

- Impact of concepts of 'morality', moral panic and the private/public distinction on processes of C
- How different normative theories of C might produce different ideas about criminal responsibility

❖ 2.3 Harm and Morality

2.3.1 Public/private

- Discerning public/private wrongs usually an effort to distinguish from crime/torts, but sometimes both (assault, theft); crime but not torts (drugs, public order offences, treason); tort but not crimes (inducing breach of contract)
- **Blackstone, Commentaries on the Laws of England, 1765**
 - Private wrongs: infringement of the civil rights which belong to individuals, considered as individuals
 - Public wrongs: violation of public rights/duties, due to the whole community, considered as a community
 - Double view in taking cognisance of all wrongs/unlawful acts
 - Redress party injured by restoring them to their right, if possible, by giving them an equivalent
 - Secure to public the benefit of society, by preventing/punishing breach/violation of those laws
- Problem: some interests can be expressed as both. Private interest in not being killed/public interest in the value of human life; individual's interest in having a contract performed/public interest in the security of transactions
- The public/private distinction does not go far enough to understand the phenomenon of crime, or explain the complex public responses to breaches of certain interest
- **Duff, Answering for Crime, 2007**: *"The 'public' character of crime is an implication, rather than a ground, of its criminalisable character – the reasons that justify its C are the very reasons why it is 'public'"*
- Public/private distinction in **where** behavior is conducted
 - But note – the public/private distinction can operate in a class, race, or gender-biased way, i.e. access to institutions of privacy (private homes, grounds, clubs, transport, etc.) is highly unequal, heavily structured in terms of class, race, sex, age – e.g. homeless, Indigenous, and youth cultures
 - Further, the ideology of "the private" has arguably operated to obscure/normalise the major form of inter-personal violence in our society: domestic violence (carried out "in the privacy of the home")

2.3.2 Privacy: the Human Rights (Sexual Conduct) Act 1994

- **HR(SC)Act 1994**
 - (4)(1) *Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Cth, a State, or a Territory, to any arbitrary interference with privacy within the meaning of Art 17 of ICCPR*
 - (4)(2) *For the purposes of this section, an adult is a person who is 18 years or more.*
- Response to UNHRC decision of **Toonen v Australia (1994)**
- Found **s122(a), (c)** and **s123** of **Criminal Code (TAS)** (criminalising sexual activity in private between adult men) was an arbitrary interference with privacy and in breach of Australia's obligations under **Art 17, ICCPR**:
 - (1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful acts on his honour or reputation*
 - (2) *Everyone has the right to the protection of the law against such interference or attacks*
- Neither reasonable nor proportionate: *"no link has been shown between the continued C of homosexual activity and the effective control of spread of the HIV/AIDS virus"*

Bronniti, 1994

- *"What is 'private' and what is 'sexual' are malleable social and legal constructs. The courts should adopt a broad construction of both concepts which is consistent with the recognition in IL that the right to privacy extends beyond the negative conception of privacy as freedom from unwarranted state intrusion into one's private life, to include the positive right to establish relationships in order to develop and fulfill one's emotional needs."*

2.3.3 Harm

- Commonsense ring, connotations of objectivity, simplicity, and concreteness: belies its complexity
- What does it mean to cause *harm*? Should all forms of harmful behavior be criminalized?

Mill, 'On Liberty', 1970

- *"the sole end for which mankind are warranted, individually or collectively, in interfering in the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others"*
- The limits to social coercion of individuals should be set by whether their actions are likely to cause harm to others.

Hunter, Saunders, Williamson, *On Pornography: Literature, Sexuality, and Obscenity Law*, 1993

- Dissemination of erotic representations: 'harmful' or not? 1960s liberals and radicals move to abolish regulation of erotic literature while allowing restricted 'private' consumption > 1970s feminist gender-specificity of consumption, undesirable consequences for women
- Argument 1 (philosophical liberalism and liberal jurisprudence): *"erotica causes no demonstrable harm to others ... its consumption is a matter of private moral judgment outside the scope of the CL."*
- Argument 2 (feminist, 'moralist', conservative jurisprudence): *"source of real harms, and should therefore be legally suppressible"*
- Argues the harm condition itself (Mills) *"cannot provide a general ground for reforming obscenity law, in either of the directions contended for" ... "the law can do no more than continue to treat obscenity as a variable category. By calculating ... audience interests, susceptibilities, competencies and patterns of conduct, the law decides where the moveable line should be drawn between legal regulation by administrative devices ... or the adjudication of legal actions"*

