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The Place of Criminal Law in Contemporary Crime Control Strategies[2]

1. INTRODUCTION

Contemporary criminological scholarship suggests that in first world countries the response to changed crime patterns is diverse if not incoherent. It emphasizes both repressive measures and adaptive, preventive strategies, accompanied by the exclusion from civil society of persons perceived as a threat. In third world countries the emphasis is largely on repressive measures, sometimes combined with authority exercised by informal customary courts. In both the first and the third world it is postulated that the primary reason for this response is the decline of the authority of the State.

This paper traces how these developments have emerged from earlier attempts to control crime, first by employing criminal law, in its classical form, largely on its own and subsequently by using the criminal law as an instrument within a larger framework of welfare intervention. It examines how the criminal law has reacted to earlier crime control strategies and in the light of these reactions asks what the reactions of the criminal law should be to the current responses of Nation States to crime.

The conclusion that it draws is that criminal law should not accept these responses as inevitable. The criminal law is itself an important source of values. It can influence the types of intervention that are deemed acceptable. In this way it will also influence the development of criminality. The criminological truism that social control is not a mere response to crime but that it plays an important part in determining the form that crime takes, should encourage criminal lawyers to play a more active role. However, this needs to be done within a context that recognizes the (relative) decline of the power of the State and the limits of the resources that would be necessary to spend on crime control.

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2. This paper is a revised version of a public lecture on the question 'Is the criminal law an appropriate instrument to influence significantly the current development of criminality?' presented at a conference of the Alexander von Humboldt Foundation on 'The Crisis of the Criminal Law and the Criminal Sciences' in Bamberg on 2 October 2000.

European Journal of Crime, Criminal Law and Criminal Justice, Vol. 8/4, 361–376, 2000.
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2. FIRST WORLD SOCIAL CONTROL

In brief and crude summary, the accepted developmental story of the relationship between criminal law and social control in the western world goes something like this: Criminal law in its modern form is a creature of the eighteenth century Enlightenment. Its major ideas – convictions only for clearly defined crimes, the equal responsibility of all individuals with criminal capacity for their crimes, a careful 'due' process for the determination of guilt and a system of moderate, graduated punishments proportionate to crimes of varying degrees of seriousness – prevailed politically in the major revolutions at the end of the eighteenth century. In theory, the revolutionary new States in France and the United States of America and in the surrounding countries that made adjustments to their administration of criminal justice in indirect response to the revolutionary fervour, were committed to using this ideal form of criminal law as an operative method of social control. In practice, of course, we know things were different. Criminal justice systems of the nineteenth century never met the standards of the philosophers, of social control fairly dispensed in the court-rooms, in Foucault's phrase, in hundreds of tiny theatres of punishment.[3] Substantive social inequalities stood in the way of the pristine formal equality of all persons before the law, encouraging social theorists from an early stage to doubt whether the idealized system of criminal justice of the Enlightenment could ever be implemented.

From the second half of the nineteenth century onwards the Enlightenment ideal of the criminal law was challenged more directly as the major player in the system of social control. The challenge took many forms but underlying them all was a claim that 'scientific' positivist methods could be used to reshape people so that they would not commit crimes. These claims took different forms. In the case of prisons they took the form of the suggestion that the prison could reform prisoners if given the freedom, the time and the resources to do so. This implied indeterminate sentences that would allow the prison authorities the scope to intervene. In the USA, where this tendency was perhaps most prominent, the new principles were formulated at an early stage. In 1870 already, the National Congress on Penitentiary and Reformatory Discipline held at Cincinnati, Ohio included in its Declaration of Principles[4] the crisp statement that:

> 'Peremptory sentences should be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time.'[5]

This principle was not implemented immediately but in the early twentieth century it was given even further impetus by the optimistic belief of the progressive era that

3. M. Foucault, *Discipline and Punish: The Birth of the Prison* (Harmondsworth 1979).
4. 'Declarations of Principles Adopted and Promulgated by the Congress', in *Transactions of the National Congress on Penitentiary and Reformatory Discipline held at Cincinnati, Ohio, October 12–18, 1870* (Albany 1871) pp. 541–547.
5. 'Declarations of Principles Adopted and Promulgated by the Congress VIII', *loc. cit.*, pp. 541–542.

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science could provide solutions to social problems.[6] The scope of indefinite detention was also gradually increased with some blurring of the distinction between imprisonment for a criminal offence and civil confinement. An example of this was the increasing number of statutes on 'sexual psychopaths' or 'sexually dangerous persons', which, in Norval Morris' memorable phrase, 'spread like a rash of injustice across the United States from 1938 onwards'.[7]

Changes in the objectives of imprisonment and the challenge to enlightened sentencing policies that they contained are examples of a much wider tendency to find other scientific strategies to replace the 'pure' criminal law as prime means of controlling crime. The science of penology that underpinned the indeterminate prison sentence was a relatively small example of the behavioural and social sciences, which not only formed the basis of the new discipline of criminology but which fed into the much more complex ideals of active welfare, if not socialism, that dominated western social organization throughout most of the twentieth century. A bewildering array of programmes, from better housing and job creation for the poor to State-led schemes to influence the young so that they would not become delinquent, were adopted as the confident responses of societies that believed they could use the resources of the State to create a better life for all and, at the same time, to work towards eliminating crime. Broadly speaking, the criminal law was left to play second fiddle to these forceful and confident interventions. Generally speaking, the criminal law of the post-war period found it relatively easy to accommodate itself to the emerging welfare State. For example, in the area of juvenile justice it was prepared, for a time at least, to concede a measure of due process to allow for the (scientifically necessary) treatment of juvenile delinquents who would be rehabilitated and thus 'sin no more.'

