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# Criminal Law and its Critics

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**LAW & CRIME****OVERVIEW**

Chapter 1:

- Explains the purpose of this book.
- Outlines some prominent features of the institution of criminal law.
- Introduces a number of important critical perspectives on criminal law.

**KEY TERMS**

criminal law the libertarian critique the 'scientific' critique the socio-political critique the restorative justice critique

**Introduction**

This book is an introductory account of the institution of criminal law, written for students and scholars of criminology and related social sciences. To be clear, it is not a book on 'law for criminologists'. Rather, we seek to provide an interdisciplinary analysis of key elements of the institution of criminal law. The disciplines we draw upon include not only criminology and law, but also history, philosophy, politics and sociology. Drawing upon works from these disciplines, we explore the creation, development and key features of criminal law, along with some of the ideas, values and projects that have shaped the institution and our expectations of it.

Our account of criminal law is a critical one. We do not start out by making the assumption that criminal law is a necessary social institution – necessary to restrain the tendency which many people have to behave in ways that are seriously wrongful and harmful. Nor do we assume that the criminal law of today is a distinct improvement over what went before. Rather, we want to provide a fair hearing to the viewpoint that criminal law is a deeply flawed institution, e.g. one which causes more harm than it prevents or which unjustifiably violates the liberties of people in order to provide spurious benefits to society. On the other hand, we will seek to avoid the opposite error of taking it for granted that criminal law is a 'failing' social institution. Hence, we will show that, for all its

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deficiencies, the criminal law has played a crucial role in articulating and defending very important social values.

In order to chart our course more clearly, we will start by identifying some core features of criminal law. We will then describe, in very general terms, some common critical stances towards this institution.

### Some features of criminal law

#### *Rules*

Probably the most prominent feature of criminal law is that it contains a body of rules. More specifically, these are rules of conduct which are formulated and enforced by society's rulers through its legislatures, courts and penal apparatus. These rules are addressed to all persons when they are within the jurisdiction of the rulers (Duff, 2002a: 14). They tend to specify types of behaviour that the rulers declare to be public wrongs: conduct which in that society is deemed harmful, unjustifiable and of concern to all righteous members of the society. These types of behaviour are called 'offences'. The rules also stipulate that those found guilty of committing an offence are liable to some punishment such as a fine or period of imprisonment. The rules tend to be prohibitory in character, i.e. they refer to conduct from which people must refrain. Less commonly – and also controversially – some rules make it an offence to omit to do something in certain circumstances (Ormerod, 2005: 75ff; cf. Hughes, 1958).

#### *Moral dimensions*

Another important feature of criminal law is that violation of its rules is widely regarded as immoral and/or disreputable. Those who violate the criminal law often attract the disapproval, and sometimes even the hatred, of 'respectable society'. Partly, this is because many of the best known rules of criminal law prohibit conduct – such as murder, theft and rape – that is already, outside of the criminal law, regarded as immoral or disreputable (Duff, 2002a: 3–4, 12). As Sir James Fitzjames Stephen – author of the nineteenth-century classic *History of the Criminal Law of England* – put it:

The substantive criminal law ... relates to actions which, if there were no criminal law at all, would be judged by the public at large much as they are judged of at present. If murder, theft and rape were not punished by law, the words would still be in use, and would be applied to the same or nearly the same actions. ... In short, there is a moral as well as a legal classification of crimes. (Stephen, 1883: 75)

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However, even where the conduct prohibited by criminal law is not obviously immoral or disreputable – is not patently wrong independently of its legal prohibition – those who are found guilty of engaging in such conduct can be morally tainted by their criminal conviction. It is as if the criminal law has its own moral authority so that once it prohibits a type of behaviour, to engage in that behaviour becomes immoral or disreputable even though it would not previously have been so. Hence, along with the formal sanction that is incurred by being found guilty of breaking the criminal law (e.g. the sentence of a fine or imprisonment), criminal conviction – or even suspicion of being involved in a criminal offence – tends to attract a social stigma. To get in trouble with the (criminal) law tends to push one towards or over a line that separates respectable from disreputable elements of society.

This 'moral' dimension of criminal law cannot be ignored if we wish to provide an adequate account of it. However, neither should it be overstated. In modern society there is a strong tendency to use the criminal law to regulate more and more conduct which – although considered injurious or dangerous – is not as obviously immoral or disreputable as Stephen's examples of murder, theft and rape. Being found guilty of breaking one of these rules does not patently reveal some deep flaw in one's moral character (in the way that even a minor conviction for theft is often thought to reveal the character flaw of dishonesty). The more criminal law is used in this way, the harder it is to sustain the notion that breach of the criminal law is inherently immoral or disreputable. Also, many of the sanctions for breaches of criminal law (even where the conduct in question does seem immoral or disreputable) are imposed in such a professionalized, bureaucratic way that they become more like mere 'penalties' than 'punishments'. The latter term carries connotations of moral censure which are not so present in the former: penalties provide people with instrumental reasons to obey the law but do not necessarily construct the penalized behaviour as immoral or opprobrious.<sup>1</sup>

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***Criminal procedure***

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Another feature of criminal law is that there is a special procedure for determining whether somebody suspected of committing an offence, and who might wish to dispute the case against them, is guilty of violating one of its rules. The actual nature of this procedure has changed significantly throughout the history of criminal law and it still varies considerably between different countries (Delmas-Marty and Spencer, 2002; Vogler, 2005). However, a persistent underlying premise is that determining the guilt or innocence of a person accused of committing an offence – and certainly a serious offence – is a grave matter and should be done on the basis of a very rigorous testing of the case against the accused.

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Such an approach is of course time-consuming, costly and likely to result in at least some people who have in fact broken the law evading conviction. Hence, there tend to be counter pressures and temptations to avoid the most rigorous process for many cases. This tends to result in practices designed to avoid having cases contested by, for instance, informally bargaining with accused persons over the charges to be brought against them or over the sort of sentence that will be demanded. It also leads to the creation of more summary processes for what are deemed to be minor offences attracting relatively light sanctions. It can also result in tendencies to remove the regulation of some conduct from the ambit of criminal law proper, by for example creating new 'quasi-criminal' regimes of regulation which use 'on the spot fines' imposed with little formality by agents such as traffic wardens, ticket inspectors or even machines.

