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## Companions on a Serendipitous Journey

Nicola Lacey\*

It has not been the journey that I originally planned. During my school days, my main intellectual love was of literature, and my imaginative world was peopled by novels and poems. However, like many of my contemporaries in an era of rapidly expanding higher education, I was the first of my family to go to university, and my parents were keen that their only daughter should have not only the educational opportunities which they had missed, but a career which would guarantee her financial independence. Literature definitely didn't fit the bill! I will never forget the look of steely determination which crossed my mother's face when one of my teachers mentioned to her that the school regarded me as a good candidate for law. An extended tussle ensued. I triumphed in round one, and applied to university to read English. But I hadn't reckoned on my mother's stamina, and she gained the day when I finally caved in under sustained pressure and changed my application to law. I was thrilled to gain a place at UCL – I could just about manage the idea of being a lawyer as long as I could be in the big city... (I grew up in a sleepy suburb.) But some ambivalence about the subject choice must have remained, and I duly hated my first term and tried desperately to change courses. The English department at UCL decisively refused to entertain an application to transfer. I didn't understand it at the time, but this was the first of the many strokes of good luck which have helped to shape my career.

Things began to open up for me, intellectually, in my second year, which included the criminal law course. I was immediately drawn to a subject so clearly open to moral and political analysis, and when I alighted upon H.L.A. Hart's *Punishment and Responsibility*<sup>1</sup> the applied philosophical jurisprudence which came to dominate the early part of my career utterly captured my imagination. I think this was because I was drawn to the intricacy which it shared with doctrinal legal analysis, while being motivated by its engagement with urgent practical problems and questions of justification. It is a puzzle to me today that I didn't draw more links between these issues raised by criminal law and the sociological classics to which I had been introduced in a half unit first year course. Perhaps it was too much too soon; perhaps I was still somewhat resistant to the whole idea of studying law. But the fact is that I didn't really connect with those sociological issues until studying a graduate course in criminal justice at Oxford a couple of years later. So if I had to choose a single book which inspired my intellectual journey, and which opened up the possibility of an academic career to me, it would have to be that luminous collection of Hart's essays, with their vision of the centrality of responsibility to the legitimacy of criminalisation and punishment in modern societies, and their intricate picture of the ways in which ideas of responsibility are inscribed

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<sup>1</sup> H.L.A. Hart, *Punishment and Responsibility* (1968)

in legal doctrines, legal processes, sentencing and punishment. I continue to treasure and to re-read the book quite regularly, almost always finding in it some insight or subtlety which I had missed last time around – or perhaps which I had simply forgotten. And though my own intellectual taste has moved in more socio-legal, historical and institutional directions, *Punishment and Responsibility* has influenced and informed much of my work.

I am not, however, going to frame this autobiographical essay around the influence of a single book. This is partly because I have already written quite a bit about *Punishment and Responsibility*, and its impact on my work is probably fairly plain. More importantly, I don't feel that my intellectual journey has been shaped by any one dominating source. It has been more a case of scholarly hitch-hiking than a carefully planned tour; a voyage marked by fascinating detours and unplanned encounters. Certainly, these have generated cumulative insights which have informed my decision about where to head – or try to head – next. But there has been no one, nor even a handful, of moments of decisive revelation or arrival. So I rather resist the 'great books' view of academic life. And while, like all academics, a range of key books have been constant companions, the course of my journey – not to mention its pleasure and interest – has been shaped as much by relationships as by reading; as much by the institutions in which I have worked as by purely intellectual inspiration – not to mention by sheer happenstance. So I am going to follow and even extend the example of one or two of my predecessors in this series and write more generally about the key turning points in my intellectual journey, and the resources and relationships which prompted them.