This confident welfarism continued through the 1950s and into the 1960s. However, the 1960s saw a backlash against the excesses of an interventionist State. A welfare example was the 1967 decision of the United States Supreme Court in the case *in re Gault*,[8] in which the Court held that the lengthy detention in an institution of a juvenile 'for his own good' could be not justified, particularly if there had not been a proper trial to determine if he was in fact guilty of the relatively minor delinquency of which he had been accused.

This decision was the forerunner of a wider movement to challenge the unrestricted power of the State. It is interesting now to reread Herbert L. Packer's classic work, *The Limits of the Criminal Sanction*, published in 1968, in which he distinguishes between two models of the criminal process, viz. the due-process model and the crime control model. The former, which was clearly ideologically dominant at that time, was based on 'a mood of scepticism about the morality and utility of the criminal sanction taken either as a whole or in some of its applications'.[9] This train of thought

6. D.J. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston and Toronto 1980). See, in general, D. van Zyl Smit and A. Oppert, 'Unbegrenzte Möglichkeiten hinsichtlich lebenslanger Freiheitsstrafen in den USA', 111 *Zeitschrift für die gesamte Strafrechtswissenschaf*t (1999) pp. 558–576.
7. N. Morris, 'Sentencing the Mentally Ill', in M. Tonry and F.D. Zimring, eds., *Reform and Punishment: Essays on Criminal Sentencing* (Chicago 1983) p. 129.
8. 387 U.S. 1 (1967).
9. H.L. Packer, *The Limits of the Criminal Sanction* (Stanford 1968) p. 170.

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underlay the development of stricter safeguards in American criminal procedure and also widespread intervention in the existing regimes for the imposition and implementation of punishment. Of course, there were differences in the forms that the intervention took in different areas. Restrictions on the rights of the police to search and seize, the right to counsel, the virtual abolition of the death penalty, determinate instead of indeterminate sentences and the recognition of prisoners' rights might raise different issues but they had in common, in the US context at least, a distrust of the interventionist State.

The social movement that led to the political resurgence of interest in these restrictions on the way that the State should exercise social control is well documented in the literature.[10] It was the product of a wider process, of what Stanley Cohen[11] has called a destructuring impulse, that took place at the end of the 1960s. Destructuring was not only a movement 'away from the State' but it was accompanied by a move away from the recognition of experts and a thrust towards de-institutionalization. Also characteristic was what Cohen describes in shorthand as a move 'away from the mind', more precisely, 'an impatience with ideologies of individualized treatment or rehabilitation based on psychological inner-state models'[12] reflected at least to some extent in a return to the ideals of justice of the classical criminal law.

It must be recognized too that the tendency of the criminal law to find ways to influence the manner in which the State exercised its power expressed itself in different ways. In all jurisdictions there was an expansion of negative safeguards, that is, those that limited the power of the State directly to infringe individual liberties. The limitation of discretion by introducing sentencing guidelines based on the just deserts of the offender in the United States, and subsequently also in Scandinavia, were inspired, at least initially, not by any punitive impulse but by the desire to structure, and indeed limit, the power of State agents of social control, be they judges or correctional officials.[13] For this reason they initially were supported by those whose ideal for destructuring went much further in the direction of the radical reduction, if not abolition, of the criminal justice system as a whole.

On the other hand, criminal law was used in another way by socially aware lawyers, not only to protect the rights of individuals against the State but also to protect and on occasion even to extend the benefits for those directly subject to the social control agencies of the State. An interesting criminological perspective on this development is that of the Dutch criminologist, René van Swaaningen, who identifies, and contrasts in part with European abolitionism, a school of guaranteeism.[14] This school, which in the Netherlands is closely connected to the modern neo-Utrecht School of the late Antonie Peters and Constantijn Kelk, has played a prominent part in developing the recognition of the positive rights not only of accused persons but also

10. F.A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven 1981).
11. S. Cohen, *Visions of Social Control* (Oxford 1985) p. 31.
12. *Ibid.*
13. A. von Hirsch, 'The Politics of Just Deserts', 32 *Canadian Journal of Criminology* (1990) pp. 397–413.
14. R. van Swaaningen, *Critical Criminology; Visions from Europe* (London, Thousand Oaks and New Dehli 1997).

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of prisoners in that country. In Germany the imaginative use of the ideal of the *Sozialstaat* by scholars such as Horst Schüler-Springorum[15] has performed a similar function. The *Lebach Urteil*[16] and other judgments of the Federal Constutional Court of the early 1970's,[17] which recognised the positive, constitutionally-derived rights that prisoners have to being provided with the opportunities of equipping themselves to lead a crime-free life in the future and which led to the legislative enactment of important reforms in the 1976 Prison Act, are illustrations from within the broad area of criminal law of what can be achieved by combining the protection of individual liberties and the recognition of a right to State facilities.