In the popular imagination, the process of determining whether somebody accused of breaking the criminal law is guilty or innocent is a weighty affair involving rigorous testing of the case and lengthy and solemn deliberation by the decision-makers. This certainly captures the reality of some criminal law. However, a large proportion of cases are handled in a much more summary manner. It is not surprising that many of the public controversies surrounding criminal law are to do with whether the procedures for determining guilt or innocence are appropriate.

### *Principles of liability*

Along with substantive rules of conduct, criminal law contains principles of liability which indicate who or what can be held legally responsible for conduct which infringes its substantive rules and how their responsibility is affected by various circumstances. Most basically, it contains principles of capacity. Only certain entities are deemed to be within the ambit of regulation through the criminal law. The entities that are included vary between different historical periods and different countries. So, for instance, inanimate objects which cause death have been put on trial in ancient criminal law systems (Hyde, 1916). And, in medieval Europe, animals were sometimes subjected to criminal prosecution and punishment (Evans, 1987 [1906]). Contemporary English criminal law regards inanimate objects and non-human animals as lacking the capacity required to be subject to regulation through criminal law. This does not mean, of course, that they are not subject to regulation (many animals get trained and controlled and animals that behave badly and cause us harm and trouble are dealt with); rather their conduct is regulated through other mechanisms.

Amongst human beings, young children are generally considered to lack 'criminal capacity'. Again, this does not mean that nothing will happen to a child

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below the age of criminal capacity who engages in the sorts of behaviour prohibited through criminal law. Rather, it simply means that they will not be subject to intervention through the mechanism of criminal law. Ideas about the precise age at which human beings acquire criminal capacity vary significantly over time and between countries. In England and Wales the official age is currently ten, in Belgium 18 and in Scotland eight.<sup>2</sup> Other human beings who are regarded as lacking criminal capacity include those adjudged to be insane at the time they committed an act which would otherwise be an offence.

The other significant entity which is subject to the regulation of contemporary criminal law (since around the middle of the nineteenth century) is the corporation: a legal person with no physical existence (Ormerod, 2005: 235). The development of the idea that a corporate body has duties to comply with the rules of criminal law and can be prosecuted and punished for failure to comply is bound up with the fact that, in modern society, a great deal of harm and injury results from the actions of corporate bodies. Perhaps less obviously, it seems to be bound up with the notion that these bodies have minds of their own, which are not reducible to the minds of individual human beings who contribute to corporate activity. As such, they are considered to be entities which are capable of being *addressed* by the law (see Chapter 6).

For those entities which have criminal capacity, a further question arises of whether they should be held responsible for engaging in conduct prohibited by criminal law given the circumstances under which they engaged in it. The key issue here tends to be the extent to which the person whose conduct is in question had a reasonable opportunity to do something other than the act which – it is alleged – is a criminal offence. So, for instance, human beings are animals that respond instinctively to physical stimuli. Sometimes, instinctive or almost instinctive bodily movements may result in the sorts of ‘conduct’ that criminal law prohibits. For example, if a person (D) is walking near the edge of a cliff and slips and is about to fall off the edge, it is virtually instinctive to grab something that will prevent them from falling. If that something is another person (V), and if as a result V is pulled over the cliff edge and dies, but D somehow survives, then the question arises of whether D (presuming their story is believed) should be able to avoid criminal liability for the death of V. D’s argument, in essence, would be that because their conduct was instinctive it was involuntary and so without fault and that it should not therefore be condemned as criminal.<sup>3</sup>

The above example is fairly straightforward; although various complexities could be introduced. (For instance, if D had ignored various warnings that walking near the edge of this particular cliff was highly dangerous and not allowed, does D’s ‘prior fault’ affect their criminal liability for V’s death? Is D’s argument one of necessity rather than involuntariness, and if so can necessity ever be a defence where the charge concerns killing? See Chapter 4.) There are however, much more complex situations encountered by criminal law. A person will often

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engage in conduct prohibited by criminal law but argue that they had no reasonable opportunity to behave otherwise for a variety of reasons. For example, they might argue that they were acting under superior orders, out of necessity, whilst subject to various forms of coercion and pressure, in self-defence, as a result of some psychological compulsion which they were helpless to control, or due to some profound mistake about the nature of their actions. All of these situations raise complex questions about whether the actor should be held criminally responsible for their actions, i.e. whether their actions should be condemned as criminal and the actor punished as a criminal.

### *Purposes of criminal law*

Criminal law has been shaped by various ideas about its purposes. Some of these ideas are compatible with each other; some are in tension with other influential ideas and these tensions manifest themselves within the criminal law (Duff, 2002a).

One patent purpose of criminal law is to control the conduct of persons. More specifically, criminal law tends to be concerned to prevent conduct which directly or indirectly causes substantial harm, trouble or annoyance to other members of society where such conduct lacks justification. Criminal law might be understood then as one institution which constructs outer limits of permissible behaviour in society – and polices those limits by imposing painful sanctions and social stigma on those who cross them. Provided people stay within certain outer limits, the criminal law is not really interested in how members of society live their everyday lives. That is to say, criminal law is not in general the sort of institution that tends to be concerned to regulate the tiny details of everyday behaviour (e.g. it is not usually concerned to control wrong-doing which does not concern the wider public, nor to punish bad manners or unhygienic habits). Still less is it usually concerned with people's thoughts. People can imagine all sorts of mischievous acts without attracting the attention of criminal law; to attract such attention they must at least attempt to act on these thoughts either directly or by inciting or conspiring with others. As we shall see, however, some critics think that criminal law *does* tend to intrude too deeply into the details of our lives. Also, as Foucault (1977) among others has argued, those who are found guilty of transgressing the limits set by criminal law are sometimes subjected to sanctions which do not simply inflict pain but are designed to reshape the habits, routines and ultimately the personalities of transgressors.