As I have already explained, Hart, and Jeremy Bentham behind him, stand for the first glimmerings of real intellectual excitement in the first phase of my career. So my main focus while a graduate student at Oxford, and indeed underpinning my first book and most of my early articles, was on analytical jurisprudence and political theory. I was fortunate to be part of a philosophy reading group involving, among others, Bob Hargrave, Mark Lacey, and Jeremy Waldron, all of whom significantly shaped my ideas at the time. But, looking back, I can see that my two years in Oxford also laid the foundations for new strands in my work. The intellectual gymnastics of high end analytical jurisprudence were invigorating up to a point, but began to feel arid. So a move to the normative theory which had attracted me in Hart's *Punishment and Responsibility* remained, and remains, appealing in its more purposive and practical application. The jurisprudence scene in Oxford at the time was enriched by political theory debates around Rawls, Nozick, Taylor and Dworkin, and these hugely enlivened my life as a graduate student. But it gradually dawned on me that having a clear view of what one would ideally like to do, or to be the case, and why, was of limited use if one had no sense of how to get there. And that implied a whole new range of questions: historical questions about how things have come to be as they are; social science questions about the conditions of existence of social institutions like law, and about their potential to shape human behaviour; cultural questions about how ideas are formed, stabilised and transmitted. These questions presented themselves to me most forcefully as a result of my first encounter with Michel Foucault's *Discipline and Punish*<sup>2</sup>, with its marvellous historical sweep and willingness both to generalise and to attend to the details of social practices and the discourses in

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<sup>2</sup> Michel Foucault, *Discipline and Punish* (transl. Alan Sheridan 1977)

terms of which they are framed. (To his great credit, Foucault's critical object Bentham also had, in Herbert Hart's words, an 'extraordinary combination of a fly's eye for detail, with an eagle's eye for illuminating generalizations applicable across wide areas of social life'<sup>3</sup> - a capacity which underpinned his status as a reformer as much as a philosopher.) But, ironically, my dawning interest in history and the social sciences was not prompted exclusively by my encounter with Foucault. Equally, it derived from what remains my most extended analytical jurisprudence workout, namely my BCL thesis, which engaged with the distinction between momentary and non-momentary legal systems developed by Joseph Raz in his brilliant if intractable *The Concept of a Legal System*.<sup>4</sup> Raz's argument was that the momentary system, consisting of all the laws valid in a single legal system at any one time, is quite distinct from the legal system understood as a socio-historical entity existing over space and time. My reaction to this – that even though the distinction was useful for some purposes, it couldn't be right that the contents of the former could be identified, interpreted and fully understood in isolation from an understanding of the latter – has informed virtually all my subsequent legal scholarship.

In 1981 I returned to UCL, my work building mainly on the jurisprudence and political theory roots which had been strengthened as a BCL student in Oxford, and nourished by regular visits to the energetic and welcoming centres of more pluralistic legal philosophy in Edinburgh, Glasgow and Stirling. But the socio-legal seeds which had been planted during my criminal justice studies began to germinate, not least as a result of William Twining's arrival as a colleague. William influenced me in two main ways: first, he encouraged me to see that evidence, and procedure more generally, were key to the way criminal law worked; second, he commissioned Celia Wells, Dirk Meure and me to write a text and materials book for the Law in Context Series. Work for that first edition of *Reconstructing Criminal Law*,<sup>5</sup> of which the close relationship which I formed with Celia was a key part, was one of the most intellectually exhilarating experiences I have had. This was because the decision to try to write a book which started not from legal categories – groups of offences – but rather from social categories – the problems which criminal law purports to address, the social arrangements and institutions which it claims to protect – necessitated a huge amount of reading in history and a range of social sciences as well as legal scholarship. There is much more than can be contained in this essay to say about the inspiration I gained from that reading, but let me pick out a few examples. Inspired by American legal scholars Jerome Hall and George Fletcher, I decided to frame the property chapter, for which I had primary drafting responsibility, in terms of history. I can still remember the excitement I felt when I first read E.P. Thompson's *Whigs and Hunters*.<sup>6</sup> I had to put it down and walk around every half hour or so, just to let the ideas and images sink in. Thompson's extraordinary achievement in bringing the lives of the victims of the Black Acts vividly to the page while never losing sight of the macro forces which drove this inglorious episode in criminal law history, drawing out its theoretical implications, still amazes and inspires me. As I moved closer to the present, I became interested in how property offenders rationalise their conduct – as well as how the 'law-abiding' rationalise their judgements of criminality - in a world in which the norms of entrepreneurial capitalism are so hard to distinguish from the norms of sharp practice on the wrong side of the law. Here Gerald Mars' unputdownable anthropological study, *Cheats at Work*, opened

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<sup>3</sup> H.L.A. Hart, *Essays on Bentham* (1982) p. 4.