Unfortunately the guaranteeist and abolitionist responses were not the only reactions to the opening up of penal thinking that took place in the late 1960s. Initially, liberal reformers were somewhat naïve and did not realise that their initiatives could be co-opted by others with different objectives. Consider the example of the Federal Sentencing Guidelines in the United States of America. As the criminologist Anthony Doob explains in his article with the splendid title, 'The United States Federal Sentencing Commission Guidelines: If you don't know where you are going, you might not get there',[18] the original impetus to introduce guidelines came from the widely discussed book that Marvin Frankel published in 1973, entitled *Criminal Sentences: Law without Order*.[19] Frankel argued that a system of guidelines would serve to subject sentencing to the rule of law and thus to make the previously unaccountable judiciary accountable while insulating the sentencing process from the emotion and short-term interests of politicians. It would also, it was hoped, result in a general reduction of punitive responses. Some early guideline systems, such as that in Minnesota, did this to some extent, or at least restricted the development of harsher sentences, but by the time the Federal guideline system had emerged, the climate had changed and it had ceased to be axiomatic that the guidelines would result in shorter sentences. It is interesting that the legislation that created the legal basis for the development of guidelines by a Commission had very wide bipartisan political support. However, after some prodding from the most conservative politicians in the US Congress, the Sentencing Commission, for which no clear philosophical approach to sentencing had been laid down in the legislation and which had declined to adopt one itself, developed a very restrictive sentencing framework. This framework was very much harsher than what had preceded it, even if, arguably, it was more closely aligned to the rule of law than the earlier *laissez-faire* sentencing process had been.

What explains the rise in harsher sentences not only in the United States but elsewhere? In an often-quoted introductory paper to an international symposium on sentencing held in 1995, Anthony Bottoms noted rising 'popular punitiveness' as the major political shift that was contributing to higher sentences in the United States

15. H. Schüler-Springorum, *Strafvollzug im Übergang* (Göttingen 1969).
16. BVerfGE 35, 202 of 5 June 1973.
17. BVerfGE 33,1 of 14 March 1972; BVerfGE 40, 1 of 29 October 1975.
18. A.N. Doob, 'The United States Sentencing Commission Guidelines: If You Don't Know Where You are Going, You Might Not Get There', in R. Morgan and C. Clarkson, eds., *The Politics of Sentencing Reform* (Oxford 1995) pp. 17–50.
19. New York 1973.

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and elsewhere.[20] Popular punitiveness, Bottoms argued convincingly, was more than a mere reflection of public opinion. It was a conscious political programme designed to exploit public uncertainties about a perceived increase in crime with strategies that were designed to show just how tough the State could be. In the rhetoric of popular punitiveness the image of the victim of crime has played an important part as a symbolic figure, who must be protected even at the cost of the welfare of the offender.[21]

With equal clarity of insight, Bottoms set this political process in the context of three wider trends. One was the still powerful movement towards the recognition of the human rights of offenders coupled with the penal philosophy of just deserts, which, in application if not in intent, could either have the restrictive effect of ensuring that no-one was punished more harshly than they deserved, or could ensure a harsher punishment where the offender got what the popular punitivists claimed he 'really deserved'. Second was a recognition of the sophisticated role that managerialism played in contemporary penal policy, and third, an attempt to understand the significance of the shibboleth, 'the community', so often used in the contemporary penal debate. Both the latter concepts need to be elaborated to understand more fully how the criminal law can best intervene to influence the development of an appropriate strategy to deal with the crime of our times.

Contemporary managerialism has different strands. It may be systematic, in the sense that it emphasizes co-ordination and co-operation amongst the different agencies that make up the criminal justice system. This is an essentially neutral, if not positive, characteristic. However, it may disguise a downplaying of the traditional norms of the criminal justice system. Managerialism may also be actuarial, in the sense that it is concerned with the probabilistic calculation of risk and dangerousness with acting in accordance with these calculations. Feeley and Simon have noted that this actuarial language of what they call the new penology implies that the moral or clinical assessments of individuals typical of older classical or positive penologies respectively are replaced by a new 'science' that makes its decisions on the basis of the statistical distribution of characteristics of larger populations.[22]

Bottoms also had some interesting things to say about the use of the community in modern penology. He noted that we use notions of community much more readily in the penal discourse now than in the past in the first world. To some extent reference to 'the community' when diverting offenders rather than prosecuting them is simply a smokescreen, but in other instances, in sentences of community service, for example, a real attempt is made to involve offenders in the community. Bottoms' view was that the term,

> '"community", though an infuriatingly imprecise term, remains highly suggestive to most listeners, and with positive connotations of belonging, support, and

20. A. Bottoms, 'The Philosophy and Politics of Punishment and Sentencing', in R. Morgan and C. Clarkson, eds., *op. cit.*, pp. 17–50.
21. D. Garland, 'The Culture of High Crime Societies', 40 *British Journal of Criminology* (2000) p. 351.
22. M. Feeley and J. Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications', 30 *Criminology* (1992) pp. 449–474.