If controlling wrongful conduct is a core purpose of criminal law, important questions arise about the relationship of criminal law to other interventions which have a similar purpose and about the precise role which criminal law does and should play in the regulation of wrongful conduct. Again, there is a

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variety of ideas about such issues. In some, criminal law is a vital but secondary mechanism of crime control: people learn to behave correctly through other mechanisms, e.g. they absorb ideas about honesty from the wider culture so that, even if they thought themselves extremely unlikely to be subject to criminal sanctions, they would still refrain from dishonest acts such as stealing. In such thinking, these other mechanisms occasionally fail for one reason or another, and criminal law is necessary to deal with the results of these failures. There are other ideas in which the criminal law plays a more basic role in shaping human conduct. For example, the regular punishment of offences and the discussion this provokes might be thought to play a vital role in implanting in people a deep sense of the wrongfulness of certain types of behaviour (Braithwaite, 1989).

There are other ideas about the purpose of criminal law which do not see controlling conduct as its sole or even central purpose. For instance, the purpose of criminal law is sometimes explained as being to ensure that those who act wrongly receive the pain which is their just desert. This may incidentally prevent them and others with similar motives and opportunities from committing further offences. But, some suggest, these control effects are useful by-products and not the main purpose of punishing criminal law-breakers. Rather, having some mechanism to ensure that people get what they deserve (be it punishment or reward) might be regarded as an end in itself in a society committed to the value of justice.

Another increasingly prevalent way of thinking about the purpose of criminal law is to regard its main function as being to communicate censure of wrongdoing (see Chapter 4). Criminal law has also been thought of as a means of providing redress for those harmed by wrongful conduct of others. On one view, those injured or threatened by wrongful acts have a natural entitlement to take retaliatory or defensive action. However, to have an orderly society, it is necessary that they forgo self-help and delegate this entitlement to some central authority which then incurs an obligation to inflict retributive suffering on those who commit criminal wrongs.

There are various other views about the purpose of criminal law which are more counter-intuitive than those outlined above. Jareborg (1995), for example, argues that an important purpose of criminal law is to cool down conflicts by providing a formal alternative to spontaneous public reactions to criminal behaviour, thereby protecting suspected offenders (and others) from violence. Also, many sociologists argue that the criminal law has real purposes which are somehow hidden from those who operate and observe it. The most famous example of this is Durkheim's (1960) suggestion that crime and the social reaction to it can help to strengthen social bonds within a community by providing a focus for group moral feelings (cf. Garland, 1990: chs. 2 and 3). In a somewhat similar vein is Foucault's suggestion that criminal law performs the important



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function of creating a steady supply of criminals who are useful to society in various ways (Foucault, 1977; cf. Garland, 1990, chs. 6–7).

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**Critiques of criminal law**

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Given the range of purposes and expectations that criminal law is expected to fulfil and meet, and that many of these are in tension with others, it is hardly surprising that criminal law is often subjected to criticism. Much of this criticism does not call into question the necessity or ultimate value of the institution, but rather points to certain shortcomings that need to be corrected. However, there are some critical themes which appear in discussions of criminal law – especially in criminology and the social sciences – which do raise more fundamental questions about the institution’s inevitability or worth. In this section we describe some of these themes. Whilst they overlap a great deal, we will somewhat artificially describe them as distinct themes.

What we aim to depict are broad critical attitudes rather than specific criticisms published by particular authors. That is to say, to a large extent what we are describing are caricatures, but caricatures which we find prevalent within criminology and social science (i.e. although in print they are often expressed in a more guarded form, the caricatures are closer to the spontaneous reactions of many academics and students). With regard to these critical themes, we have two aims which pull in opposite directions. On the one hand, we find these critical themes very useful for sensitizing us to certain dangers and limitations of the institution of criminal law. On the other hand, we think there are valuable aspects of criminal law that are sometimes overlooked, under-appreciated or misunderstood by critics of the institution.

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***The libertarian critique***

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This critique accepts that people need to be protected by some entity from injurious and wrongful behaviour of others. Hence, it accepts that an institution bearing some resemblance to criminal law is a social necessity. It suggests, however, that the actual institutions of criminal law that we have, tend significantly to exceed these minimal protective functions. Criminal law tends to interfere without warrant in people’s freedom to decide how to conduct their lives.

Criminal law is often criticized, for instance, for interfering with matters of ‘private morality’. It prohibits behaviour which does not patently cause harm – or at least harm to non-consenting others – but is simply regarded by a majority (or perhaps even an influential minority) of members of society as distasteful,

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offensive or morally lax. (The now classic debate on the role of criminal law in enforcing morality is between the positions represented by Hart, 1963 and Devlin, 1965.) The criminalization of some consensual sado-masochistic activities as a result of the House of Lords' decision in *R v Brown* [1993] 1 AC 212 is one example (Beckmann, 2001).<sup>4</sup> Another criticism is that criminal law is frequently used paternalistically: to coerce people into behaving in ways that others think are in their own best interest or for their own protection. Using criminal law to require people to wear crash helmets whilst riding motorbikes is a key example. Such laws, the critique suggests, deprive people of the freedom to decide for themselves what is in their own best interests or to behave in ways that endanger themselves if they so fancy.

This libertarian critical perspective has also been applied to the sanctions that are imposed upon criminal law-breakers. It suggests that criminal law frequently goes beyond what it is entitled to do: imposing penalties on those who break the law. In addition, it uses its coercive powers to subject law-breakers to interventions designed to re-educate them and to render them able and willing to lead useful and law-abiding lives. Offenders are subjected not just to moral lectures but to therapeutic interventions designed to improve their attitudes, behaviour and personalities. For some critics, such use of coercive power is an unwarranted intrusion into the right to be different (Kittrie, 1971).

