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The Formation of Criminal Justice

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THE FORMATION OF CRIMINAL JUSTICE

OVERVIEW

Chapter 2:

- Explains the importance of understanding how criminal law began and developed.
- Introduces two influential theories about origins of criminal law: social contract theory and self-help theory.
- Looks at how troublesome conduct and conflict were handled before the emergence of criminal law.
- Traces the emergence of criminal law in medieval Europe.
- Describes important developments in criminal law, such as how crime came to be shaped by notions of sin and how liability became increasingly individualized.

KEY TERMS

social contract theory self-help theory communal punishment private vengeance compensation
crime and sin *mens rea*

Introduction

Criminal law is such a familiar aspect of contemporary societies that it can appear to be a natural phenomenon or at least 'an inescapable feature of the developed societies in which we live' (Duff, 2002a: 6). As Simpson puts it:

Even quite young children, long before they take up shop-lifting, or driving uninsured mopeds, or scrumping apples, are at least familiar with the criminal law, with its court dramas of wickedness and tragedy, its parables of right and wrong, its fearsome denunciations of cruelty and greed. They know only too well what becomes of the likes of Mr Toad and others who violate the more serious rules of social behaviour, once they fall into the hands of the stern and brutal minions of the law. The tales they read, the movies they see, the television they watch, familiarize them with a whole range of conceptions intimately related to the existence of law. (Simpson, 1988: 1)

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Even if it is realized that societies have existed in the past (and that some societies may still exist today) in which there was no criminal law, it is difficult to avoid presuming that such societies must have been extremely simple or primitive.

A problem with this way of thinking is that it limits our imagination. Because we regard the institution of criminal law as natural, the question of whether we ought to maintain the institution – although it has certainly been asked – is seldom taken seriously. To open up the question of whether we should maintain an institution such as criminal law, it is necessary first to disturb the air of naturalness and inevitability that it has acquired over the centuries. One way of doing this is to look with an open mind at how historical societies which did not have criminal law viewed and handled troublesome conduct (that we might today call ‘crime’) and at how and why our distant ancestors developed institutions of criminal law. (In Chapter 7, we look at long-term historical developments in criminal procedure and evidence.)

Theories about the creation of criminal justice

In the history of western political and legal thought, there have been some highly influential theories about the origins of criminal law. We will start by briefly describing two of the most influential theories: the social contract theory and the self-help theory.

Social contract theory

Social contract theory is a general theory about the nature of political and legal obligation. Since the eighteenth century, its ideas have had a profound influence on thinking about criminal law. There are numerous versions of the theory. However, the basic idea is that people are obliged to obey the state and its laws because they have agreed, at least tacitly, to obey them. This invites the question: why would people agree to such a restriction of their liberty? In answering this, social contract theory imagines what life would be like in a ‘state of nature’, i.e. before a regular system of government, law-making and law-enforcement existed.

One of the most memorable depictions of life in a state of nature is that of Thomas Hobbes.¹ According to Hobbes, in a state of nature every man is roughly equal in physical strength and cunning. No man is sufficiently stronger than others that he can avoid being killed by them. This makes men wary of each other. Each man dreams of having dominion over others, but no man can achieve such dominion. Realization that others have the same dreams of dominion increases

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each person's feeling of insecurity. In this situation, each man will do whatever he can to preserve his life. This makes his behaviour unpredictable. None of the goods that are possible only as a result of human co-operation exist. In Hobbes' famous phrase, the life of man in a state of nature is 'solitary, poore, nasty, brutish, and short' (1914: 65).

In such a state of nature people have liberty, but it is useless to them. Accordingly, it is rational to give up some liberty to gain security. The rational man will agree to obey laws and give up his right to defend himself, if he can be sure that every other person will do the same. In Hobbes' scheme this is achieved by men coming together to create a sovereign with power to make and enforce laws.²

So, in the Hobbesian state of nature people live in fear of each other. What they fear above all is predatory behaviour: killing, violent attacks, plunder of possessions, rape, and so on. Crucially, in the absence of criminal law, such predatory acts are not properly speaking 'crimes'. In the absence of some sovereign with the authority and power to define certain acts as wrongs, punishable by the sovereign, 'crimes' do not really exist. Such predatory acts are more like acts of war.

Through the social contract crime itself comes into being. The people create a sovereign with the authority and power to define some actions as crimes punishable by the sovereign. People will tend to refrain from conduct which the sovereign prohibits because they fear the sanctions which the sovereign may impose. Because other people know this, they become less wary and fearful of others. People can begin to accumulate property, build permanent dwellings, trade with others and join in other co-operative ventures.

If we think about the institution of criminal law in the terms suggested by Hobbes' version of social contract theory, abolition of criminal law becomes virtually unthinkable. To abolish criminal law would be to return to a state of nature. Society would simply crumble.

Self-help theory

The self-help theory of the origins of law and the state was developed by scholars in reaction to social contract theory.³ Like social contract theory, self-help theory assumes that, prior to the emergence of the state, there was a state of nature which was characterized by high levels of inter-personal and inter-group violence. But, in the self-help theory, far from being chaotic and unpredictable, this violence was organized around fairly sophisticated principles of vengeance. Acts which were perceived as injurious were met with 'private vengeance'. Custom dictated the situations in which vengeance was permissible (and, as we shall see, mandatory) and the sorts of things that could be done in the name of

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vengeance. Moreover, rather than eliminating private vengeance, early states tended to supervise and institutionalize it. It was only later that states began to take over the administration of 'punishment' and later still that they reserved a monopoly of the legitimate use of punitive violence. In place of the simple dichotomy – state of nature/governed society – posited by social contract theory, the self-help theory suggests that the early development of law and the state took place through four stages (Whitman, 1995: 42).