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> identity. As such, it may be used in modern society for a variety of political perspectives … It may also be used, more or less consciously, as an attempt to evoke the image of a bygone and allegedly more tranquil/peaceful society, and in this respect there are some obvious potential linkages between the modern use of "community" as an idealized concept, and the rise of the "heritage" theme in modern societies.'[23]

It is clear that the various themes that Bottoms outlined stand in some tension to each other. For example, desert theory would emphasise rights where managerialism would emphasise efficiencies within and outside the penal system. A communitarian approach would emphasise punishments that reinforce community values rather than being concerned in the first instance about individual rights or efficiency. Before considering the choices that these tensions imply for the criminal law I wish to pose a wider 'why' question.

3. THE 'WEAK' STATE?

Why is it that this extraordinary mixture of potentially contradictory responses to crime, what Nikolas Rose has called 'a bewildering variety of developments in regimes of control',[24] has emerged in contemporary society? The answer must be in a large part that the State has not recovered the power, or indeed the cultural confidence, to control and reduce crime in the way that it claimed to be able to do before the major destructuring movement of the 1960s and the 1970s.

Much has been written about the relative weakness of the Nation State in first world countries in the last decade of the twentieth century and David Garland has rightly highlighted again the aphorism of Nietsche about its reverse side, that strong States have no need to rely upon intensely punitive regimes.[25] Certainly, one indication of the weakness of many modern States is the increase in penal rhetoric and also to some degree an increase in harsh penal measures such as the greatly expanded use of imprisonment and, in the case of the USA, the death penalty.

However, the most important analytical insight provided by contemporary criminological theory may be that the State now governs by a range of strategies that are both inclusionary and exclusionary.[26] The inclusionary strategies identify those who are creditworthy both in the financial sense and who are qualified to take part in desirable social activities such as driving a motor car or indeed freely crossing a national border. It is obvious that the use of identity as a strategy of inclusion has as its converse a strategy of exclusion, a question to which I will return.

Inclusionary strategies go further by encouraging individuals to take responsibility for their own security by private insurance. The insurance adviser quickly becomes the crime avoidance officer, explaining to you that household insurance will not be

23. A. Bottoms, *loc. cit.*, p. 36.
24. N. Rose, 'Government and Control', 40 *British Journal of Criminology* (2000) p. 321.
25. D. Garland, 'The Limits of the Sovereign State', 36 *British Journal of Criminology* (1996) p. 445.
26. N. Rose, *loc. cit.*

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renewed unless you get an alarm system or that your car insurance premium will be increased unless you install the latest anti-theft device. By encouraging and facilitating such insurance systems a State is therefore in fact governing at a distance.

Inclusionary strategies also draw on all manner of State agencies at the local level and also civil society organizations to assist in the project of social control. Neighbourhood watches, sponsored by local government and facilitated by the police, are perhaps the most obvious of such strategies. Their persistence in the light of very mixed reports of their success indicates perhaps that they represent the hankering after an idealized self-regulating community, which is so typical of our times. In Bottoms' terms, the inclusionary strategies encompass elements of managerialism and a focus on the community.

Exclusionary strategies are at least an equally strong feature of how the modern State exercises social control.[27] In terms of the examples we have just considered, people who are excluded are denied facilitative identification, they are left uninsured and indeed disbarred from communities. The key word here is citizenship. Commentators from a number of perspectives have recognized that the denial of citizenship is the chief characteristic of contemporary exclusion. There is a distinct overlap between the general restrictions on access to countries and denial of citizenship, on the one hand, and the activities of the criminal justice system in this sphere, on the other. In some instances this denial refers to the whole area of crimes committed by foreigners, who may be formally excluded from the rights that citizens of the national State enjoy in respect of the criminal law or who, even if admitted as citizens, may be treated by the agents of social control as belonging to a second, inferior class. In other instances the exclusion is not on the grounds of foreignness but because the persons caught up in the net of criminal justice and marked by actuarial prediction as likely to reoffend have their ordinary rights as citizens abridged for a long time or even indefinitely. Jonathan Simon's empirical study of parole as applied in California not directly as punishment but as a measure to allow the high risk sub-group to be picked up, that is arrested and searched with the normal constitutional protections applying to them, is a good example of how a bureaucracy can operate such an exclusionary device.[28] The movement to have the whereabouts of sex offenders made known to the public after release is another example. As David Garland puts it: 'The favoured modes of punitive expression are also modes of penal segregation and penal marking.'[29]

Orwellian as they may sound, the twin strategies of inclusion and exclusion are not, it must be emphasized, the products of a strong State. Such a State would claim, as did the welfare States of the 1950s, that it could solve the problem of crime by changing social conditions so that people would not become criminals and by rehabilitating those who still committed crimes. The contemporary first world State cannot and does not make such claims. Instead, it is driven by a concerned citizenry of insiders to respond as best it can within the framework of its own fiscal crisis. In the words

27. For a general overview, see J. Young, *The Exclusive Society, Social Exclusion, Crime and Difference in Late Modernity* (London 1999).
28. J. Simon, *Poor Discipline, Parole and the Social Control of the Underclass, 1890–1990* (Chicago 1993).
29. D. Garland, *loc. cit.* (2000) p. 350.