Libertarian criticism of criminal law often focuses upon particular laws or penal practices which, it is suggested, depart from libertarian standards that are themselves part of the criminal law tradition. According to these standards, criminal law should be based upon certain ideas about the proper relationship between individuals and the wider society of which they are a part. Individuals should be regarded as sovereign beings who are entitled to think and act as they please (e.g. in accordance with their own conceptions of morality and the good life) provided only that they do not interfere with the sovereign rights of other individuals. The criminal law's function is to prohibit and sanction behaviour if, and only if, it does constitute such interference with the rights of others. It is not to be used to coerce individuals into refraining from behaviour which other members of society regard simply as immoral or distasteful. Nor should it be used to coerce people into refraining from behaviour which might harm themselves but is no threat to others. Still less should the coercive power of criminal law be used to compel people to behave or think in ways considered moral or beneficial. Moreover, in sanctioning criminal law-breaking, the concern should be only to provide a disincentive to law-breaking. The coercive power of law should not be used in efforts to mould the thoughts, personality or habits of sovereign individuals.

As indicated, criminal law is to some extent founded upon such libertarian ideas. However, some fear that it is in danger of being shaped by quite contrary – illiberal – understandings of the relationship between individuals and other members of society. In some cases, the source of danger is identified as religious

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fundamentalism which insists on using coercive powers, such as those of criminal law, to punish breaches of religious rules. In other cases, the danger is seen as coming from those who favour the use of criminal law to repress behaviour that is not patently harmful but which they regard as immoral, be they 'moral conservatives' (e.g. supporters of the criminalization of homosexual behaviour) or 'moral progressives' (e.g. supporters of the criminalization of making hateful remarks about homosexuals).

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***The 'scientific' critique***

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The next critical perspective that we will describe will be examined at greater length, since it is crucial to thinking about the implications of criminology for criminal law. Its central themes are: the institution of criminal law is founded upon a pre-scientific understanding of criminal behaviour; as a result, many of its practices are futile and cruel; we need a radically different approach to dealing with crime based upon a more scientifically valid understanding of offending behaviour. This critical perspective is of particular interest for this book as it tends to pitch a scientific understanding of offending behaviour – of the sort that criminology and other social sciences aim and purport to provide – against popular myths about offending behaviour, which it is sometimes claimed underpin much of criminal law. To explain this critique, we need first to say something about the understanding of criminal behaviour that does underlie the practice of criminal law.

Criminal law is founded upon the notion that criminal behaviour is almost invariably the result of a freely made choice to do the deed that is proscribed by criminal law. According to this notion, all human beings above a certain age have the capacity to understand the nature of their behaviour and to control it through an act of will. So, if they do what is prohibited, this is the effect of a conscious choice, unless it can be shown that they were affected by some exceptional condition or circumstance that impaired their understanding or will and hence their capacity to choose how to behave.

Such a notion concerning criminal behaviour is implicit in various rationales proposed for the practice of punishing criminal law-breakers. One rationale for this practice points to the deterrent effects of punishment. By punishing those who break the law, the institution seeks to influence the offender's future conduct along with that of other persons who have similar motives and opportunities. The idea is that, if people form the impression that if they commit a crime they will likely suffer the pain of punishment, they will be more likely to refrain from committing crime in order to avoid the unpleasant consequence. But punishment could only have these effects if people who engage in criminal behaviour have a significant degree of control over their behaviour. To the

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extent that they lack such control – whatever the reason – the deterrent effect of punishment will be undermined.

Another rationale for the practice of punishing law-breakers is that it is a fair ‘reward’ (a negative reward) for behaving badly, i.e. punishment is the just desert of those who do wrong. Again, if those who do behave badly do not have the capacity to behave otherwise, it is difficult to sustain the notion that they merit punishment.

A frequently used analogy here is with illness (see Johnstone, 1996). By becoming ill, people can sometimes cause us trouble (they may miss work, become a burden on us, infect us, etc). Yet, we do not punish people for becoming ill. This is not simply because, as people who are already suffering, they deserve our sympathy. Rather, it is because it would strike us as completely pointless and inappropriate because people do not choose to become ill (although they may often be negligent in allowing themselves to become ill). Illness is something that happens to people rather than something they choose.<sup>5</sup> Accordingly, we cannot influence whether people become ill or not through the practice of punishing the ill, and nor does it seem appropriate to say that they deserve to be punished for being ill. It is because we make different assumptions about criminal law-breaking (erroneously according to the ‘scientific’ critique) – viz. that people do have a choice about whether or not to commit it – that we imagine punishment to be an appropriate way of dealing with it.

As well as underpinning the practice of punishment, the notion that criminal activity is almost invariably freely chosen also explains a great deal of judicial doctrine concerning liability for crime. When some unusual condition or circumstance clearly interferes with the person’s normal capacity to choose how to behave, we tend to think there may be a case for excluding them from liability for what would otherwise be deemed a criminal deed.

It is this notion that virtually all of those who commit offences have normal capacities to control their behaviour that is criticized by the ‘scientific’ critique. The argument tends to be that the human and social sciences that have emerged and developed since the nineteenth century (such as biology, psychology, psychoanalysis, sociology and criminology) demonstrate that ‘free will’ is a myth (this is why we refer to this as the ‘scientific’ critique: to denote its source, not because we think it is in fact scientific). Although many of those working in the human and social sciences strongly distance themselves from such claims, there is a tendency to suggest that these disciplines – by showing human conduct to be ‘determined’ or moulded by some factor outside of the conscious control of the person (such as their biological inheritance, the way they were reared in early childhood, the way the society in which they live is structured) – reveal that the notion that humans have unconstrained choice over how to behave is false. In its strongest form the claim is that, whilst we tend to be under the illusion that we control our behaviour, in fact all we do is

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act out biological, psychological or sociological scripts written elsewhere. Our belief in the idea that we choose our behaviour has about the same status as the idea that the world is populated by invisible ghosts, spirits or angels who sometimes intervene in human affairs. Practices based on these beliefs have the same status as practices such as exorcism, which seeks to deal with certain pathological human behaviour by evicting from the person the demons or evil spirits which are responsible for it.<sup>6</sup>

Criminal law, of course, falls into the category of institutions which are based on the belief in free will – not necessarily in any metaphysical sense,<sup>6</sup> but in the sense that it focuses on individual choice as a real and morally crucial feature of human action. Indeed, it is the institution *par excellence* which takes the notion of free will very seriously. The whole enterprise of governing behaviour through issuing rules and enforcing them by sanctioning violators assumes human control over their conduct. The heavy moral censure which we attach to those who violate criminal law only makes sense if we assume they could have done otherwise. The painstaking efforts to which the law goes to ascertain whether, in any particular case, a claim that one's choice was severely restricted by some exceptional condition or circumstance would be nonsensical if it were not assumed that the norm is that people have such choice. The relatively rare cases in which those conditions or circumstances are investigated reinforce the idea that free choice is the norm.