- 1 There is a state of nature, in which individuals or clans exact vengeance for wrongs done to them in accordance with social customs which regulate – albeit roughly – the circumstances in which an individual or clan will seek vengeance and the nature of vengeful acts.
- 2 The early state emerges and supervises the system of private vengeance, requiring wronged parties to seek state approval for customary vengeful action.
- 3 The state begins to take vengeance against wrong-doers on behalf of injured parties.
- 4 The state moves to outlaw private vengeance, reserving for itself the legitimate use of penal violence. It also institutes a system of composition substituting monetary compensation for penal violence for some wrongs.

Shortly, we will point to certain revisions of this theory which have been suggested. First, though, we will briefly look at some implications of the self-help theory, as described by Whitman, for our understanding of criminal law.

One implication is that criminal law has its roots in the ancient practice of private vengeance (cf. Saleilles, 1911: ch. 2). The state tames private vengeance. It formalizes the customary norms which determine the actions for which vengeance is permitted and the severity of vengeful actions, makes rules about who is a legitimate target for vengeance, and gradually replaces violent killings and mutilations with gentler forms of punishment such as fines or imprisonment. The state transforms the wild justice of private vengeance into the domesticated justice of state retribution. But, the urge to exact vengeance from those who wrong us lies at the root of criminal law. Whilst contemporary criminal law is often discussed as if it were simply about identifying and repressing socially harmful behaviour, it is moulded by a quite different social practice: taking vengeance on those who wrong us (some of the implications of this view are explored by Gardner, 2007: ch. 10).

Crucially, the self-help theory can lead us to a different way of thinking about the social necessity of criminal law than that encouraged by social contract theory. The self-help theory suggests that criminal law did not arise from people agreeing to set up a sovereign with the power to punish in order get out of a chaotic and inconvenient state of nature. In the self-help theory, the state of nature is violent but its violence is by no means unpredictable. There are customs governing private vengeance which make it predictable and so not an automatic

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obstacle to social co-operation. Indeed, the knowledge that certain injuries are likely to give rise to vengeful attacks may provide a significant degree of security. It is not quite so obvious then why people in such a state of nature would be willing to transfer their right to take vengeance to a central state. It therefore becomes important to understand the state's motives for gradually taking over the power to punish and the consequences of this takeover. There is no reason to suppose that the motive was purely disinterested or that the effects of this development were wholly beneficial. Rather these become matters to be investigated, and the results of such investigation have implications of our assessment of the desirability of maintaining an institution such as criminal law.

Revisions to the self-help theory

Before leaving the self-help theory, it is important to note some important modifications that have been proposed.

The first concerns composition. As we have seen, self-help theory suggests that composition emerges at the final stage of the transition. The state introduces a system of buying off penal violence by paying monetary compensation. However, there are good reasons for thinking that compensation was always a possibility in a system of private vengeance (Whitman, 1995: 70ff). Miller (2006), for instance, suggests that retaliation is inherently governed by principles of reciprocal payment for injuries done. The *talionic* principle – eye for an eye, tooth for a tooth, etc. – suggests as much. In systems of private vengeance there is almost always an option to substitute that which is to be lost as the result of wronging another by something of commensurate value (e.g. 50 cattle in exchange for a life instead of a life for a life). Some, such as restorative justice advocate Howard Zehr (1990: ch. 7) suggest that (in what he calls community justice) there was a presumption that injuries would be compensated by things other than lives and body parts, and that killing and mutilation were resorted to only when an agreement on appropriate compensation could not be reached.

We will return to this idea, but for the moment we should note that, if Zehr's claim is plausible, an implication is that to characterize what existed before criminal law as a system of private vengeance is itself highly misleading. Rather, what existed was a hybrid system of negotiated settlement of conflicts through compensatory payments, with the threat of private vengeance in the background as a possibility should a wrong-doer refuse (or be unable) to pay whatever compensation was customary. Although such a system would have all sorts of problems, and may be less desirable than a system of criminal law, simple assumptions about the superiority of criminal law over whatever existed before its creation become even more tenuous.

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A second modification to self-help theory, proposed by Whitman (1995), concerns the notion that state criminal law is simply an institutionalized form of private vengeance. State punishment of offenders, it is suggested, has independent origins in social practices that have little to do with vengeance. What Whitman points to in particular are ritualistic practices of sacrifice-based religions. Ancient religious systems often featured human, animal and food sacrifices as ways of appeasing or invoking interventionist gods. The sacrificial use of money is also quite continuous with these practices. The mutilation of bodies, too, was an act carried out not only as vengeance but as a religious practice. From this perspective, the emergence of state punishment must be understood as a continuation and extension of these religious practices, as well as an attempt to institutionalize customs of private vengeance.

To these, we would add a third modification, which is related to that of Zehr (1990: ch. 7) mentioned above. Arguably, both social contract and self-help theory focus upon conflict between strangers. This is most explicit in Hobbes' version of social contract theory which takes as its starting point a society of isolated individuals (who in a state of nature remain solitary). However, before the emergence of the state people did not live in isolation from each other. Rather, most lived in communities. This raises the question of how wrongs were dealt with when they were committed between people who had a strong communal relationship with each other. It may be that wrongs committed within such a setting were dealt with differently to wrongs committed between 'strangers'. This opens the possibility that criminal law may have been modelled as much upon these intra-community practices as it was upon the practice of private vengeance.