2.3.4 Morality

- Immorality/sinfulness of the conduct as sufficient reason for C. *But* – it is not the case that CL has made a simple equation between crime and sin, e.g. fornication is a sin but not a crime, treason is a crime but not a sin.
- Is immorality a necessary condition for C? Should CL prohibit conduct because it is immoral?
- **Hart/Devlin debate**: response to the **Report of the Committee on Homosexual Offences and Prostitution (the Wolfenden Report)** which argued that the CL should not enter into areas of private morality

Devlin, *The Enforcement of Morals*, 1965 – CL justified on the basis of morality

- Social cohesion argument
- Law without morality *"destroys freedom of conscience and is the paved road to tyranny"*
- Appealed to the idea of society's *"moral fabric"*, arguing that CL must respect and reinforce the moral norms of society in order to preserve social order
- Any category of behaviour is capable of posing a threat to social cohesion.
- Moral laws are, therefore, justified to protect society against the disintegrating effects of actions that undermine the morality of a society
- Law should set a minimum standard and should intervene when society will not tolerate certain behaviour
- Content of moral legislation should be determined by "public morality", the view held by the "reasonable/right-minded man", the "man in the jury box"
- 3 principles for legislating morality:
 - There must be a *"toleration of the maximum individual freedom that is consistent with the integrity of society"* – utilitarian perspective
 - Because in matters of morals "the limits of tolerance shift" so "in any new matter of morals the law should be slow to act"
 - *"as far as possible, privacy should be respected"*

Hart, *Law, Liberty and Morality*, 1962 – CL *not* justified on the basis of morality

- Humanistic, libertarian, individual argument
- Mill's harm principle: Everyone has *a priori* liberty. Cannot exercise liberty when it infringes upon another's.
- Societies survive changes in basic moral views, it is absurd to suppose that when change occurs, one society has disintegrated and been succeeded by another
- Critical morality: a statement of what is morally true. Positive morality: A statement of what most people believe is morally true. Hart believed Devlin slipped into the positive morality approach, and argues that beliefs about moral matters constantly change

- The burden of proof falls upon those who prohibit the “immoral” conduct

2.3.5 Offensiveness

- Offensiveness in law involves an element of publicness
- The criterion of “*offensiveness*” forms the basis of a range of existing criminal prohibitions: public order offences – drunk and disorderly conduct, indecent exposure, soliciting for the purposes of prostitution, indecent language
- **Hall, ‘Reformism and the legislation of consent’, 1980**
 - Cautions against a reading of the Hart/Devlin debate which reduces it to a dispute over whether morality has a place in law. Such a reading conceives law and morality as two separate and distinct spheres. Yet, there is a morality concerned with appearances and visibility, structured around the gendered and classed figure of petty bourgeois “*respectable man*”, a moral economy linked to changing market forces.

Duster, *The Legislation of Morality*, 1970

- Changes in the legal status of drug use law could lead people to think of an activity as immoral even though they had not thought so previously
- Development of immoral connotations in relation to drugs such as morphine was conditioned by the process of social stigmatisation, as official policy transitioned from regulation by the free market > doctors > police

❖ Social Reaction

2.4.1 Defining the boundaries

Emile Durkheim, *The Division of Labour*, 1933

- Key universal feature of crime: reaction of the social audience; advised against making lists of all forms of criminal behavior to isolate common properties or essence – focused on the reaction of the audience rather than the qualities of the act itself/characteristics of the actor
- Crime as normal and healthy.
 - Normal because even in a society of saints, you would have criminals who fell below the saintly norm of the others.
 - Healthy because in the act of condemnation, members of the community came together and confirmed their shared values in denouncing the deviant – enhancing social solidarity, important in small-scale communities whose bonds depend on shared beliefs
- “*The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it collective or common conscience*”
- “*We must not say that an action shocks the common conscience because it is criminal, but rather it is criminal because it shocks the common conscience*”
- Social nature of reaction comes from social nature of offended sentiments. The reaction is general and collective, it is “*not produced isolatedly in each one, but with a totality and a unity, nevertheless variable, according to the case*”
- “*Crime brings together upright consciences and concentrates them*”