The 'scientific' critique of criminal law goes further, though, than simply claiming that criminal law is based upon a misunderstanding of offending behaviour. It suggests that, because of this, the interventions of criminal law tend to be both cruel and ineffective in controlling crime. Adherence to the belief in free will leads us to inflict pain and moral stigma on people who actually have little or no control over their conduct. It also leads us to rely on such punishment as a means of control, when in reality punishment can have little influence on the conduct of people who lack control over their conduct.

According to the 'scientific' critique, criminal law should therefore be replaced by an entirely different approach to crime. The factors which cause crime need to be identified – on the basis of scientific research – and eliminated if possible. The logic of crime policy should be modelled on that of medicine and public health (Farrington and Welsh, 2007: 3). As Enrico Ferri, one of the 'founding fathers' of 'scientific criminology' put it in a lecture delivered in 1901:

The 19th century has won a great victory over mortality and infectious diseases by means of the masterful progress of physiology and natural science. But while contagious diseases have gradually diminished, we see on the other hand that moral diseases are growing more numerous in our so-called civilisation. While typhoid fever, smallpox, cholera and diphtheria retreated before the remedies which enlightened science applied ... we

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see on the other hand that insanity, suicide and crime, that painful trinity, are growing apace. (Ferri, 1913: 7–8)

Early texts such as Ferri's are of interest because they pursue the logic of the scientific critique to an extent rarely found in the work of present-day heirs to the same tradition (e.g. Farrington and Welsh, 2007). Here is another example, from an article with the telling title 'Science Approaches the Lawbreaker':

... the methods employed by the Man of Science should be extended from the care and treatment of the body to the care and treatment of the soul ... Science has already rescued the body of man from the unscientific hands of the medieval practitioner who, ignorant of the true causes of the maladies he has sought to cure, had recourse to remedies which we now see were not calculated to produce the desired results. ... All that now remains is to allow the Men of Science in a similar manner to rescue the soul of man out of the hands of the medieval psychologist – whose way of thinking underlies and is exemplified by our present penal methods. (Gardner, 1928: 205)<sup>8</sup>

This still leaves the question, of course, of what to do about those who are already predisposed to crime (the equivalent, to stay with the logic, of those who have already been infected with what it is that causes diseases such as typhoid fever). This is an important question because defenders of criminal law could say that it is in fact quite compatible with efforts scientifically to identify and eliminate the causes of crime. Unless and until those efforts are completely successful, we still have the problem of dealing with those who are disposed to commit crime, and criminal law is perhaps an appropriate way of doing this job. Again, however, the scientific critique suggests a different approach. One suggestion is that those who are predisposed to commit crime (because, for instance, they have the gene that makes people dishonest, or their upbringing left them with deeply ingrained violent tendencies) can be identified through some scientific procedure. This has a crucial implication.

Currently, the way we tend to distinguish between offenders and non-offenders is by reference to whether they have been convicted of a criminal offence (there are other methods, such as self-report studies, but they are of far less social importance). Those who have been convicted are offenders and we need to make a decision about how to deal with them. Those who have not been convicted are non-offenders and are of no concern. The scientific critique suggests a different approach. We can distinguish by quite different means (e.g. some sort of a scientific screening programme) between those predisposed to commit crime and those not so predisposed. Many of the former will not actually have committed a criminal offence but, in a sense, they are 'offenders'. They are, so to say, offenders by nature even though they are not yet offenders by deed; they have high 'antisocial potential' (Farrington, 2007: 621). We should not wait until

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they actually commit a criminal offence before intervening into their lives. Likewise, although this tends to be less stressed, some of those who have committed a criminal offence may not be natural offenders. They are 'accidental criminals': people with no predisposition to commit crime but who happen to have offended on what is likely to be a one-off occasion.

What the scientific critique tends to focus upon is the former group. It suggests, basically, that the way we handle them should be based upon a scientific analysis of their condition and prognosis. For the early positivists, this implied radical changes in the way the courts dealt with offenders. 'Sentencing' should be based upon scientific criteria and not traditional criminal law criteria. Positivist criminologists today rarely take such radical positions. Farrington and Welsh (2007: 3) for example, proclaim that their 'immodest aim is to change national policies to focus on early childhood prevention rather than on locking up offenders' but beyond that they have almost nothing to say about how the courts should respond to crime. We find it regrettable that positivist criminology has lost its critical bite. Ferri, Gardner and their ilk were naïve in thinking that 'science' could of itself provide answers to fundamental questions of justice. But if many offenders' behaviour is the product, for example, of a disastrous early childhood, this does have implications for a system that aims to do justice to them as adults, which criminologists ought to address (see Chapter 4).

### ***The socio-political critique***

This critical perspective overlaps with others that we describe. However, it is sufficiently distinctive and important to warrant its own section. There are two strands. The first concerns the range of behaviour that is prohibited by criminal law; the second concerns the way criminal law assigns blame for criminal events.