Punishment, vengeance and compensation

We will now turn from these general theories about the emergence of criminal law to look a little closer at how criminal law might have emerged in Europe. In most of western Europe prior to the eleventh century, and in many regions for several more centuries, the largest units in which the vast majority of people lived were very small, economically self-sufficient villages. Central imperial and religious authorities existed, but exercised very little control over day-to-day life of people in these villages (Berman, 1983: 85–6). These villages were relatively self-governing, yet they lacked specialized laws and law enforcement agencies. What we want to look at here is how, in such a context, incidents that we would today call crimes (homicides, assaults, thefts, etc.) were normally handled. To start, we need to distinguish two quite different situations: (i) wrongs committed within the village or communal circle and (ii) wrongs committed by (or against) 'strangers' (Moberly, 1968: 97).

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Punishment within the communal circle

In the former, it is likely that wrong-doers were frequently admonished and/or chastised by fellow villagers without much formality. Given that the offender would not be a stranger but an intimate member of the community, it is also likely that the 'punishment' meted out would be shaped by much wider considerations than the nature and gravity of the particular wrongful act. The close relationship between those punishing and those being punished, and the probability of that relationship continuing, would play a major role in shaping the likelihood of punishment and its severity and nature when it did occur. Often, we can guess, the fact that 'there is a background of kinship or sympathy between judge and culprit' (and we might add economic interdependence) would result in a punishment being strongly influenced by compassion and considerations of the offender's welfare (quote from Moberly, 1968: 97). However, the nature and severity of 'intra-village punishment' no doubt varied enormously from village to village and would have been shaped by a wide range of economic and cultural factors. It is also possible that certain wrongs breached taboos and aroused strong emotional reactions and were met with particularly harsh punishments (ibid.). We can also assume that a small proportion of wrong-doers – such as habitual wrong-doers or perpetrators of particularly atrocious wrongs – were banished from their communities, and that this almost invariably resulted in their death.

Vengeance amongst 'strangers'

Let us turn now to the second situation, where an offence is committed against a 'stranger'. One widespread way of responding to such events was private vengeance. Those who suffered by a misdeed – or more often the kin or companions of the injured party – retaliated against the perpetrator of the injury and that person's kin or companions. Such retaliation often took a violent form: the perpetrator might be killed or mutilated, property might be seized or destroyed, and so on.

As we have seen, there are important questions about how we characterize such 'private vengeance'. It is tempting to characterize it as a primitive form of punishment (cf. Saleilles, 1911: ch. 2). However, punishment implies some pre-existing relationship of authority between the punisher and person or group punished: punishment is inflicted by a superior authority upon an (at least formally) inferior subject. Private vengeance might be better characterized, then, as an act of warfare. In the absence of a central authority able and willing to impose order from above, a state of war and pillage prevailed. In this context, attacks upon others and retaliatory violence were common occurrences and

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every individual and group assumed 'the right to defend himself and to take vengeance when attacked' (ibid.: 21).

An important question is why people would undertake acts of vengeance. After all, this is a very risky activity: it commits one to what may become a drawn-out violent feud. Acts of vengeance were always likely to be perceived by those on the receiving end as wrongs done to them, which in turn needed to be avenged. So, far from vengeance putting an end to conflict, the outcome could be to instigate or continue a cycle of tit-for-tat violence. There must have been a temptation, then, for those wronged to simply endure the wrong done to them rather than risk becoming embroiled in blood-feud.

What seems clear is that there was in fact significant social pressure to avenge an attack on oneself or one's kin, despite the risks involved in doing so. In Anglo-Saxon Britain, for instance, the kinship group of a person killed felt a strong *obligation* to take vengeance against the killer and their kin (Whitelock, 1952: 29ff; Harding, 1966: 14). To fail to avenge the killing of a kinsman was regarded as dishonourable at a time when a person's or group's honour was amongst their most prized possessions (Berman, 1983: 55-6; Miller, 2006). Similar duties were entailed in the close bond that existed, in this period, between a lord and his followers (Whitelock, 1952: 29). One aspect of the relationship between a man and his lord was a duty to avenge the homicide of either by killing the slayer or, as we shall see, obtaining compensation which was high enough to do honour to the man killed.

The motive behind acts of vengeance, then, was usually provided by the dynamics of shame and honour. No doubt, another important concern was to deter attacks upon the group, by establishing a reputation as a group which would not hesitate to exact vengeance upon any who attacked one of its members (Berman, 1983: 55). Indeed, the practice of vengeance probably contributed to the control of wanton violence in a society in which there was no central authority.

Compensation: buying off vengeance

We have suggested that a consequence of private vengeance is that it tends to produce chains of tit-for-tat violence that can go on for years and even generations. These 'blood-feuds' create insecurity, offsetting the degree of social control provided by the fear of vengeance. They also act as an obstacle to the co-operation necessary for economic advancement. Hence, even where a people lacked a strong central authority, there was often significant incentive to settle disputes peacefully by negotiating mutually acceptable compensation (Berman, 1983: 49ff). The strength of this pull towards settlement was influenced by a range of factors. For instance, in Anglo-Saxon Britain, settlement was less common in areas inhabited by the Danes - who had a tendency to regard acceptance

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of compensation in place of vengeance as unmanly – than it was in other areas (Whitelock, 1952: 44). On the other hand, the Christian Church encouraged settlement as it regarded vengeance (other than divine vengeance) as conflicting with Christian ethics. This became an important factor from the end of the sixth century when the English largely converted to Christianity (ibid.: 42).

Even those not directly caught up in a feud had an interest in peaceful settlement, since the security and well-being of an entire people was to some degree threatened when some of them engaged in a prolonged blood-feud. Hence, members of the surrounding 'society' often brought pressure to bear upon parties with a dispute to settle it peacefully.