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of Garland again: 'The new penal ideal is that the public be protected and its sentiments expressed.'[30] The responses of the State to achieve this ideal are a mixed bag. Carrying out the demands of popular punitiveness costs a great deal and may not be cost effective in terms of protection. It is noteworthy that confident conservative governments sometimes attempt to limit the effects of popular punitiveness *by reducing the prison population* for reasons of fiscal constraint, only for their perhaps more 'liberal' but less secure successors to rake it up again.

These weaknesses and ambiguities of the contemporary State provide, I will suggest in the concluding section of this paper, the particular entry point for the criminal law into the debate about contemporary crime control policies. Before doing that, however, let us widen the general comments to include problems of crime control in the third world.

4. THIRD WORLD SOCIAL CONTROL

If one thinks of the third world in a historical context one thinks inevitably about the colonial project. Its objective was the creation of a social order in which the colonial authorities could profit. The criminal justice system had a prominent place in this project. It is not necessary to belabour this point. To take a Southern African historical example: the first modern prisons in the Cape Colony were created to have sufficient labour available to construct the mountain passes necessary for access to the interior. The major prison of the colony in the latter part of the nineteenth century was owned by the De Beers Diamond Company, and kept filled exclusively with indigenous prisoners by a supportive colonial Government concerned to provide the profitable mine with an easily accessible and cheap labour force.[31] The point is not that prison labour has remained a major productive force in the third world,[32] but that for historical reasons the classical criminal law with its measured punishments applied equally to all did not ever enjoy the same degree of legitimacy as in the first world, and the subtle underpinning of the criminal law by the welfare state in its most optimistic phase of claiming to control crime did not happen.

Colonial governments were always in the position of contemporary weak States in that they were without a monopoly of authority. To a greater or lesser extent they relied on tribal leaders and their indigenous courts to maintain order. Of course, in various ways they manipulated these 'alternative' legal systems to ensure their overall control but nevertheless they maintained them intact. When independence came from the colonial powers the new governments understandably (and justifiably) had ambitions to introduce liberal democratic systems in all areas, including criminal justice. In the criminal justice area too, modern criminal law together with formal, often constitutionally enshrined, guarantees of due process was universally adopted. The

30. *Ibid.*
31. D. van Zyl Smit, 'Public Policy and the Punishment of Crime in a Divided Society: A Historical Perspective on the South African Penal System', 21/22, *Crime and Social Justice* (1984) pp. 146–162.
32. It has not. See generally D. van Zyl Smit and F. Dünkel, eds., *Prison Labour Salvation or Slavery? International Perspectives* (Aldershot 1999).

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structure on which this new criminal justice system was based in most post-colonial countries was the structure that in the past had been used to deal with that part of the population[33] whose 'ordinary' (as opposed to 'political') crime had been dealt with by the formal colonial courts.

This criminal justice system has proved inadequate in post-colonial societies, in almost all cases, certainly in the African context. A recent overview of crime in Africa by Bayart, Ellis and Hibou suggests that not only are African States very weak and their criminal justice systems broken down, but also that corruption in some countries has reached the level where it is possible to speak of the criminalization of the State itself.[34]

If the third world criminal justice system cannot cope with ordinary crime, it can hardly be expected to cope with the massive stresses induced by processing political crimes.[35] Even in South Africa, where the resources of the criminal justice system are relatively greater than other African countries, they have not been sufficient for a systematic prosecution of offences related to the apartheid order. This has undermined the work of the widely-hailed Truth and Reconciliation Commission, as those who have not applied for amnesty under its procedures have, with few exceptions, not been brought to book. Arguably, truth commissions following a period of turmoil are both symptoms and products of weak States and should not be romanticized. Certainly in the South African case the discovery of the 'truth' by the Commission was not a very rigorous process.[36] While the Commission may have served a political function, the substantive weaknesses in its work leave it open to attack in the future from revisionists from all sides of the political spectrum and undermine its efficacy as an example of restorative justice.

In spite of all their weaknesses many third world States still try to respond to popular punitiveness through legislating tougher penalties to be administered by the formal criminal justice system.[37] At the same time, as a result of the massive difficulties faced by formal criminal justice systems and a shortage not only of resources but also of trained lawyers, many African countries have continued to rely on or, in some instances have turned anew to informal justice systems.[38] In most African countries it is still true that non-state, informal dispute-resolution processes deal with far more cases than the State courts. In Mozambique more than 80 percent of disputes are processed through the popular tribunals. In South Africa, where official recognition of the new informal courts that emerged in the cities in part as a by-product of the

33. Typically this group comprised European settlers and the section of the indigenous population that had been allowed to assimilate with them.
34. J.-F. Bayart, S. Ellis and B. Hibou, *The Criminalization of the State in Africa* (Oxford and Bloomington 1999).
35. For a superb picture of the difficulties that a national government has in this regard, see M. Drumbl, 'Scelrosis, Retributive Justice and the Rwandan Genocide', 2(3) *Punishment and Society* (2000) p. 287.
36. Anthea Jeffries, *The Truth about the Truth Commission* (Johannesburg 1999).
37. For an analysis of the impact of the trends that Bottoms identified in South Africa, see Dirk van Zyl Smit, 'Some Features of Correctional Reform in South Africa', 11 *Acta Criminologica* (1997) pp. 47–57.
38. I am indebted to my Cape Town colleague, Wilfried Schärf, for the information contained in this paragraph. The interpretation is my own.

