, but the imposition of the objective test was, of course, exactly what was done a few years later (*Caldwell*, 1982) for a specified class of offences against property, with considerations of social policy overriding the subjective test. Apart from the question of the perceived importance for social policy of the problem of rape in comparison to the security of property, this raises all the problems laid out by Norrie (see above) in relation to the excessive narrowness of the subjective test for recklessness. In the context of rape, does it really make sense to allow a defendant who, against however much evidence to the contrary, has chosen to believe that a woman is actually consenting, is 'subjectively' guilty of no offence? The conceptual problems with defining recklessness unambiguously are accentuated here, but the core of the feminist argument, that the bias in favour of males can be concealed by the appearance of judicial impartiality, does seem to be vindicated. It was not until the Sexual Offences Act (2003), which stipulated that a jury must be convinced that a man's belief that a woman was consenting was a reasonable one, that this particular injustice was eliminated.

It is the way in which this concept of reasonableness operates in criminal law, however, that remains one of the principal targets of feminist criticism. It features prominently in all the defences. In judging guilt and innocence, or degrees of responsibility and grounds for mitigation of sentence, the standard of behaviour is what can be expected of a reasonable man or person. With necessity and duress, it is a question of what could be expected of a person of 'reasonable fortitude'. With self-defence, it is a question of what constitutes 'reasonable force', and of what a reasonable person would have done in the circumstances. In cases of provocation, it is a question of the kind of provocative acts that might induce a reasonable person to suddenly and temporarily lose self-control. According to the feminist criticisms, all of these are defined in such a way that they implicitly refer to male standards of reasonableness, making one assumption after another about the substantive equality of power between males and females, when the opposite is manifestly the case.

An assessment of the critical theories

As noted at the outset of this chapter, the real force of the radical criticisms lies in their charge that even at a deep theoretical level the modern systems of criminal justice are defective, and that it is not just a failure of putting sound principles into practice that leads to tangible injustices in the courts. We have to ask now whether this is borne out by the arguments and examples given by the radical critiques, and if so, whether or not it is

fatal to the credibility of a liberal theory of criminal justice. A plausible answer is that to an extent it is borne out, that one can concede many of the insights into the problems and inconsistencies in the presuppositions made within mainstream criminal law and jurisprudence, but without allowing the conclusion that, for example, the rule of law is an empty ideology or that the criminal law is nothing but an instrument of oppression rather than of justice.

On each of the specific criticisms of the principles and operation of the *mens rea* doctrine, a common feature is that problems and dilemmas are exposed without a positive solution being proposed. Let us consider again the essential points in each area. On the question of agency in the defences of necessity and duress, it may well be that cases such as these raise intractable dilemmas that have to be dealt with pragmatically by the courts. It is widely agreed that the state of law on these defences is inconsistent and overdue for radical overhaul. Norrie and Kelman, among others, have highlighted some of the conceptual problems effectively, but the basic moral problem is a deep one. The question of the value of human life and of the justifiability of killing the innocent creates a deep moral schism in contemporary society and poses dilemmas that cannot be resolved by utilitarian numerical calculations. These dilemmas are arguably not created by particular societies, by the ascendancy of an economic class or by male domination. They are the inevitable outcome of serious moral reflection in any pluralist liberal society that does not impose uniformity on moral thinking.

The problems relating to *mens rea* and intention also run deep. Both CLS and feminist critics have criticised the separation of intention and motive as morally counterintuitive and as an expedient for the protection of property and/or male domination, by expelling from the main trial process the one factor that could lead to acquittal. The separation of the process of determining guilt or innocence from the secondary process of sentencing in the light of mitigating factors, however, does have a purpose, which cannot be reduced to these charges of expediency and cynicism. The admission of blameless motive as a substantial defence, which if successful would lead to acquittal, would almost certainly create more problems than it solved. Would it really be satisfactory to allow a standard defence to offences against the person, based upon honourable or blameless motive, given that the intention was to harm? Norrie's argument that the present state of the law makes a cold-blooded contract killing morally equivalent to a mercy killing motivated by compassion (2001: 39) only illustrates the problems with the mandatory life-sentence for murder, which could be reformed with lower minimum sentences for euthanasia and possibly other forms of homicide. The case for root-and-branch reform of the intention–motive distinction has simply not been made.

The problems and inconsistencies in the law on intention in relation to recklessness are undeniable. Many contradictory stands have been taken by judges and legal writers in recent years on questions of criminal liability in

relation to the thorny problem of how and where to set the boundaries of intentionality in relation to, for example, drunkenness, dangerous driving or the use of firearms. The distinction between criminal negligence and recklessness has been particularly problematic. It can be argued against the CLS critiques, however, that this difference of opinion and lack of certainty is an inevitable feature of any society and its legal system, rather than specifically of the modern liberal legal systems. The tension may in part be the consequence of attempting an almost impossible balancing act between assumptions about autonomy and responsibility, on the one hand, and the need for consideration of public safety, on the other, and this tension may in certain respects be more acute at some times and in some systems than others, due to specific social conditions, but this does not vindicate the CLS thesis that the law is entirely incoherent or radically indeterminate.