The question was how to do this whilst preserving honour (Miller, 2006). One way to avoid vengeance was to settle disputes by payments of compensation to the injured party by those responsible for the injury. But this simply pushes the question back, i.e. the question now becomes: how could compensatory payments ever satisfy honour? If one of your kin is killed, and honour demands that you avenge the killing by taking the life of the killer (or one of the killer's kin) would it not be dishonourable to settle for a payment, e.g. to accept a number of cattle as settlement for the injury? In order to understand how one *might* be able to accept a payment, whilst preserving one's honour, it is crucial to grasp that vengeance itself, far from being a wild and unregulated practice, was itself governed by customary principles of exchange (Miller, 2006).

Pre-state societies had complex systems for valuing lives and body parts (ibid; Whitman, 1995). For example, they might measure the value of a person's life in terms of how many lives of a certain sort would make up for it. A lord might be equal to ten freemen; if the lord was killed, it would be necessary to take the lives of ten freemen to avenge the lord. Or, if one person maimed another by cutting off the person's arm, custom would dictate how much the arm was worth (with the price depending on the status and possibly other characteristics of the maimed person). Because vengeance was governed by a complex exchange system, it already had some of the features of compensation. The rules governing vengeance were like rules specifying how much compensation the injured party could help themselves to (in terms of lives or body parts) for the injury suffered. This made it relatively easy to conceive of offering and accepting something of equal value to what the injured party was entitled to as a way of satisfying the demands of vengeance.

However, as Miller (2006) makes clear, negotiating compensation was an extremely precarious business. To accept too small a payment could lead one to be judged as a person with little or no honour. Those who allowed their right to vengeance to be bought off too cheaply could appear avaricious and/or cowardly. On the other hand, refusing to accept a reasonable offer of compensation, and insisting on exacting vengeance, would make one appear unreasonable and raise questions about one's motives. Then again, some injuries were seen as

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non-compensable and vengeance was mandatory. Moreover, the rules governing all of this varied from people to people, and would be influenced by the wider values and beliefs of a people.

All of this suggests that, although we tend to talk of 'private vengeance', vengeance and compensation were far from being purely private matters. The practices were governed by customary expectations. Also, members of the society often helped disputing parties to reach an agreement. They could do this in a number of ways. They might, for instance, guarantee the safety of disputing parties whilst they undertook negotiations (Bianchi, 1994). They might also help the parties reach an agreement by reminding parties of the customary amount of compensation for a particular injury. Or they might suggest outcomes which would preserve the honour of both sides of a dispute – enabling each side to go away feeling that they had won (Roberts, 1979: 20–1; Baker, 2002: 4–5).

Some legal historians suggest that, in some societies, such communal intervention became so habitual that parties with a dispute began routinely to take their 'case' to a communal forum (Berman, 1983: 56). As this happened, vengeance came to be seen more and more as an exceptional rather than primary response to injury, to be resorted to only when the process of settlement through negotiated compensation broke down or where the injury is considered so serious as to be redressable only by violent retaliation. This seems to have happened, for instance, in Anglo-Saxon Britain where, according to Pollock and Maitland (1898: 46–7), as settlement through negotiated compensation became more and more usual, and customary scales of compensation became established, the kindred of an injured party became expected first by public opinion and then by public authority not to pursue a feud if proper compensation was forthcoming.

Some general features of pre-criminal law handling of wrong-doing

As we have seen, in the absence of a central authority, a range of models of handling wrong-doing are likely to exist. Which model guides the response to wrong-doing will depend on the context. Wrongs committed within a village circle are likely to be met with what we might call 'community punishment', provided we bear in mind that the term 'punishment' can cover reactions ranging from the mildest rebuke to harsh sanctions such as banishment and death. When it comes to wrongs committed by (or against) strangers, a different model is likely to come into play: vengeance and compensation. It is tempting to see these as forerunners of the institution of criminal law; to see the emergence of criminal law as involving the formalization and institutionalization of these ancient practices. However, it is also important to recognize the differences between these practices and also that the institution of criminal law may have its own independent origins.

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The birth of criminal justice

We have suggested, in line with self-help theory (at least in a modified form), that prior to the emergence of criminal law there existed reasonably sophisticated and practical ways of dealing with injurious behaviour. This being so, the emergence of criminal law requires more explanation than we might suppose. We cannot assume that life without criminal law was simply so chaotic and unpredictable that the need for such an institution would be obvious, with the only problem being how to create it. We cannot assume that people would willingly give up their traditional practices in preference for state punishment of what the state defined as criminal conduct. Rather, the historical emergence of criminal law becomes more of a puzzle.

In what follows, we will look a little more closely at this development, focusing upon two broad themes developed by legal historians in accounting for the birth of criminal law. Both see a crucial shift occurring in the eleventh/twelfth centuries. One concerns the fiscal and political needs of the emergent (secular) state. The other focuses upon a quite different set of changes: changes within the social mission of the Christian Church.

Secular criminal justice

If we focus on England for the moment, one impetus for the creation of criminal law was the movement to strengthen royal power following the Norman conquest (Stenton, 1964; McAuley and McCutcheon, 2000: 3). The precise course of increasing Royal involvement in the handling of incidents of wrongful injury seems unclear, as does the precise nature of the complex of motives behind this development. However, the development pattern can be roughly reconstructed with sufficient accuracy for our purpose.

In the Anglo-Saxon era, kings undertook some responsibility for maintaining the peace in their territories, and sometimes sent officials to supervise local assemblies which mediated in cases of conflict (ibid.: 86). This corresponds to the second phase of self-help theory. After the Norman invasion, however, central authorities sought to exercise control on a more regular basis throughout society through delegated officials (ibid.: 86). The Crown's officials increasingly took over the role, previously played by community representatives, of mediating between conflicting parties (Weitekamp, 2003). In the process, the Crown started retaining a portion of the compensation paid by the perpetrator to the injured party, as a payment for helping to bring about a settlement. Driven by its fiscal needs, the Crown gradually increased the proportion of the compensation that it retained, whilst the proportion that went to the injured party correspondingly

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declined. Eventually the 'penalty' for 'criminal' wrong-doing effectively became a 'fine' payable to the Crown (ibid.).