2.4.2 Of muggings, media, and moral panics

Hall et al., *Policing the Crisis*, 1978

- England moral panic over mugging: press, politicians, police chiefs and “the public” reacted strongly to the mugging “crisis” **but** Hall et al. found there was no available statistical evidence to suggest an actual crime wave
- Importation of the American slang “*mugging*” with all its connotations of crime and violence in the large American cities.
- Why such an extreme response when the incidence of behavior had changed very little?
 - Crisis of self-perception of middle-aged to older English people in the face of Britain’s post-war economic decline, loss of empire, influx of East Asian and West Indian immigrants
 - Muggings were often committed by young, black males
 - Profoundly affronted a range of values and tapped deep fears in the older English population, sparking a reaction which was out of proportion to changes in the incidence of behavior
- **Cohen:** a moral panic is a condition, episode, person or group of persons emerging to become defined as a threat to societal values and interests, its nature is presented in a stylized and stereotypical fashion by the mass media

- Shift of attention from the deviant act (“mugging”), treated in isolation to the relation between the deviant act and the reaction of the public and the control agencies to the act

Poynting et al., *Bin Laden in the Suburbs*, 2005

- *“the social imagining of the criminal in contemporary Australia increasingly involves the invocation of the Arab Other as a primary folk devil of our times: a figure which conflates Arabs, Muslims, and Australians of Middle Eastern ancestry, and is grounded in an Orientalist pathology of crime, violence, barbarism and sexual rapaciousness”*
- Dangers in too loose a use of the notion of moral panics
 - Tendency to degenerate into a media-based conspiracy theory, paradoxically replicating the same style of analysis being decried
 - Danger of equating moral regulation with conservative politics
 - Danger of overgeneralization which obscures the specific ways public sentiment is mobilized around particular folk-devils are “novel” social problems are “discovered”

Lumby, ‘Sex, Murder, and Moral Panic: Coming to a Suburb Near You’, 1999

- Moral panic analysed through examination of extreme public reaction to the release of John Lewthwaite in 1999
- Understanding abhorrence of paedophilia requires an understanding of *“how paedophilia is discursively organized by contemporary debates on the sexual and physical abuse of children”*
 1. Increasing evidence that paedophilia takes place within the family; heightened community fear of the paedophile as a male stranger = displacement of anxiety about the family unit, projects it onto the monstrous outsider
 2. Anxiety surrounding technology, allowing access to pornography and challenging traditional parent-child hierarchies within the family

❖ Case study: soliciting for the purpose of prostitution

Summary Offences Act 1988, s 19: Soliciting clients by prostitutes

- (1) A person in a road or road related area shall not, near or within view from a dwelling, school, church or hospital, solicit another person for the purpose of prostitution. Maximum penalty: 6 penalty units or imprisonment for 3 months.
- (2) A person shall not, in a school, church or hospital, solicit another person for the purpose of prostitution. Maximum penalty: 6 penalty units or imprisonment for 3 months.
- (3) A person shall not, in or near, or within view from, a dwelling, school, church, hospital or public place, solicit another person, for the purpose of prostitution, in a manner that harasses or distresses the other person. Maximum penalty: 8 penalty units or imprisonment for 3 months.
- (4) The provisions of this section are in addition to, and do not derogate from, any other law (including section 4).
- (5) In this section:
 - (a) a reference to a person who solicits another person for the purpose of prostitution is a reference to a person who does so as a prostitute, and
 - (b) a reference to soliciting includes a reference to soliciting from a motor vehicle, whether moving or stationary.