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struggle against apartheid has been slow in coming, there are an estimated 4,000 street committees across the country compared with approximately 500 State courts which deploy 1,700 magistrates and judges in all areas.[39] In Uganda the Local Council Courts, essentially the formalised version of the resistance committees that opposed the previous regime, have been incorporated in the complex hierarchy of formal or, at least, State recognized courts. On the other hand, the development may also be in the opposite direction. In Malawi the Chief's courts were incorporated into the official court hierarchy and given extensive powers to try all criminal matters shortly after independence. However, there was a widespread perception that this power was abused during the long period of one-party rule of Dr. Kamuza Banda. With the advent of multi-party democracy in 1994, these courts were abolished and the criminal process was again forced to rely on the already overburdened formal system.

5. COMMON INITIATIVES IN THE FIRST AND THIRD WORLD?

- To summarise thus far: the contemporary Nation State has lost its confident view that welfare interventions underpinned by a criminal justice system operating in accordance with the principles of the classical criminal law can reduce criminality. Instead the State, moving from a position of relative weakness in both the first and the third world has adopted a mixture of strategies aimed at controlling crime and responding at the same time to the not always directly instrumental demands of popular punitivists.
- This summary would be perceived by many as too pessimistic. Indeed, the move away from the monopoly of authority exercised by the State has been seen by some as presenting new possibilities for ordering that are potentially liberating. In a recent issue of the British Journal of Criminology the English social theorist, Paul Hirsch, has reflected that the ideal form of government may arise from the crisis in which the State now finds itself.[40] He makes a case for what he calls an associative democracy. In such a system a small core of common morality would be recognised. In Hirsch's words: 'There is a thin common morality, that most groups in society oppose murder, theft, lying and fraud.'[41] Beyond that, largely self-governing 'communities of choice', associations that people voluntarily join, should be left to form and develop their own rules. Attractive as this vision may be to many, there is little indication that government strategies are in fact developing in a way that will empower such freely associating groups. Instead, they have tended to combine the granting of greater responsibilities with other measures that are intended to consolidate central power and bring group actions in line with centrally defined

39. The estimate of the total number of state courts is based on South African government information at www.gov.za/about-admin/html. It does not follow that in South Africa more cases are heard by these part-time courts than by the State system.
40. P. Hirsch, 'Statism. Pluralism and Social Control', 40 *British Journal of Criminology* (2000) pp. 279–295.
41. *Ibid.*, p. 289.

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goals.[42] Yet, even if Hirsch's vision is realised, criminal lawyers should not be too concerned, as the 'thin common morality' relates to the topics traditionally central to the criminal law.

- A complementary, but perhaps more sophisticated, approach is that espoused by John Braithwaite, who argues that criminologists should co-operate with the new regulatory State in order to get it to provide the resources that will enable its communities to regulate ordinary crime effectively.[43] He points out that the restorative approach to crime, which he believes should be adopted in the community, requires State resources in order to allow the welfare programmes that underpin it to operate. It also requires that the State eliminates long-term unemployment, funds policing in the broad sense of the steps that need to be taken by the community to provide a safe environment, and, finally, continues to support financially State police and courts, where they are still required for those functions that the community or market regulation cannot fulfil. It is clear that the continued reliance on the State police and courts means that a place has to be retained for the criminal law as a last resort.

6. A DEFENSIVE ROLE FOR THE CRIMINAL LAW?

Where do these initiatives, those taken directly by the State in the first and third world and those alternatives suggested by criminologists who welcome a changed, if not necessarily a reduced, role for the State, leave the criminal law? The first point to make is that criminal lawyers must recognize that they are operating within a very different environment, both from the comfortable accommodation with social welfare of the 1950s and from the radical destructuring forces of the 1960s and 1970s. They must look anew at the limits that current social control strategies seek to place on the liberties traditionally guaranteed by the criminal law.[44]

Secondly, criminal lawyers must recognize that they are not passive victims of wider social currents but that they have a contribution to make as exponents of a nuanced moral philosophy that has important things to say about personal responsibility for willed actions; about the duty of the State to create a legal framework to protect the fundamental rights of its citizens; about the power of the State to act against those who deliberately infringe these laws by punishing them for the infringements; and about the appropriate limits of the powers of the State both to criminalize conduct and to punish those whose conduct is proven to have deliberately infringed such laws.[45]

The question is how do criminal lawyers engage with the range of challenges with

42. D. Garland, *loc. cit.* (1996).
43. J. Braithwaite, 'The New Regulatory State and the Transformation of Criminology', 40 *British Journal of Criminology* (2000) pp. 222–238.
44. For an earlier attempt to reposition the criminal law in this way, see the conclusions of Antonie Peters, 'Main Currents in Criminal Law Theory', in J. van Dijk *et al.*, eds., *Criminal Law in Action* (Arnhem 1986) pp. 19–36 at p. 35.
45. For research and analysis on the establishment of such limits, see I. Loveland, ed., *Frontiers of Criminality* (London 1995).