The representatives of royal authority were, however, in a very different position vis-à-vis the conflicting parties than were community representatives who had previously played this mediating role. Royal authorities had greater power with which to compel conflicting parties to comply with a decision reached in a negotiation session. We can surmise that the Crown's role gradually shifted from helping parties negotiate an agreement amongst themselves to imposing a solution upon the parties, with the threat of force should they refuse to co-operate. Hence, there was a shift from the second to the third phase postulated by self-help theory. It is also likely that, over time, the solution imposed at first was one which took into account the interests of the Crown (e.g. in social peace) – and the wider society whose interests the Crown claimed to protect – as well as the interests of the conflicting parties. Eventually, it seems, the interests of the Crown and society came to dominate over those of the parties to the conflict.

A growing central power clearly gained much – in terms of revenue, capacity to govern, and perceived authority – by taking control of criminal conflicts. It is likely that, recognizing this, it started to insist that criminal cases come before it, and that resort to self-help and private bargaining was increasingly suppressed, i.e. there was a move to the fourth phase stipulated by self-help theory.

The Church

If we focus not just upon Britain but look at developments in Europe more generally, another important development becomes visible. Starting in the eleventh century, a momentous transformation occurred in the position of the Christian Church vis-à-vis society and in the Church's conception of sin.⁴ The hub of this transition was the Gregorian Reformation – or, as Berman describes it, the papal revolution – of the eleventh/twelfth centuries. Before this, there was no clear separation of Church and society. Secular rulers were the religious heads of their peoples (Berman, 1983: 63). They appointed bishops and dictated liturgical matters (ibid.):

The church as an organization was almost wholly integrated with the social, political and economic life of society. It did not stand opposite the political order but within it. Religion was united with politics and economics and law, just as they were united with one another. Ecclesiastical and secular jurisdictions were intermingled (Berman, 1983: 64–5).

As a result of the papal revolution, the Church became a distinct, independent body. It became detached from 'secular' government and claimed superiority over it (ibid.: 83). The Church also became a hierarchical institution. Crucially, it

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sought with considerable success to exert authority throughout society. According to Berman, it became the first modern state.

The Church regarded itself as having a special mission: the care of souls. In order to fulfil this mission, it regarded it as necessary to reform and regulate social life. The Church therefore claimed the right to make new laws as required by the times. This entailed a radical break with prevailing understandings of law as codified custom. Whereas law had previously been virtually synonymous with custom – and even when written was usually no more than an attempt to record custom – it was now becoming something deliberately created by a professionally staffed, hierarchical bureaucracy for the purpose of reforming society. Concomitantly, the law was increasingly systematized. Within the Church, for the first time, canons – i.e. laws of the Church – were clearly demarcated from theological doctrines, moral exhortations and so on. They were also sorted and arranged in a hierarchy. The product was a new type of law, disembedded from the society in which it was to operate as a regulatory force.

Deeds which contravened these laws had a different meaning to deeds which simply caused injury to others. From the Church's perspective, they were not interpersonal injuries which required vengeance – or extraction of compensation – in order to vindicate the injured party's honour. Rather, they were sins, i.e. conscious disobedience of God's commands (McAuley and McCutcheon, 2000: 4–8). Viewing crime as sin had a number of inter-related, crucial, long-term effects.

First, it pointed towards a restriction of criminal liability to those who deliberately did something wrong, excluding those who caused harm to others through their actions but clearly acted without malevolence or mischievous intent. The principle developed that those who caused harm without any moral fault would be liable to make amends for the harm they caused, but they would not be regarded and handled as criminals.

Second, the concept of crime became imbued with a new moral significance and danger. To commit a crime was not simply to injure another person; it was consciously to disobey divine authority. To commit a crime therefore marked the offender as somebody lacking virtue or at least moral fibre. It was also something dangerous since it invited God's wrath and vengeance; a community which failed to distance itself from the criminal risked being tainted and subject to God's wrath and vengeance.

If we look at these two effects together, we can see that whilst viewing crime from the perspective of sin may have narrowed the scope of 'criminality' (the label of criminality and the consequences of this label now attached only to those who caused injury through some culpable action) it also deepened the significance of that label. Criminality now implied something about the moral and spiritual state of the offender, and the authorities regarded this moral and spiritual state as a matter of their concern. As Raymond Saleilles wrote:

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While previously the law recognized only the injury to the individual or society – that is, the material crime in its direct relation – the ecclesiastical law looked to the soul of the man who had committed the crime. In its own language, its concern was the soul that had sinned, that was to be healed, purified, and regenerated through expiation and punishment. (Saleilles, 1911: 37)

A third effect of viewing crime as sin was that it shifted thinking about the appropriate response to the criminal. Crimes required a response designed to reclaim the malefactor spiritually, to reassert the authority of the sacred law that had been violated, and to demonstrate clearly that the community did not endorse the offender's behaviour but regarded it as odious. Eventually, this new set of objectives of intervention came to predominate over the traditional idea of satisfying the honour of the injured party.

This insistence that crime should be regarded from the viewpoint of sin occurred at a time when the Church's conception of sin was also undergoing a transformation. In this period, the conception of sin itself became increasingly 'legalistic', in the sense that sin became identified more with specific sinful acts rather than with more amorphous states of mind. Sinful conduct thus became more clearly defined and at the same time a new doctrine of penance emerged, specifying precise amounts of penance required to atone and earn forgiveness (it is worth noting that prior to the twelfth century, penance could consist not only of undergoing something painful and purifying – such as fasting – but also of compensating those injured by one's sinful actions and assisting their relatives – see Berman, 1983: 68ff). In this context it became important to assess the precise gravity of each sin, so that the appropriate amount of penance could be determined (Cayley, 1998: 128–9). Moreover, what made sin problematic was not only its effects in the world, but also, and more so, its alienating affect upon the soul of the sinner. Accordingly, in assessing the gravity of a sin, more attention was paid to the desire behind the act (i.e. the crucial question was whether it was inspired by a sinful state of mind) than to its consequences for the victim.