*Punishing trivial misdeeds, ignoring serious harm:* The first strand of criticism argues that much of the behaviour prohibited by criminal law causes trivial harm – or may be harmless or even beneficial to society – whilst there is much behaviour that causes great social harm that is either not prohibited by criminal law or, if formally prohibited, is rarely met with significant criminal sanctions (Hillyard and Tombs, 2007, especially pp. 11–13). The implication is that, if one of the major purposes of criminal law is to protect citizens from the harmful behaviour of others in our midst, the criminal law does not in fact serve its purpose well. It fails to protect citizens from behaviour that causes widespread and serious harm, whilst diverting social attention and resources towards the punishment and control of people who cause relatively little harm.

If we agreed with this critical claim we would, of course, want to know why this is the case. Various explanations can be suggested. It may simply be that the

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institution of criminal law reflects a broader tendency towards irrationality in thinking about the risks surrounding us: we tend to worry a great deal about threats that are actually small, whilst being complacent about things that regularly cause serious social harm. As the authors of *Panicology* put it, we are anxious about the threat of terrorism even though:

In England and Wales the threat to our lives from terrorism has been much lower than deaths from transport accidents (3000), falls (3000), drowning (200), poisoning (900) and suicide (over 3000) ... It is pretty clear that, so long as you stay away from the world's insurgent hotspots, the chances of being caught up in a terrorist event are minuscule (Briscoe and Aldersey-Williams, 2007, quoted in O'Hagan, 2007).

Some criminologists, however, tell a more politicized story. They suggest that the criminal law – either straightforwardly or in complex ways – serves the interests of powerful groups within society. For instance, it is suggested that it is the minor illegalities of powerless people that tend to be punished and controlled through criminal law, whilst the 'crimes of the powerful' – which cause much greater harm – tend to escape criminalization (e.g. Pearce, 1976; Hillyard and Tombs, 2007; Reiman, 2007). This, some suggest, is because powerful groups within society have control over the social and political processes through which it is determined whether behaviour is to be prohibited by criminal law or, if it is prohibited, through which it is determined how vigorously it is policed, prosecuted or sanctioned. A related theme is that the huge devotion of resources to the punishment and control of conduct that is of relatively little harm occurs because it functions to divert social attention towards that behaviour – as the cause of our misery and suffering – whilst diverting it away from actions and policies of powerful people and organizations, including government, which are in fact a cause of much greater misery and suffering.

This critique might be identified as being about the *substantive content* of criminal law. The suggestion is that, for whatever reason, the criminal law targets the wrong sorts of behaviour and people. What is required, it is implied, is a massive decriminalization of conduct (abolition of many of the prohibitions enforced through our criminal law, most importantly drugs offences) and a corresponding criminalization of seriously harmful conduct currently ignored by criminal law.

*The individualization of blame:* Whereas the previous strand of criticism goes to the substantive content of criminal law, this one goes more to its structure. It argues that criminal law adheres to and propagates 'a narrow individualistic notion of responsibility' for acts of social harm, which ignores and deflects attention from social or structural factors that cause criminal behaviour (Hillyard and Tombs, 2007: 19).<sup>9</sup> The gist of this critique is that criminal law channels all the blame, condemnation and punishment for criminal actions



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towards the immediate perpetrators – who may be relatively lacking in power – and that this also has the effect of diverting attention and condemnation away from others (perhaps more powerful) whose actions were, albeit indirectly, a contributing cause to the crime that occurred. The following conveys the flavour of this critique well:

Behind the man with the knife is the man who sold him the knife, the man who did not give him a job, the man who decided that his school did not need funding, the man who closed down the branch plant where he could have worked, the man who decided to reduce benefit levels so that a black economy grew, all the way back to the woman who only noticed ‘those inner cities’ some six years after the summer of 1981, and the people who voted to keep her in office. The harm done to one generation has repercussions long after that harm is first acted out. Those who perpetrated the social violence that was done to the lives of young men starting some 20 years ago are the prime suspects for most of the murders in Britain. (Dorling, 2004: 191)

The moral intent of this passage is fairly obvious, as are some of its implications for policy. If we recognize that a great many people (perhaps even ourselves, although that is rarely acknowledged) have some responsibility for the crime that occurs in our society, we might adopt a less condemnatory and less punitive stance towards the actual perpetrators. We might also divert some of the resources that we currently devote to running a hugely expensive criminal justice system towards correcting some of the structural factors that lead many people – who in different circumstances would have been law-abiding – to commit crime. As Dorling (2004) and Pemberton (2007) suggest, in the aftermath of a knife crime, instead of calling for tougher sentencing, we might instead advocate policies that address the social contexts which inexorably lead to knife crime.

What is less clear is the precise implication of this stance for our thinking about criminal law (cf. Reiman, 2006). Despite the rhetorical excess at the end of the quote from Dorling, it is presumably not meant to imply that people who indirectly contribute to crime (e.g. somebody who interviewed ‘the man with the knife’ for a job but decided not to employ him or somebody who voted for a political party whose social policies have clearly resulted in a rise of crime) should be subjected to criminal conviction and sanctions; we must find other ways of bringing home to them the fact that they share some responsibility for crimes that occur. But what are less apparent are the implications for the way criminal law should treat ‘the man with the knife’. How does the fact that others are also partly responsible for his actions, and especially the fact that as well as being an offender he is also, in a sense, a victim of earlier harmful acts, affect our judgement of his culpability or our decision on what should be done to or with him? This, of course, is a very difficult question. Our criminal law provides a fairly clear answer to it.<sup>10</sup> Some

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criminologists, among others, have rightly questioned the criminal law's 'individualistic notion of responsibility'; but without thinking rigorously about what the proposed alternative might be.

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***The restorative justice critique***

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Since the 1970s, a new social movement, *viz.* the restorative justice movement, has emerged and gained significant influence in the fields of criminal policy and criminology. This movement has been the source of a profound critique of criminal law and of proposals for alternative ways of thinking about and handling the sorts of events that criminal law deals with.<sup>11</sup> Advocates of restorative justice take seriously the idea that it is necessary to provide a response to criminal wrong-doing that is effective in controlling crime and delivering justice. However, as Pavlich (2005) puts it, restorative justice attempts to approach these issues with a different moral compass than that used by the institution of criminal law.