- 1988: **s19(1)** – “within view” added
- 1997: changed the location of the offence from “a public place” to a “road or road-related area”.
- 1999: **s19** further amended, adding **sub (5)**
 - *“by expressly mentioning motor vehicles, the new offence will operate to target “kerb crawlers” ... the actions that constitute soliciting are well established in the law and the actions of persons in motor vehicles who are charged with soliciting will reflect the action of propositioning, pestering, or similar relevant behavior as well as being in the motor vehicle” (Second Reading Speech, Hansard, 1999)*
- Ongoing problem with enforcement of soliciting laws: the prosecution of prostitutes, but rarely clients.
 - *“whilst it appears that the offences contained in s19 apply equally to prostitutes and clients of prostitutes, in practice only prostitutes are charged by police with offences under s19 ... by clearly criminalizing the behavior of persons seeking the services of a prostitute in the proscribed public places, the creation of the new offences should have a deterrent effect on such persons and thus reduce the incidence of street prostitution... a separate offence for clients will guide police discretion with an explicit policy statement and clear direction about the desirability of charging clients of sex workers with prostitution offences ... the offence will be non-gender specific so that it will apply equally to heterosexual, homosexual, and transgender street prostitution” (Second Reading Speech, Hansard, 1999)*
- Meaning of solicit in **s19(1)** considered in **Coleman v DPP [2000]**

- Defendant convicted of soliciting in Darlinghurst within view of SCEGGS. On appeal, contended that soliciting involves “*persistence, pestering, pressure*” and her conduct was no more than a simple request.
- O’Keefe J upheld conviction: “*solicit involves a personal approach, for the purpose of, or which is accompanied by, or which constitutes or conveys, an offer that some form of sexual activity will be engaged in by the person making the approach in return for monetary gain. It is unnecessary for there to be any element of aggressive persistence, pestering, or pressure, or harassment or annoyance to the person approached... the mere approach by a prostitute to a person who is a potential customer when she is dressed in a suggestive manner, perhaps with appropriate gestures or words, or is presented in a particular way is sufficient to constitute an offer of services as a prostitute*” ([41]–[42])

Summary Offences Act 1988, s 20: Public acts of prostitution

- (1) Each of the persons taking part in an act of prostitution:
- (a) in, or within view from, a school, church, hospital or public place, or
 - (b) within view from a dwelling,
- is guilty of an offence. Maximum penalty: 10 penalty units or imprisonment for 6 months.
- (2) Each of the persons taking part in an act of prostitution in a vehicle that is:
- (a) in, or within view from, a school, church, hospital or public place, or
 - (b) within view from a dwelling,
- is guilty of an offence whether or not the act of prostitution can be seen from outside the vehicle. Maximum penalty: 10 penalty units or imprisonment for 6 months.

- Street soliciting has been legal in NSW for approx. 32 years except in view of the proscribed locations
- Decline of approx. 95% in number of prosecutions for street soliciting
- Street-based sex workers represent only approx. 10% of the sex industry population
- Most of the remaining 90% comprise various indoor work – brothels, private premises, phone-based escorts

❖ **Normative theories of criminalisation**

2.5.1 From “overreach” to “overcriminalisation”

- Normative theories of C attempt to specify legal conditions that should apply *before* particular forms of behaviour are criminalised

Ashworth, ‘*Is the CL a Lost Cause?*’, 2000 (*procedural concerns: principled core of criminal laws*)

- **The CL should only be used to censure persons for substantial wrongdoing**
 - Prevention of misconduct is a reason for criminalising it. If serious wrongdoing can be identified, it is of social importance that its incidence be reduced
 - Should be distinguished from the less acceptable propositions that the prevention of misconduct is a sufficient reason for C or that the CL is (either on its own or in combination with other social policies) necessarily an effective means of prevention
 - Appropriately targeted social, educational and housing policies may have a greater preventive effect than the enactment of a criminal offence and the conviction of a relatively small proportion of offenders
- **CLs should be enforced with respect for equal treatment and proportionality**
- **Persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences**
 - At least the minimum protections declared by *Arts 6.2, 6.3 of European Convention on HR* (as an inherent element of criminal procedure)
 - If wrongdoing is serious enough to warrant an offence, and if it is thought of as so serious as to require a substantial maximum sentence, it would be a violation of the principle for a government to avoid/whittle down the protections that a person facing such a charge ought to be accorded
- **Maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing**
 - Needs to be a thorough revision of maximum penalties and reassessment of sentence levels and of differentials between them
- **Principles leading in other directions which cannot be fully examined**
 - Core: if a particular wrong is thought as serious enough to justify the possibility of a custodial sentence, that wrong should be treated as a crime, with fault required, and proper procedural protection for defendants