The very 'legality' of this new conception of sin eased the process by which 'crimes' became conceived as sins. Hence, crime became increasingly conceived as problematic, less because of the actual injury caused to others, more because it violated divine law and the Church's authority and damaged the spiritual welfare of the offender. Eventually, the harm actually incurred by the victim would become of secondary concern (though never irrelevant) and the spiritual state of the offender of primary concern. Hence, in assessing the gravity of an offence, less and less attention was paid to the harm emanating from it (e.g. the dishonour it brought to the injured party), while more and more attention was paid to what the offender's mental state was at the time of committing the breach of law. And in order to make amends for crime, it was not sufficient to satisfy the

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injured party – to do something to restore their sense of injured honour. Rather, it was necessary for the offender to undergo penance. Crime, eventually, became something to be purged by undergoing pain. The Church, as responsible for the care of souls, had a duty to inflict this pain.

Corresponding with these changes, the Church assumed the right to seek out and prosecute crime on its own initiative. As an institution responsible for enforcing God's law and caring for souls, it could not be satisfied with intervening only when complaints were made by those injured through criminal acts. A crime violated the law and damaged the welfare of the offender, and required atonement, regardless of whether the injured party sought intervention. Even if the injured party received compensation, and had its honour satisfied, the deeper damage caused by crime – to the authority of the Church, the well-being of society and the spiritual well-being of the offender – had to be atoned for.

Subsequently, the Church separated itself from secular justice and the secular courts emerged as the predominant institutions for the dispensation of criminal justice in society. However, within the secular courts, the understanding of crime and of what constituted an appropriate response were profoundly shaped by the Church's canon law. The Church's conception of crime as a sinful act to be sought out and atoned for through suffering of the offender constituted one of the most important cultural forms that would shape the secular criminal law (cf. Garland 1990: 193ff; Gorringer, 1996). This was probably the case even in Britain, where ecclesiastical courts were less central to the administration of early criminal justice, although they certainly played a role (Baker, 2002: ch. 8).

Of course, in the hands of secular authorities, this conception of crime and the appropriate response to it became intertwined with more obviously secular concerns such as maintaining peace and protecting society from mischievous or dangerous individuals. But in some ways, the social authority of secular courts was bolstered by their inheritance of functions once dominated by the Christian Church. For instance, secular courts became perceived as neutral bodies standing above society, enforcing a law which itself came from above and had a higher (virtually sacred) status than mere codified convention. The notion that secular justice agencies were the instruments of some earthly and personal force *within* society, and operated to protect material and often partial interests, was veiled by the religious conception of crime and justice bequeathed to secular authorities by the Church.

The development of criminal liability

By the thirteenth century, the institution of criminal law was becoming established and gaining familiarity. It would take many centuries, however, for something

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reasonably resembling contemporary criminal law to emerge. One of the most important developments was the doctrine of *mens rea* (a guilty mind). As we have seen, the notion that crime was akin to sin created the 'cultural space' within which the notion that crime existed only where injurious behaviour was accompanied by some degree of moral fault could develop. However, it took several centuries for this idea to become embedded in secular criminal law, and the doctrine of *mens rea* was central to this development.

In contemporary criminal law, the meaning of *mens rea* is quite complex (see Chapter 4). Here, a brief and simplified explanation may suffice. A common way of analysing the legal concept of crime is to say that crime has at least two necessary ingredients: *actus reus* (a guilty act) and *mens rea* (a guilty mind). The former concept refers to 'outward' conduct (or conduct accompanied by certain consequences). For example, 'appropriating property belonging to another' is the *actus reus* ingredient of the offence of theft. The latter concept refers to the mental state accompanying the *actus reus*. For example, in order to have the *mens rea* ingredient for theft, the person who appropriates property belonging to another must (i) do so dishonestly and (ii) intend to deprive the other of it permanently. If either of these *mens rea* ingredients is absent, the person is not liable at criminal law (although they still might be liable to return the property or compensate those harmed by their actions at private law).

It is generally assumed that early criminal law did not formally require proof of *mens rea*. If somebody committed what we would now call the *actus reus* of an offence (e.g. took somebody's property) they could be convicted of a crime without any need to prove that they acted dishonestly, or intended to take somebody else's property, or were even being careless when they took somebody else's property. It was only around the sixteenth century that a concept of *mens rea* began to emerge firmly in criminal law. This is generally understood as a sign of moral progress, since it meant that those who did something that outwardly infringed the criminal law, but did so without mischievousness or fault, would no longer be convicted and punished for criminal behaviour. However, the assumption that the emergence of the doctrine of *mens rea* constituted unambiguous moral progress is not accepted by all criminal law scholars.

In some historical accounts of criminal law, the emergence of the concept of *mens rea* is attributed, not to some straightforward awakening of awareness of the injustice of punishing those who outwardly broke the criminal law but lacked fault, but to attempts to address more specific problems encountered as criminal law developed. One was the problem of distinguishing felonies from trespasses. The former were regarded as heinous crimes punishable by forfeiture of property and life or limb; the latter resulted in lesser penalties, such as a fine or corporal punishment (Baker, 2002: 523–5). Increasingly, the presence or absence of fault became one of the main bases for making this distinction. Another concern was to provide a basis for pardoning certain groups of people,

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such as lunatics and young children, who – as we might now put it – lacked some minimal capacity requirements (McAuley and McCutcheon, 2000: 14–17).