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which they are confronted? In my view the answer has much in common with the views of the 'guaranteeist' school that I discussed earlier. But the debates that must be entered into are new and the power to speak authoritatively that criminal lawyers claimed has been reduced significantly with overall questioning of the authority of 'experts'. It is therefore imperative that criminal lawyers engage in a more public debate.

Let me return to some of the themes highlighted above. First, popular punitiveness needs to carefully disaggregated on the basis of whether the true concern is with just deserts in the narrow sense or with incapacitation. The direct threat to individual liberty of the latter must be identified and this contrasted with the pragmatic reality of its limited effects. There is a strong link, which we underestimate at our peril, between the limits contained in the notion that no-one should be punished more than they deserve and the defensive human rights guarantee of, for example, freedom from arbitrary arrest or the right of prisoners not to be subject to restrictions that are not inherent in the loss of liberty that incarceration entails. At the same time, the distinction between a penalty proportionate to the guilt of the offender and vengeance-driven retribution must be emphasized. In this respect there is much encouragement for the criminal lawyer who enters into the public debate in the findings of surveys that show that members of the public are not as punitive when confronted by carefully crafted questions about what the punishment in individual cases must be, as they are when asked general questions about appropriate levels of punishment.[46] The strategy of public debate demands engagement with the fashionable initiative of increased recognition of the rights of the victims of crime. Some aspects of this initiative are salutary. Clearly, much can be done to keep victims informed of the course of proceedings and generally to make them more comfortable in their interactions with the criminal justice system. But, in some instances, victim advocacy groups press for forms of intervention that may lead to offenders being punished more harshly than they deserve and in extreme cases may undermine the just determination of guilt, which is at the core of the criminal justice process.[47]

Secondly, the strategies of exclusion that feed both on the actuarial managerialism of the kind described by Jonathan Simon and the treatment of outsiders as non-citizens, must be resisted from the perspective of the criminal law. The principles of legality must be applied at all stages of the criminal justice process. Equality before the law is one of the cornerstones of the criminal law, as it is of citizenship generally. Where an alleged criminal is merely deported as an effective penalty for an alleged offence rather than being subject to a criminal trial the guarantees of the criminal law are undermined. Furthermore, he person's humanity itself is denied because the question of whether he is responsible for his actions is not considered before the State acts against him. The criminal law can and should act as a wider guarantor to ensure that denial of citizenship is not used to disguise the arbitrary exercise of State power against which it forms such an important bulwark.

Other forms of exclusion must be avoided too. The criminal law need not be too despondent in this regard. Even in these reactionary times in which we live, there

46. M. Hough and J.V. Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion', 1 *Punishment and Society* (1999) pp. 11–26.
47. A. Ashworth, 'Victim Impact Statements and Sentencing', *Criminal Law Review* (1983) p. 498.

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are still positive gains that can be made by stressing the social welfare rights that offenders can enforce against the State. An example from the sphere of prison law is the decision of the German Federal Constitutional Court in July 1998, to recognize that prisoners who are compelled to work have a constitutional right to be rewarded adequately for their labour.[48]

Thirdly, the criminal lawyer must be prepared to cast a critical eye over the fashionable claims of community justice. The contemporary State may be justified in claiming that in certain instances community involvement in aspects of social control may achieve desirable results without impinging on the rights of the accused any more than do the procedures of the formal criminal law. But these claims need to be examined very carefully. Although various forms of victim-offender mediation and restorative justice are premised on the idea that the offender consents to the process, the criminal lawyer must ensure that these premises are tested empirically, for there are many subtle forms that social pressures may take. The high-sounding ideals of the restorative justice lobby must also be examined closely, for their strategies of recognizing the loss of 'dominion' suffered by victims of crime and recompensing and reassuring them may result in repressive, incapacitatory measures or in punishments that are grossly disproportionate to the seriousness of the offence, unless sufficient safeguards are in place.[49]

These difficulties are compounded in multicultural contexts where some devolution of social control may be politically desirable. The problems that may arise have been highlighted by Douglas Iverson in his thought-provoking essay, 'Justifying Punishment in Intercultural Contexts', in which he notes that for a punishment to be appropriately communicative in the Australian Aboriginal context it may have to include a 'spearing', that is a non-lethal wounding of the offender with a spear in the thigh in a community based ceremony.[50] In one controversial case a judge allowed earlier release from custody for a prisoner who would undergo such a community-based 'payback'. This raised widespread objections from the wider Australian community, both in respect of the ostensible toleration of an assault and because the earlier release of the Aborigine offender created a perception of an unfair disparity in punishments. There are no easy answers to this dilemma. The human rights roots of the criminal law would provide a basis for objecting to the 'spearing'. Classical criminal law with its strong emphasis on formal equality would object also to the different punishments. In fact, the political function of criminal law was to eliminate such disparities within the nation State, and to establish a wider solidarity that transcended the smaller (ethnic) community. On the other hand, there is a case to be made for recognition of different forms of punishment in a multicultural society. The debate about how far this should go is not one that the criminal law can avoid.