Similar problems appear in any critical assessment of the radical critics of the law on insanity. In mainstream criminal jurisprudence the evolution of the law on insanity has to be understood in terms of the *mens rea* doctrine, but as any examination of this history will reveal, the standard *mens rea* requirements of cognitive and volitional competence are constantly balanced against consideration for public safety, even where this is not explicit. One of the problems with the critical theories is that genuine concern for public safety is systematically interpreted as social control, as if there were no concern for justice within the legal system or for humane and beneficial treatment within the psychiatric profession at all. The argument that because legal reasoning conceals relations of power and struggles between vested interests, then there are only relations of power and no real values at stake is invalid. The whole of human affairs and human interaction can be described in terms of power, if one is determined to do so, but this is only one description from one particular angle. There is more to it than this.

Conclusion: Enlightenment values and the rule of law

Resistance to the sweeping criticisms of the systems of criminal justice in the liberal democracies has revolved around a defence of the independent value of the rule of law, regardless of its origins. It is certainly arguable that the development of procedural rights in the eighteenth century was intrinsically linked with the interests of the privileged few in their battle against the old order, but this does not undermine their real value to real individuals. The security of the individual citizen from arbitrary arrest, imprisonment and torture has an impact on the realities of criminal law in a liberal society, quite independently of how fictitiously liberals conceptualise 'the individual'. An illuminating example of this can be seen in one of the milestones in the struggle for women's rights. In the case of *R. v. Jackson* (1891) a woman estranged from her husband had been abducted and imprisoned by her husband. The remedy at law was for her relatives to apply to the court

for *habeas corpus*, legally compelling the husband to release her. This unprecedented action established the common law principle that such imprisonment of married women was not legal, an outcome that was only made possible by the liberal rule of law. It may be objected that such legal remedies were only in practice available to the educated élite, but it can hardly be denied that such developments constituted a real advance in the cause of women's equality.

In assessing the values of the Enlightenment it is also necessary to separate them from the political and social conditions with which they were contemporaneous. While it is true that there were glaring contradictions between the grand universalism in the proclamations of human rights and the practical, and in some senses legal, denial of those rights to the lower classes, to women and to black slaves, there were at the same time liberal reform movements to change these social and economic conditions. The 'empty' ideal of universality was an essential presupposition behind these reforming ideals. The concept of the autonomous reasoning individual, although formulated in abstract terms, was also indispensable as a general formulation, as was the idea that each of these autonomous individuals was equal in standing, even while this flatly contradicted the social reality of differences in social status.

The principle of autonomy has, as we have seen in the critical writings, given rise to numerous problems, but one of the most general problems in criminal law – not just in critical legal scholarship – is that the obvious truth that autonomy as the capacity for self-governance is a matter of degree, that people vary enormously in the type and quality of their rationality, is frequently overridden by the assumption that one either has this capacity or one does not. The generally unexamined assumption is that there is an implicit standard of sufficient degree of autonomy (rationality, specific cognitive skills, ability to choose, etc.) for the ascription of responsibility. As we have seen repeatedly, the traditional standard of the reasonable man is notoriously implausible for assuming a general norm to which everyone and no one conforms. However, when suitably adjusted to 'the reasonable person', it seems hard to avoid the conclusion that, despite the problems highlighted by feminist critics, some such generality is inescapable when formulating a standard that everyone is presumed capable of. The liberal ideal of the autonomous self may be a fiction, but it is also an inescapable one. It is undisputed that a new conception of the self emerged in the early seventeenth century, a new dimension of inwardness and individuality, which had momentous political and philosophical consequences. It was linked with, among other things, the growing awareness throughout the following centuries of individual human rights. What is not generally agreed is that this new idea of 'the individual' was simply the ideological product of the capitalist mode of production, or the latest strategy to perpetuate male domination.

Study questions for Part III

General question: Are the radical critics of modernity justified in their attack on mainstream criminal law theory?

Further study questions: Explain the role of the rational, autonomous individual as the subject of criminal law and assess the critics' arguments that it leads to incoherence and radical indeterminacy. Does the *mens rea* doctrine stand up to the scrutiny of the radical critics? Does the deconstruction of intention and the intention–motive distinction undermine the assumptions behind the *mens rea* doctrine? Do the CLS critiques of the tests for recklessness resolve the problems surrounding the subjective–objective wrangle? Are the radical criticisms of the law on insanity convincing? Explain the distinction between overt and covert gender-bias. How justified are the feminist critiques of the legal concepts of reasonableness and rationality in the context of domestic violence and rape?

Suggestions for further reading

For general reading on the values of liberalism and the Enlightenment, and their postmodernist critics, see the references at the end of Chapter 5.

The essential background in criminal law is provided by the cases, critical discussions and proposals for reform in *Elliott & Wood's Casebook on Criminal Law*, Allen (2001) and the Smith and Hogan textbook on criminal law, Smith (2002). Elliott and Quinn (1996), *Criminal Law* is also useful.

The most relevant Marxist and CLS writings on criminal law referred to in this chapter are Norrie (2001) and Kelman (1987: ch. 3).

The most useful examples of feminist perspectives on criminal law are Lacey *et al*. (2003), Graycar and Morgan (2002), and Nicolson and Bibbings (2000). See also Barnett (1998: chaps 11 and 12) on criminal law in relation to domestic violence and rape.

On the radical critiques of the modern treatment of insanity in general, the most influential writings are found in Foucault (1967), Szasz (1960) and Laing (1965). For critical discussions of insanity in relation to criminal law, see Reznek (1997) and Norrie (2001). These should be compared with the more orthodox accounts referred to in Chapter 11.