One of the most significant contexts for the emergence of *mens rea* was the attempt to restrict benefit of clergy. Clergymen were historically exempt from worldly punishment and would be handed over to ecclesiastical authorities to be dealt with according to Canon law, where the penalties were generally less severe. But, by the fourteenth and fifteenth centuries, ‘benefit of clergy’ was regularly being granted to laymen who could read and write, which enabled judges at their discretion to avoid imposing the death penalty on literate men – i.e. men (but not women) who somehow could display some degree of literacy – who had committed what would otherwise be a felony (Baker, 2002: 513–5). In the sixteenth and seventeenth centuries, the secular law was ‘reformed’ with a view to preventing what was depicted as abuse of benefit of clergy. Distinctions began to appear between crimes committed with and without malice aforethought, with the former becoming ‘non-clergyable’ (McAuley and McCutcheon, 2000: 18–19). For instance, ‘murder’ (homicide committed with prior malice) began to be distinguished from ‘manslaughter’ (homicide without prior malice). According to McAuley and McCutcheon, this constituted a ‘mutation of malice aforethought’: the emphasis on moral fault as a criterion of criminal responsibility, which previously ‘had been used to soften the impact of the regime of absolute liability inherited from the Anglo-Saxon codes’, was now re-deployed to ensure that offenders regarded as morally culpable received the secular penalty for their crimes rather than receive benefit of clergy (ibid.).

It was around this period (sixteenth to early seventeenth centuries) that the term *mens rea* began to appear in treatises explaining the criminal law. The concept was used to refer to the ‘mental element’ that had to accompany the ‘material component’ for a particular felony to have been committed. The idea that *mens rea* was an essential ingredient of felony served to exclude from felonious liability those who ‘outwardly’ did something prohibited by criminal law but acted without mischievousness. But, it did not entail the restriction of felonious liability to those who intended to bring about the precise harm with which they were charged. *Mens rea* was often defined quite loosely, to refer to any maliciousness or mischievousness behind the act which resulted in criminal harm. For instance, a person who without lawful justification struck another person intending to hurt but not kill them, but in the process caused their death, was deemed to have the *mens rea* necessary for murder.⁵

Indeed, it should not be assumed that the overall result of the incorporation of the concept of *mens rea* into criminal law was to restrict the scope of criminal liability. In many ways, the function of the concept of *mens rea* was to produce the opposite effect. For instance, in the law of larceny, at the same time as the concept of *mens rea* emerged, the ‘conduct element’ of the offence started to be interpreted more and more loosely (McAuley and McCutcheon, 2000: 21–6).

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Whereas larceny had previously required 'forcible taking' of the goods belong to another, increasingly cases where somebody had acquired goods lawfully and then kept them or even simply interfered with them in an unauthorized way, began to be interpreted as falling within the conduct element of larceny.⁶ The concept of *mens rea* then began to be used to distinguish between those who committed 'larcenous conduct' (now widely construed) and were 'as bad as thieves' and those who committed larcenous conduct and were not as bad as thieves. The whole focus of the criminal process shifted significantly away from the outward observable conduct of the person and the consequences of that conduct, towards the mental state of that person and whether their general purpose was mischievous.

Conclusion: gains and losses

Estimating what was gained and lost as a result of the creation and early development of criminal law - in anything other than the most general of terms - is extremely difficult. Perhaps the most we can do is indicate a few pertinent questions and explain why they are so hard to answer.

An obvious question is whether the creation of criminal law resulted in the security which social contract theory suggests was the chief purpose of its creation and, if so, how high a price was paid for this in terms of liberty. Answering such questions is particularly difficult. Just how insecure European or British societies were prior to the emergence of the state and criminal law is a moot point. They were probably much more secure than the Hobbesian state of nature, but how much? And, to the extent that society did become more secure in the period following the emergence of the state and criminal law, how much of this can be attributed to the creation of criminal law would be very hard to ascertain. A useful starting-point for such a historical inquiry might be Elias's (2000 [1939]) *The Civilizing Process*, which argues that the state monopoly of violence was an essential element in a complex and very long-term process of cultural and psychological change that brought about the low levels of interpersonal violence (by historical and comparative standards) experienced in contemporary Europe.⁷ Even if Elias's analysis is (very approximately) correct,⁸ it must be emphasized that when the power to resolve conflicts by inflicting violence on perpetrators of injury was transferred from private bodies to public authorities, and regulated by law, what occurred was not the elimination of 'penal violence' but its (gradual) monopolization by the state. The state's use of such violence is itself in many societies a source of insecurity. Poorly regulated state violence often coexists with high levels of 'private' violence, as in much of Latin America and Africa (see Green and Ward, 2009). So, even if the institution

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of criminal law has contributed to long-term processes of pacification in European and some other societies, we cannot assume that such benefits exist wherever the institution has been exported. The kind of comparative and historical research needed even to begin to address such questions is all too rare in the criminological literature (but see Archer and Gartner, 1984).

The question of how much liberty was lost as a result of this process is also difficult to answer. Even if we could assess whether and to what extent people in any particular society were more dominated – less free – following the creation of criminal law, the extent to which the creation of criminal law contributed to this would be hard to establish.

Perhaps we might gain a better impression of what was gained and lost by focusing on the logical implications of the creation of criminal law for individuals affected by the sorts of conduct that would come to be called 'crime'. In theory, victims of crime (and their kin) should have gained a great deal. Those who did not have the power to exact vengeance or obtain compensation from those who injured them would now be able to get some redress. Even those who did have such power would gain, since they would now be relieved of the responsibility of taking vengeance and negotiating compensation – which, as we have seen, is a risky business. However, as we shall see in the next chapter, such benefits did not automatically flow from the creation of criminal law. Rather, victims retained much of the responsibility for bringing cases to criminal justice well into the nineteenth century.