Central to the moral compass of criminal law is the distinction between crimes and 'mere' private wrongs (Duff, 2002a: 4; e.g. Ormerod, 2005: 11; Zedner, 2005: 58). Private (or 'civil') wrongs are acts of wrong-doing which interfere with the rights of other individuals (such as failing to comply with contractual duties owed to another). They give rise to liability in private (or civil) law. It is the injured party's decision whether or not to bring the matter to court, and if they decide to do so they bear the responsibility and cost of presenting the case. The most common legal remedy for a private wrong is an order that the wrong-doer compensate the injured party – putting the injured party in a position comparable to that they were in before the wrongful act occurred.

A crime, on the other hand, is a 'public wrong': a wrongful act which has a harmful effect on the public, or which 'threatens the security or well-being of society' (C.K. Allen, quoted in Ormerod, 2005: 11), or which should be the concern of all citizens.<sup>12</sup> It is a commonplace of legal discourse that a crime cannot be remedied only by compensation to the injured party. Something else must be done to vindicate the public interest which has been damaged by a criminal act. It tends to be taken for granted that that 'something' is punishment of the offender. It also tends to be taken for granted that state officials should investigate and prosecute crimes as well as administering the punishment of those convicted. Indeed, the direct victims (where there are direct victims) are generally regarded as having no formal stake in the case; the matter is officially between the state (or 'the crown' or 'the people') and the accused. So, for instance, the victim's wishes – on whether the case should proceed, what charges should be brought, and so on – can be ignored by the prosecutor, whose official responsibility is to the public rather than to the direct victims.

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The restorative justice critique attacks the contemporary conception of criminal justice at its heart. It argues that crimes always harm actual people and that by constructing crime as a wrong against an impersonal entity (such as 'the public', society, or 'the state'), criminal law obscures the fact that this interpersonal harm occurs, downplays its significance and fails to provide an adequate remedy for it. As Howard Zehr, a leading advocate of restorative justice, puts it:

Crime then is at its core a violation of a person by another person, a person who himself or herself may be wounded. It is a violation of the just relationship that should exist between individuals. There is also a larger social dimension of crime. Indeed, the effects of crime ripple out, touching many others. Society too has a stake in the outcome and a role to play. Still, these public dimensions should not be the starting point. Crime is not first an offense against society, much less against the state. Crime is first an offense against people, and it is here that we should start. (Zehr, 1990: 182)

One implication of this is that, in the aftermath of crime, providing a remedy for the person(s) who have actually been harmed should take precedence over providing a remedy for the public interest that might also have been harmed as the effects of crime 'ripple out'. A restorative criminal justice system, then, would be a system in which the priority is to provide a remedy for the direct victims of crime, with taking action on behalf of the wider public very much a secondary goal.

Crucially, according to proponents of restorative justice, we cannot assume that what the victim requires, in order to experience justice, is punishment of the offender. Indeed, it is argued, for various reasons, punishment of the offender is unlikely to be in the interests of the victims. Their interests may be much better served through something like the compensatory approach used in private law. However, in the field of private wrongs, court-ordered compensation is not in fact the norm. Rather, the normal way of settling conflicts arising from private wrongs is negotiated settlements between wrong-doers and injured parties; courtroom settlement is a last resort when attempts to negotiate a private settlement fail. Accordingly, proponents of restorative justice argue, when a crime occurs the wrong-doer and the injured people should be encouraged and facilitated to reach a negotiated settlement, ideally involving restitution or reparation. The state's role should be to facilitate this process of negotiated reparative justice. It is the parties involved – the offender(s), the victim(s) and others with a direct stake in the outcome – who should decide what needs to be done to remedy the harm that has occurred and to oversee acts of reparation. The state should only step in and start making and imposing decisions if all reasonable efforts to bring about a negotiated reparative settlement fail. If the parties involved do arrive at a negotiated solution, then – but only then – should the

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question of whether anything *further* needs to be done to protect the public interest be addressed. Proponents of restorative justice suggest that that question is also better addressed – initially at least – by local community forums rather than by centralized state officials.

This critique suggests the need for a fundamental realignment of the assumptions and priorities of the institution of criminal law. Just as importantly, a significant shift away from the sort of criminal justice system we have now in most contemporary societies towards a restorative criminal justice system would result in significant blurring of the boundaries separating the institution of criminal law from other institutions and social practices such as private law and community-based conflict resolution practices. The restorative justice critique, if followed through logically, points towards the partial dissolution of criminal law as a discrete social institution.

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**An open attitude**

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There are further critical perspectives (partially overlapping with some of those above) that we have not described at length. These include a justice critique, which suggests that criminal law ought primarily to be an institution which seeks to correct injustices, but has become an institution which seeks primarily to control crime. We might also have included an anarchist critique, which suggests that people can govern themselves effectively without coercive laws (Tifft and Sullivan, 1980). However, the critical perspectives we have described are perhaps the most important in the context of this book, and are sufficient to show that criminal law is often regarded – within criminology and the social sciences – as a fundamentally flawed institution which has little call on our allegiance and is in need of fundamental reform.

As indicated at the outset, our position is somewhat different. We regard these critical perspectives as having great value and we are very sympathetic towards many of the values and ideas which inform them. These critiques point towards important shortcomings and dangers of the institution of criminal law and suggest that these could only be remedied through, at the very least, a fundamental redesign of the institution; mere tinkering is not enough.

However, we think there is also a tendency – amongst those who think about criminal law from within these critical perspectives – to fail to see or to misunderstand elements of the institution of criminal law that are of value and worth preserving, even if in modified form. For example, we suggest that holding individuals responsible for their actions, as a general principle, is practically and ethically defensible. Or, to provide just one more example, we suggest that the conception of crime as a distinctive type of wrong – *viz.* a public wrong as

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opposed to a mere private wrong – is worth retaining, even though many of the assumptions and practices based on this conception could be transformed.