A further complicating factor with the use of ethnically based informal courts is the anthropological truism that these are not static structures but themselves evolu-

48. Decision of 1 July 1998. Reported in 51 *Neue Juristische Wochenschrift* (1998) pp. 3337–3347.
49. A. Ashworth and A. Von Hirsch, 'Not Just Deserts: A Response to Braithwaite and Pettit', 12 *Oxford Journal of Legal Studies* (1992) p. 82.
50. D. Iverson, 'Justifying Punishment in Intercultural Contexts', in M. Matravers, ed., *Punishment and Political Theory* (Oxford 1999) pp. 108–124.

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tionary. In many African countries, for example, there is a rapid dislocation of tribal life and authority. Yet at this very stage an attempt is being made to reassert their role. A critical criminal lawyer should therefore be alert to the fact that they may be used, as was the case in Malawi, to avoid the constraints on the exercise of arbitrary power inherent in the criminal process.

7. A POSITIVE ROLE FOR THE CRIMINAL LAW?

The concerns that I have suggested up to now that should dominate the response of criminal lawyers to contemporary forms of social control have been typified by negative questions, that are designed to limit and restrict many of these social control initiatives. To these concerns of the criminal lawyers one could respond in the words that the South African poet, Roy Campbell, addressed to his critics:

> 'They use the snaffle and the curb all right but where's the bloody horse?'[51]

I therefore want, in conclusion, to emphasize that the criminal law does have a positive role to play in responding to the current upsurge in crime by creating a framework within which obedience to the law is a rational option. One observes this in the first instance, in the context of third world countries in some of which, as I have mentioned, the power of the State has been so severely eroded that it is not able to provide minimum guarantees of safety for its inhabitants. In these instances it is not the power of the State but its absence that is a threat to the human rights of its inhabitants.

Against this background the criminologist, Stanley Cohen, who himself was both a leading figure in, and chronicler of, the destructuring movement, has also recognised that there is a need to distinguish clearly in these parts of the world between the political and the criminal. In his view: 'For these countries, the remote prospect of democracy lies in a radical separation of crime and politics.'[52] I would add to this that a pre-condition for such a separation is both a clear criminal code and a reasonably effective apparatus to enforce it justly.

Cohen goes on to argue that in the 'prosperous and stable democracies, although the stakes are lower – "identity" rather than life or death – more of a separation between public and private lives might also be desirable' to avoid 'the moral and Olympic games between competitors claiming superior status for their particular psychic suffering and victimization' and to create a basis for any public debate about democracy and social justice.[53] To achieve this, a clear separation between crime and politics is equally necessary. In these societies too, the criminal law must also assert itself to set publicly

51. R. Campbell, 'On Some South African Novelists', in S. Finn and R. Gray, eds., *Broken Strings: The Politics of Poetry in South Africa* (Cape Town 1992) p. 19.
52. S. Cohen, 'Crime and Politics: Spot the Difference', 47 *British Journal of Sociology* (1996) pp. 1–21 at p. 19.
53. *Ibid.*

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those boundaries beyond which all shall not stray and, inclusively, to which all are equally subject.

I stress this point because it is essential that criminal lawyers have the confidence to argue for an appropriate portion of State resources to be spent on a criminal justice system (not necessarily on the construction of prisons!) that can deliver the conviction and sentencing of offenders after a demonstrably just process. Simply put, legality costs money. It goes almost without saying that when criminal lawyers engage with policymakers they should recognise that running and maintaining a criminal justice system is an expensive enterprise. They should engage with the authorities on how this can be done as cost-effectively as possible without undermining fundamental principles. It should be emphasised though, that legality is worth it: because it establishes that we are dealing with not a mass of people to be manipulated and cajoled into conformity but free citizens in the widest, most inclusive sense, who can only be brought to book in this way.

I wish to conclude on a positive note. It may be true that the power and sovereignty of nation States is in decline and that new laws are needed in the twenty-first century to deal with new forms of transnational and international crime.[54] But here, too, criminal lawyers have an important role to play and, increasingly, are playing it. The development of general principles for transnational criminal law within Europe is an example of how engaged academic criminal lawyers can attempt to ensure that the standards of the criminal law are applied to what otherwise could simply become mindless bureaucratic regulation.[55]

Even more encouraging is the emergence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and, of course, the Statute of Rome to create a permanent International Criminal Court.[56] Criminal lawyers should be proud of these developments, as they represent, something often overlooked by criminologists, a powerful recognition that a significant part of the world community believes that the due procedures of criminal law, which carefully establish individual responsibility and mete out moderate punishment rather than brute vengeance, offer the best way of dealing with the most heinous crimes imaginable.

There can be no doubt that the criminal law is an appropriate instrument with which to influence significantly current developments in criminality. Appropriately applied, the criminal law provides the basis for, and contributes directly to, social justice in contemporary societies.

54. M. Pieth, 'Internationale Harmonisierung von Strafrecht als Antwort auf transnationale Wirtschaftskriminalität', 109 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1997) pp. 756–776.
55. U. Nelles, 'Europäisierung des Strafverfahrens – Strafprozeßrecht für Europa?', 109 *Zeitschrift für die gesamte Strafrechtswissenschaft* (1997) pp. 727–755.
56. M.C. Bassiouni, *The Statute of Rome* (Ardsley N.Y. 1998).

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