<sup>4</sup> (1979)

<sup>5</sup> Nicola Lacey, Celia Wells and Dirk Meure, *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* (1990).

<sup>6</sup> E. P. Thompson, *Whigs and Hunters* (1975).

some important windows for me.<sup>7</sup> In working on the introductory chapter for the book, which sets up its theoretical framework, when I reached the point of tracing how cases made their way through the criminal process, Doreen McBarnet's *Conviction*<sup>8</sup> opened my eyes to the key insight that, Herbert Packer's conceptual dichotomy notwithstanding, the due process norms conceived by lawyers as the bedrocks of criminal law's (ethical) legitimacy could operate to legitimate (practically) some pretty instrumental crime control logics – an illumination which prefigured an enduring interest in the ideological qualities of legal doctrine. And for the public order chapter, I found huge inspiration from the work of Stuart Hall and his colleagues in *Policing the Crisis*,<sup>9</sup> in terms not only of the influence of race and class in the fundamental development of criminal law in its social context, but that of contemporary politics and power relations more generally.

These were all quite revolutionary ideas to me; and I am sure I am not the only socio-legal scholar who has sometimes felt a degree of intellectual schizophrenia as I have struggled to bring the insights of one part of my work to bear on another. (How can it have taken so long for these questions to present themselves to me? *JLS* readers will reasonably ask! I can only answer that a relatively conventional legal education in those days did not invite thinking outside the doctrinal box. It doesn't seem quite an adequate answer to me, but it does help to explain why Duncan Kennedy's 'Legal Education as Training for Hierarchy'<sup>10</sup> spoke to me immediately and powerfully when I first read it, and remains a key entry in my academic lexicon.) By the mid 1980s, I was beginning to discover that the conceptual worlds of both doctrinal analysis and normative legal and political theory could be quite unwelcoming to interrogation from the point of view of interpretive and empirical social science. But, gradually, the glimmers gleaned from my work on *Reconstructing Criminal Law* began to show, albeit dimly, in *State Punishment*.<sup>11</sup> I still remember the series editor who had commissioned the latter, the philosopher Ted Honderich, booming at me when he read the first draft, 'What is all this *stuff* about social meaning?' To Ted's great credit, he was ultimately convinced of the work it was doing in my argument. But it was a reminder of the challenge which had to be met if these substantively overlapping but methodologically mutually intolerant paradigms were to be brought into some form of productive dialogue.

In 1984, my journey took another turn, back up the M40 to Oxford. This time my intellectual aspirations, though they still encompassed it, reached beyond jurisprudence and extended definitively in a socio-legal direction. But my affiliations and assumptions were about to receive another productive shock in the dual (and related) shapes of critical legal studies and feminist theory. It turned out that there was a sizable group of law colleagues across Oxford who, like me, were in search of an intellectual space beyond the common law/doctrinal and jurisprudential/philosophical orthodoxies which had shaped the law faculty in the post-war period; and several of them, unlike me, had extended their horizons by venturing abroad for their graduate studies. We formed a reading group, which met in Hugh Collins' rooms in Brasenose, and spent a

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<sup>7</sup> G. Mars, *Cheats at Work: An Anthropology of Workplace Crime* (1982).

<sup>8</sup> Doreen McBarnet, *Conviction* (1981).

<sup>9</sup> S. Hall, C. Critcher, T. Jefferson, J. Clarke, B. Roberts *Policing the Crisis: Mugging, the State, and Law and Order* (1978).

<sup>10</sup> Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1982) 40–61; a longer version appeared as 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591.