There were also losses for victims. With the creation of state criminal law, victims eventually lost the right to resort to self-help in dealing with those who injured them. With this, at least in Britain (developments in continental Europe were somewhat different), their ability to gain compensation for injuries was eroded. Victims could still seek compensation through action at private law, but the state's punishment of offenders tended to take priority over such private law actions.

For offenders and their kin, the suppression of private vengeance is beneficial in important respects. It protects them from the unpredictable and possible excessive reactions of those they injure. Crucially, it saves them from being economically ruined by having to meet demands for compensation. On the other hand, with the emergence of criminal law, offenders – at least in theory – lost the right to negotiate with those they injured, avoiding penal violence by paying compensation.

Summary

Whilst criminal law might appear to be an inevitable feature of society, it is a human invention. The question of whether we should maintain such an institution is an

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important one, and one way of addressing it is to look afresh at how and why criminal law was created. Social contract theory is one of the most influential attempts to explain the origins of criminal law. Self-help theory modifies social contract theory in significant respects.

In Europe, prior to the creation of criminal law, what we today call crime was dealt with in various ways. Some 'offences' were met with communal punishments. Others could result in private vengeance, although there was probably always the possibility of 'buying off' vengeance by compensating those injured. Pre-state societies, then, probably functioned tolerably well without criminal law. Criminal law was not therefore an obvious institution, but was the result of specific initiatives by the emergent state and the Christian Church.

One of the most important developments in the early centuries of criminal law was the emergence of the doctrine of *mens rea* – the term itself first began to appear in treatises about criminal law in the sixteenth century. For many, this development constitutes unambiguous moral progress as it ensures that only those at fault for breaking the criminal law receive its condemnation and punishment. Other scholars see this development as arising from efforts to solve particular problems confronting the developing institution, such as the need to eliminate 'abuse' of benefit of clergy. They suggest that the impact of the doctrine of *mens rea* was to expand the scope of criminal law in some ways, rather than being simply to restrict its scope.

The actual impact of the rise of criminal law – on levels of security and liberty and on the plight of victims and offenders – is difficult to estimate. This chapter simply points to some pertinent ways of thinking about this impact.

STUDY QUESTIONS

1. Is the institution of criminal law best understood as something created by the people who are subject to it or as something imposed upon people by external institutions?
2. What implications does social contract theory have for the way criminologists think about 'crime' and 'punishment'?
3. What are the implications of the idea that a significant impetus for the development of criminal law was the state's need to consolidate its power?
4. What role has the Christian Church played in the creation and development of 'crime' and criminal law?
5. How might we account for the emergence of *mens rea* as a vital ingredient of criminal liability?

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FURTHER READING

McAuley and McCutcheon's *Criminal Liability* (2000) is one of the few contemporary criminal law textbooks to adopt a significantly historical approach to the subject. The first chapter, a long chapter entitled 'Origins and Development', is a useful starting point. Part IV of J.S. McClelland's *A History of Western Political Thought* (1996) is a good introduction to social contract theory (but it does not deal directly with its implications for understanding criminal law). James Q. Whitman's 'At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?' (1995) provides a useful explanation and critique of self-help theory. William Ian Miller's *Eye for an Eye* (2006) is a fascinating account of revenge and justice. Chapter 7 of Howard Zehr's *Changing Lenses* (1990) (entitled 'Community Justice: The Historical Alternative') provides his critical account of the origins of state criminal justice. Harold J. Berman's *Law and Revolution* (1983) contains his theory of the role of the Church in the creation of western legal institutions including criminal law. A useful general introduction to legal history is J.H. Baker's *An Introduction to English Legal History*, 4th ed. (2002). James Fitzjames Stephen's *History of the Criminal Law of England* (1883) is the classic treatment of the history of the institution.

Notes

- 1 Hobbes' account is contained in his book, *Leviathan*, published in 1651 (page references here are to the 1914 *Everyman* edition). In describing ideas such as Hobbes', it is awkward to try to avoid using the gendered nouns of the original (Part 1 of *Leviathan* is titled 'Of Man'); in what follows we will therefore suspend our usual gender neutrality. McClelland (1996: ch. 11) provides an excellent account of Hobbes' theory. Hobbes was in fact untypical of social contract theorists in that he used the idea to support 'absolute' government, whereas the idea was more commonly used to undermine absolutism.
- 2 Other social contract theorists differed from Hobbes in their depiction of the state of nature. John Locke, for instance, did not see the pre-contractual state as being quite so bleak and chaotic (McClelland, 1996: ch. 12). Nevertheless, for Locke too, the predictability and security that would arise from a mutual contract to obey laws made by a central authority is advantageous.
- 3 Our main guide for this section is James Q. Whitman's paper 'At the Origins of Law and the State' (1995). In this paper Whitman provides a brief account of the self-help theory as a prelude to making some important criticisms of it. See also Miller (2006).
- 4 What follows is drawn mainly from Harold Berman's (1983) study of the formation of the western legal tradition and Cayley's (1998: 123-36) useful summary and drawing together of the ideas of Berman (1983), Bianchi (1994) and Gorringe (1996).

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- 5 This position continues, more or less, to the present day. The *mens rea* of murder in contemporary English law is either an intention to kill a person *or* an intention to cause grievous bodily harm to a person (Ormerod, 2005: 437).
- 6 This occurred at a time when expanding trade increasingly required that goods be transported or processed by third parties.
- 7 For historical evidence see Eisner (2001). For comparative statistics see WHO (2002).
- 8 An important limitation of Elias's work is that he begins the story several centuries too late (see Gillingham, 2002).