This 'open' attitude towards the institution of criminal law will underlie our account of the institution. That account begins in the next chapter with an attempt to describe the origins and development of criminal law from ancient times up to the end of the eighteenth century, when the institution underwent a fundamental transformation. That transformation and its aftermath are described in Chapter 3, where we show how criminal law became a central institution of social governance from the nineteenth century onwards, with profound implications for the nature of the institution. In Chapter 4, we return to the issue of free choice and the way the law constructs criminal responsibility, which are discussed further in Chapter 5 with reference to murder and manslaughter. Chapter 6 looks at attempts to use criminal law to control corporate wrong-doing and crimes of the powerful and at the strains and tensions that surface when criminal law is extended beyond its traditional concerns with predatory crimes against persons and property. Chapter 7 deals, again in a long-term historical perspective, with issues of criminal procedure and evidence. Chapter 8 discusses criminal law's distinctive mode of sanctioning – the punishment of offenders – and in Chapter 9 we consider the growing fields of international criminal justice and transitional justice (where a state's former officials are on trial for crimes committed under a previous regime). We then end with some concluding reflections.

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## Summary

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The purpose of this book is to provide an introductory account of criminal law for criminologists, social scientists and others interested in criminal law as a social institution. At the outset, the main features of criminal law are introduced: enforceable rules of conduct, the moral dimensions of criminal law, criminal procedure, criminal liability and different views about the purposes of criminal law. The institution of criminal law is often viewed as a deeply flawed institution. This chapter introduces some important critical perspectives on criminal law. We call these: the libertarian critique, the 'scientific' critique, the socio-political critique and the restorative justice critique. These critical perspectives sensitize us to important limits and dangers of the institution of criminal law. However, there is also a tendency to fail to recognize or to misunderstand elements of criminal law that are of significant value and worth preserving. The account of criminal law provided in this book attempts to steer a course between a complacent acceptance of the obviousness and rightness of criminal law and ultra-critical perspectives.

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**STUDY QUESTIONS**

1. Why is an analysis of the institution of criminal law important for criminology?
2. What are the purposes of criminal law? Is its function solely to control crime?
3. What are the implications of the discoveries of the human and social sciences about the determinants of criminal behaviour for the institution of criminal law?
4. Does the institution of criminal law criminalize the most harmful behaviour in society? What implications do criminological studies of white-collar crime have here?
5. Is the law's model of individual responsibility for one's wrongful actions defensible? Are there any viable alternatives?
6. What is the basis for the distinction between private wrongs and public wrongs? How fruitful is it to make such a distinction?

**FURTHER READING**

Anthony Duff's contribution to the *Stanford Encyclopedia of Philosophy*, titled 'Theories of Criminal Law' (2002a) is an excellent introduction to thinking about the purposes of criminal law, its proper scope, and whether the institution should be preserved; it is available online at <http://plato.stanford.edu/entries/criminal-law/>. Nicola Lacey's chapter 'Legal Constructions of Crime' (2007, in the *Oxford Handbook of Criminology*) provides a useful examination of the relationship between legal and social constructions of crime. Of the many short introductory books on criminal law aimed at law students, Christopher Clarkson's *Understanding Criminal Law*, 4th ed. (2005) is recommended as most accessible to non-law students. Three very different critical studies of criminal law that we recommend for criminologists are: Alan Norrie's *Crime, Reason and History*, 2nd ed. (2001), Lacey's et al.'s *Reconstructing Criminal Law*, 3rd ed. (2003), and Andrew Ashworth's *Principles of Criminal Law*, 5th ed. (2006).

**Notes**

- 1 See Feinberg (1994 [1970]). On the 'rationalization' of criminal law, justice and punishment in modern society, see Garland (1990: ch. 8). For many, this distancing of criminal law from moralistic conceptions of crime constitutes progress; others think it has gone way too far (see, for instance, Braithwaite, 1989).
- 2 Such comparisons need to be supplemented by other material to become meaningful. In many countries, such as England, children above the age of criminal capacity but below a higher age

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(usually in the range 16–21) are not subject to the adult system of prosecution and punishment. We discuss age and criminal responsibility in more detail in Chapter 4.

- 3 In this example D denotes defendant, V denotes victim.
- 4 For an explanation of case citations such as this, see p. 199.
- 5 This 'passive' conception of the process of becoming ill is challenged by some sociologists of illness and medicine. For an excellent introduction to this field see Turner (1995).
- 6 Although exorcism itself is of course based on deterministic beliefs about some human conduct – in this case the determining entity is a demon or evil spirit.
- 7 For example, the view of free will advocated by Kant; for discussion of Kant's ideas in a criminological context, see Beyleveld and Wiles (1979).
- 8 For discussion of these ideas and their influence see Johnstone (1996). It is very important to recognize that the claim was that the approach to criminal law-breaking should be modelled upon the *logic* of the scientific approach to controlling disease. It is not necessarily implied that crime – like disease – has biological determinants (although many developed such ideas in this direction). This logic is equally compatible with the idea that crime is caused by social factors such as social deprivation or particular patterns of child-rearing. The logic is that the causes of crime should be ascertained through some scientific process and then rectified, as a way of preventing crime.
- 9 Hillyard and Tombs' critical target is the discipline of criminology, which they argue has uncritically adopted legal conceptions of crime. But they clearly have a critical attitude towards legal constructions of crime.
- 10 But that answer is nowhere near as clear as Reiman (2006) seems to suppose; cf. Norrie (2001).
- 11 The nature and scope of this critique of criminal law is not always clear. The literature of restorative justice contains within it the outlines of an extremely radical and challenging critique which, if followed to its logical conclusion, would result in a call for the abolition of the entire institution and its replacement by a wholly new approach to crime. In practice, restorative processes have tended to be developed and employed within the institution of criminal law, functioning more as alternative processes for dealing with some aspects of some cases (Johnstone, 2002).
- 12 The same act can constitute both a private wrong and a crime. A famous example is the O.J. Simpson affair of the mid-1990s. Simpson was prosecuted for murder and acquitted. The families of the two murder victims subsequently successfully sued Simpson in a civil trial for private wrongs: causing the wrongful death of one victim and committing battery against the other.