<sup>11</sup> Nicola Lacey, *State Punishment: Political Principles and Community Values* (1988).

couple of years working our way through some of the key texts of the American critical legal studies movement, including of course some powerful feminist texts by scholars like Clare Dalton, Catharine MacKinnon and Frances Olsen. I had a small taste of the intellectual divisions which were already exploding in some US Law Schools when one colleague declined an invitation to the reading group on the basis that he 'didn't attend events for which I need a party card'. But that fundamental insight that knowledge is inextricably linked with power, is constructed from a point of view which is at once, significantly, obscured - which had been gradually impinging on my consciousness since reading Foucault, and re-encountering Marx in the interstices of my work on *Reconstructing Criminal Law* - was now moving to the centre of my intellectual agenda. So it was not surprising that critical legal studies appealed to me; and the discussions we enjoyed over those experimental years, as well as a visit to Stanford in 1992, were truly formative.

On the other hand, the critical legal studies genre was, to my post-*Reconstructing Criminal Law* taste, too exclusively concerned with legal doctrine, its genesis and effects – reproducing, it seemed to me, for all its iconoclasm and political energy, and notwithstanding the multi-disciplinary expertise of several of its leading proponents, something of the narrow legal focus of the doctrinal scholarship which it took as its critical object. My outlook was already firmly socio-legal in the sense that I saw the social, political and economic institutions, forces and contexts within which legal doctrines were created, interpreted and enforced as utterly central to legal scholarship: indeed to the very meaning of law. And the closest echoes of my own emerging view in the critical literature came – perhaps not surprisingly – from the so-called 'fem-crits', and, a little later, from the emerging voices of feminist critical race scholars like Angela Harris, Patricia Hill Collins, Kimberle Crenshaw and Patricia Williams. The feminist aspect of the CLS debate also spoke to me, however, for another reason, so far glossed over in this autobiographical account. It still amazes me to write it: I had completed my entire legal education virtually without being taught a woman. The late Anne de Moor sat in on some seminars in one BCL course; but otherwise my five years at university had been an entirely woman-teacher-free zone. This despite the fact that women were already getting on for a half of the student cohort at UCL and of other universities free from Oxford's and Cambridge's history of formal exclusions.<sup>12</sup>

Inevitably, this under-representation of women in the legal academy was reflected in the sources I was reading. It pains me to see that only one of the texts I have cited as major influences up to the time of the Oxford reading group was by a woman. (I note that a similar gender proportion marks the other contributions to this series, not excluding the single such contribution by a woman, my LSE colleague Carol Harlow.<sup>13</sup>) There I was, a woman academic whose pre-university inspirations had been Simone de Beauvoir, George Eliot, Virginia Woolf, in the midst of an intellectual world in which women's voices were virtually silent. Yet I hadn't made the least fuss about it. There is little point in glossing over this fact, which speaks to the strange compartments in which we live our complex and often contradictory lives. It surprises, indeed disappoints me. But the fact is that until I became a teacher, and began to hear from my women students about the gender barriers to pupillages and articles<sup>14</sup> in the legal profession, even my experience of arriving in Oxford in 1979 in the first intake

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<sup>12</sup> Women were excluded from the vast majority of colleges until the 1980s – men only from a handful.

<sup>13</sup> Carol Harlow, 'La Huronne au Palais-Royal or a Naïve Perspective on Administrative Law', 27 *Journal of Law and Society* (2000) 322-327.

<sup>14</sup> As training contracts were called in those days.

of women students at University College, greeted at the Lodge by the Head Porter supposing he would have to get used to 'the likes of you', seemed like a piece of eccentric Oxbridge exotica rather than a political fact to be engaged with, resisted and, if at all possible, changed. But arriving at New College in 1984 as – for the first three years – the only woman with a vote on the Governing Body, and one of only two women in the Senior Common Room, was a radicalising experience, and it had a profound, and positive, impact on my intellectual as much as on my political life. So various dots began to join up, and gradually the itinerary for the next part of my intellectual journey was sketched out.

The 'femcrit' literature spoke to my emerging feminist consciousness and sense of the gender gap in my own education, as well as my impulse to subject legal arrangements to critical scrutiny. But it didn't always feed my socio-legal agenda; nor did it fully engage with the questions of normative reconstruction beyond the law which I still felt to be pressing. But two further literatures which I began to encounter as a result of both teaching and research interests, as well as my close relationships with editorial colleagues in setting up the journal *Social and Legal Studies*, now helped to bring these different questions into a meaningful relationship with one another. First, a number of pioneers in feminist criminology – Frances Heidensohn, Carol Smart, Ngaire Naffine and Pat Carlen particularly come to mind – were doing truly illuminating work which reinserted the construction and treatment of women into criminal justice studies, in the process transforming our understanding of how social control is exercised in a number of different contexts, with decisive implications for socio-legal scholarship. Second, this was a time of huge energy and innovation in feminist philosophy and political theory, with scholars like Seyla Benhabib, Drucilla Cornell, Nancy Fraser, Moira Gatens, Carol Pateman, Anne Phillips, and Iris Marion Young reshaping the landscape of political theory, as well as building bridges between political and legal theory, between theory and praxis, and between anglo-american and continental theoretical traditions. By this time I was deeply involved in feminist politics in the small but complicated world of Oxford University, through which I met the sociologist and political theorist Elizabeth Frazer. Appropriately enough, our political and personal connection generated another intellectual project via the medium of a reading group thinking through the synergies and tensions between feminism and communitarianism, which led to a co-authored book, *The Politics of Community*<sup>15</sup> – an incredibly exciting time and my first experience of true interdisciplinary collaboration. If I had to pick out a small number of formative books from this period, they would be Seyla Benhabib's magnificent *Situating the Self*,<sup>16</sup> for its bringing together of competing ethical and political traditions in a mode of argument which combines sparkling precision with great passion; Carol Smart's *Feminism and the Power of Law*<sup>17</sup> - a reminder that sociologists can write excellent legal scholarship; Ngaire Naffine's *Law and the Sexes*<sup>18</sup>, a powerful demonstration of the applicability of feminist theory across the legal spectrum; and Pat Carlen's *Women's Imprisonment*,<sup>19</sup> which remains for me one of the most impressive empirical studies: one in which a meticulous analysis of micro-dynamics and small institutional arrangements builds up into a compelling picture of a total institution.

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<sup>15</sup> Elizabeth Frazer and Nicola Lacey, *The Politics of Community* (1992).

<sup>16</sup> Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (1992).

<sup>17</sup> Carol Smart, *Feminism and the Power of Law* (1989).

<sup>18</sup> Ngaire Naffine *Law and the Sexes; Explorations in Feminist Jurisprudence* (1990).

<sup>19</sup> Pat Carlen, *Women's Imprisonment* (1983).

1995 took me back to London, where I spent just over two years at Birkbeck, before moving to LSE in 1998. Birkbeck was a cauldron of theoretical innovation, and an ideal place in which to continue my work on feminist legal theory,<sup>20</sup> both because of the shared interest of several other colleagues, and because gender issues had found their way more fully on to the syllabus than at any other law school in which I have worked. I enjoyed my encounters with the imaginative and poetic work of French feminist writers like Luce Irigaray, and experimented with psychoanalytic analyses of law such as those deriving from Jacques Lacan, and with the radical constructivism of Judith Butler. But I felt that feminist theory was beginning to suffer from some of the same problems as political and legal philosophy: viz. that as its technical brilliance and sophistication increased, its engagement with the practical political issues which motivate any feminist inquiry began to become attenuated. So the main intellectual turn at this point in my career – and one which has shaped one major strand of my work ever since – was historical. My encounter with Thompson and other historical scholarship while working on *Reconstructing Criminal Law* – as with Alan Norrie, who was working on his *Crime, Reason and History*<sup>21</sup> for the same series during the same time, and with David Garland's *Punishment and Welfare*<sup>22</sup> – were now given new impetus by conversations with Lindsay Farmer, and by the freedom to design core aspects of the criminal law course in historical terms. At last I was beginning to see – or think I was seeing! – a way to bring historical insights to bear on the issues which had dominated my earlier analytic and doctrinal work, arguing that the key concepts in terms of which doctrinal fields such as criminal law are framed and legitimated – responsibility being a key example – themselves had histories, and cultural, political and institutional conditions of existence, which helped to explain their shape and impact. These, it seemed to me, underpinned the structural links between the momentary and non-momentary legal systems – links which tended to be obscured in contemporary criminal law theory's inclination to see concepts like responsibility in ahistorical, even metaphysical terms.

The key texts for me in the early part of this work were Blackstone's *Commentaries*;<sup>23</sup> James Fitzjames Stephen's monumental late Victorian works on criminal law, in particular his *General View*;<sup>24</sup> and Martin Wiener's marvellous *Reconstructing the Criminal*.<sup>25</sup> Blackstone's extended and creative effort to rationalise the criminal law in terms of a distinctive category of public wrongs focused on the substance of criminal prohibitions – what Glanville Williams two centuries later called the 'special part' of criminal law – still resonated with Stephen's confident late Victorian rendering of the social role and rationale of criminal law, albeit complicated by a greater sensitivity for the importance of procedure and some emergent sense of the nascent general doctrines, particularly in the defences. By the mid 20<sup>th</sup> Century these had come so to dominate the scholarly vision of criminal law – as exemplified in Williams' magisterial *Criminal Law: The General Part*<sup>26</sup> in 1953 – that Williams never felt the need to write the second volume in the *Special Part* as originally planned. And Wiener's exploration of the diverse social, scientific and political sources which shaped the conception of the criminal in the period which saw the construction of a formalised, professionalised criminal law system in England and Wales, along with their implications for that system, stands as one of the most inspiring reads of my career. A blissful year at the

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<sup>20</sup> *Unspeakable Subjects: Feminist Essays in Legal Theory* (1998).

<sup>21</sup> First edition (1990).

<sup>22</sup> (1985).

<sup>23</sup> William Blackstone, *Commentaries on the Laws of England* Vol. IV (first published 1769: 1979).

<sup>24</sup> James Fitzjames Stephen, *A General View of the Criminal Law of England* (1863).

<sup>25</sup> Martin Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914* (1991).

<sup>26</sup> Glanville Williams, *Criminal Law: The General Part* (1<sup>st</sup> ed 1953; 2<sup>nd</sup> ed, 1961).



Wissenschaftszentrum in Berlin in 1999-2000 gave me an extended opportunity to start to shape this project, which ultimately resulted in the publication of *In Search of Criminal Responsibility: Ideas, Interests and Institutions* in 2016. A particularly important part of the Kolleg's institutional context were its extraordinary library facilities, which brought books from all over Germany to visiting scholars' desks. I will always remember the excitement – and perplexity – which I felt when the librarian delivered to me a first edition of Leslie Stephen's biography of his brother James – with its pages as yet uncut.

In recounting the germination and growth of the historical interests laid down in Oxford, rekindled at Birkbeck, and nurtured at LSE, I have however been ignoring a second, rather different strand in my intellectual development, and one which demonstrates the importance of contingency in any biographical trajectory. In 1990, my husband, economist-turned-political scientist David Soskice, moved to a research position in Berlin, and for much of the next seventeen years I made regular, and often extended, visits to Berlin. In a heroic attempt to bring my personal and professional lives into a manageable geographical relationship (!) – and prompted by genuine curiosity about how a country so close to the UK could feel so utterly different in many ways – I embarked for the first time on some comparative research. I was lucky enough to find a wonderful collaborator in Lucia Zedner, and learned a huge amount from her as we toured Germany researching community crime prevention – much written about but, as it turned out, much less often practised: a key socio-legal lesson for us both.

At this time, David and colleagues in the unit which he directed at the Wissenschaftszentrum were developing a new paradigm in comparative political economy – the now extremely well known *Varieties of Capitalism*,<sup>27</sup> which argues that advanced capitalist democracies come in two main families, liberal and coordinated economies, which function in importantly different ways. During my visits to Berlin, I would often sit in on their seminars; and I found myself wondering whether the comparative model which they were discussing might have any application to the differences between the penal systems of otherwise relatively similar advanced capitalist democracies. There seemed to be a significant gap in the literature here. Despite a profusion of books and articles exploring 'the politics of criminal justice' or 'law and order politics', criminologists had made little effort to acquaint themselves with the sort of political science analysis of differently configured electoral and political systems which might make a systematic difference to the trajectory of criminal justice policy; conversely, political scientists seemed curiously incurious about what is, after all, the most draconian form of state power short of waging war. The pioneering work of a few scholars – notably David Garland's *The Culture of Control*<sup>28</sup> and James Q Whitman's *Harsh Justice*<sup>29</sup> – had rekindled interest in the sorts of macro analyses of penalty prefigured by Rusche and Kirchheimer's monumental (if monolithic) *Punishment and Social Structure*.<sup>30</sup> But the time seemed ripe for a more systematically comparative analysis, building on the resources being created not only by the Varieties of Capitalism scholars but also by works such as Gosta Esping Andersen's influential *Three*

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<sup>27</sup> Peter A Hall and David Soskice (eds.) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (2001).

<sup>28</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

<sup>29</sup> James Q. Whitman, *Harsh Justice* (2003).

<sup>30</sup> Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (1969; first published, in German, 1939).

*Worlds of Welfare Capitalism*<sup>31</sup> and Arend Lijphart's *Patterns of Democracy*.<sup>32</sup> But I was busy with history, and my work on this topic was for some years confined to interstitial reading and to debates with David and his colleagues in Berlin, and with David Garland and his colleagues during visits to NYU.

But in 2006, I had the great good fortune to secure a three year Leverhulme Fellowship, and although I was meant to be working exclusively on my historical project, this space made it possible for me to accept an invitation to deliver the Hamlyn Lectures in 2007.<sup>33</sup> It was the perfect opportunity to think through my ideas about the comparative political economy of punishment: and you can imagine my excitement when I discovered that patterns of increasing severity in punishment tracked the distinction between liberal and coordinated economies quite closely. Correlations between punitiveness and variables such as generous welfare states, levels of inequality and degrees of social trust had already been quite widely noted in the literature. But what the scholarship of Hall and Soskice, Lijphart and Esping-Andersen made possible was a much more ambitious attempt to map the causal mechanisms underlying these correlations. This was because of their closely grained account of the varying shape and interlocking dynamics of a range of institutions which lie beyond the criminal justice system yet which shape the emergence of criminal justice policy: the electoral system, the labour market, the welfare state, finance, employers, unions, the bureaucracy. These institutional differences, it seemed to me, allowed us to pinpoint much more accurately than previous structural accounts such as those deriving from the Marxist tradition the fluctuations of penal policy in different countries over time. My continuing dialogue (and now research collaboration) with David, and my regular exchanges with his colleagues during that time, have had an enduring impact on how I think about criminal justice, as well as introducing me to an entirely new fund of resources which can be brought to bear not only on criminal justice but on the impact and implications of legal regulation more generally.

Finally, another lengthy and enjoyable research detour, and one which took me back to my earliest intellectual tastes, had proposed itself in the form of my first adventure into the terrain of law and literature. My Leverhulme Fellowship gave me the chance to reconnect with my historical project after a period of fairly intense administrative responsibility at LSE. I decided to spend the summer vacation of 2006 recovering from surfeit of emails and meetings, and reconnecting with the lifeworlds of the 18<sup>th</sup> and 19<sup>th</sup> centuries, by immersing myself in some of those novels one means to read but never gets round to. I was working with a thesis that criminal responsibility in the 18<sup>th</sup> Century was importantly understood in terms of bad character; and I knew that there had been an extended debate about character in the 18<sup>th</sup> century novel. So I set off to France with a huge pile of Penguin Classics and plenty of sun tan lotion. Soon afterwards, the first woman Dean at Toronto Law School, Mayo Moran, invited me to give a public lecture the following year; to do so on International Women's Day; and, of course, to do so on an issue dealing with law and gender. I was aware of an interesting debate started by an article by Malcolm Feeley and Deborah Little,<sup>34</sup> which

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<sup>31</sup> Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (1990).

<sup>32</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Governments in Twenty-One Countries* (1984); *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (1999).

<sup>33</sup> Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008).

<sup>34</sup> Malcolm Feeley and Deborah Little, 'The Vanishing Female: The decline of women in the criminal process 1687-1912' *Law and Society Review* (1981) 719.

argued that there was a fascinating exception to the (equally fascinating) rule that women constitute a small minority of those proceeded against for crimes in most systems: late 17<sup>th</sup> and early 18<sup>th</sup> Century London. I had not conceived my historical project in specifically gender terms – again, I ask myself why not ??! - so I asked for a bit of time to think. And by some quirk of fate, the very next book in the pile waiting to be read was Daniel Defoe's *Moll Flanders*<sup>35</sup> – a novel which was set at one end of Feeley and Little's 'exceptional' period, and written as it drew to a close. Moll immediately presented herself as part of the answer to the question of why at that particular time it had become more natural to think in terms of women as offenders – and of women offenders, even dishonest and frankly sexual women - as heroines. Could one think of a 19<sup>th</sup> century, or even late 18<sup>th</sup> century, equivalent? Clearly not.

So how had Moll become displaced by literary heroines in the style of the unfortunate Tess of the d'Urbervilles, who became the end point of my story?<sup>36</sup> Along the road which led to my provisional answer to this question, as well as consuming dozens of intoxicating novels, and reconnecting with my original love, I also cured myself of any lingering regrets about not studying English. For I discovered that literary theory often left analytical jurisprudence and the further reaches feminist social theory in the shade in terms of inaccessibility and abstractness. But I did enjoy a large number of marvellous books on literary, legal and social history, of which, once again, I can mention only a few: Jan–Melissa Schramm's magnificent *Testimony and Advocacy in Victorian Law, Literature and Theology*<sup>37</sup> - an object study in all that a study of the history of literary culture and its reception can teach to the social sciences; Dror Wahrman's extraordinary *The Making of the Modern Self*<sup>38</sup> – which shows that virtually every cultural form - translations of the classics, fashions such as the taste for masquerade or caricature, even beekeeping manuals – can be mined as resources by the imaginative social theorist; and Margot Finn's fascinating *The Character of Credit*,<sup>39</sup> whose erudition in its tracing of the changing forms and significance of credit and debt is matched only by its imaginative scope and narrative power.

I have always been intensely curious about the factors – social, institutional, psychological - which shape people's careers, and which in particular determine what they choose to research and write about. In the middle of my career, I had a wonderful opportunity to indulge this curiosity in the form of work on Herbert Hart's biography:<sup>40</sup> a project from which I learnt so much and for which I feel so intensely grateful that I can barely begin to write about it here. And I have long joked – like most jokes, it has an underlying seriousness – that we academics tend to work on things which puzzle or perplex us. (Which raises some interesting questions about the length of time I have spent working on responsibility...!) As I have engaged in this very privileged opportunity to reflect on my own intellectual biography, I am struck by two things. First, it does seem to me that my initial reluctance to read law has been – perhaps most especially in the early part of my career – an influential force in inclining me to experiment at the margins of the discipline. It has of course led

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<sup>35</sup> Daniel Defoe, *Moll Flanders (The History and Misfortunes of the Famous Moll Flanders &c)* (first published 1722; 1989).

<sup>36</sup> *Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles* (2008) (The Clarendon Law Lectures).

<sup>37</sup> Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* (2000).

<sup>38</sup> Dror Wahrman, *The Making of the Modern Self* (2004).

<sup>39</sup> Margot C. Finn, *The Character of Credit: Personal Debt in English Culture, 1740-1914* (2003).

<sup>40</sup> *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (2004).

me into some risky ventures, and up some blind alleys: I have definitely had moments of wishing I could have been the kind of person who was content to work at perfecting my technique of writing doctrinal pieces for the establishment law journals. But not for long. And hence, second, the precious opportunity which Phil Thomas and his editorial colleagues have given me in commissioning this piece has made me reflect on how profoundly lucky I have been to study law during a time in which its boundaries have been expanding and its methodological pluralism has burgeoned. I have always regarded law not so much as a discipline but rather as a fascinating social practice, open to analysis from many different points of view and disciplinary perspectives. I now realise with renewed force how much to be treasured is this openness of law. Amid the increasing pressures to formalise our criteria of excellence, may a single hierarchy of journals continue to be resisted; and may the pluralism and generosity of the legal academy flourish.