

LAWS1021 Comprehensive Exam Notes

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1. Criminalisation

Stan Cohen, *Against Criminology* (1988)

- Criminalisation must be seen in terms of a complex set of strategies, manoeuvres, and relationships in which the power to ban, to say no, is not its only effect.
- Criminalisation is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable.
- Criminalisation is a particular reaction to a defined social problem.

Douglas Husak, *Overcriminalisation: The Limits of the Criminal Law* (2008)

- Overcriminalisation is objectionable because it
 - Produces too much punishment, and many of these punishments are unjust.
 - Undermines the objective that law exists largely to guide behaviour, as potential law breakers may not receive adequate notice of their legal obligations.
 - Incurs massive opportunity costs
 - Breeds a lack of respect for law
 - Disrupts the lives of ordinary citizens unfairly
 - Is destructive to the rule of law itself as the quantity of criminal law undermines the principle of legality.

Law and Order “Commonsense”

Russell Hogg and David Brown, *Rethinking Law and Order* (1998)

- This commonsense is built, layer upon layer through constant repetition by popular and authoritative sources of a number of questionable views and assumptions which have assumed the status of a set of givens within debates about crime. These assumptions do not require empirical verification, and brook no serious contradiction or qualification. They form a sort of bedrock of mainstream policy debate about law and order, the taken-for-granted starting point for what should be done about crime.
- “Primary definers” refer to those influential sources such as police, judges, magistrates, Royal Commissioners, Police Ministers and Attorney General, who provide the primary account of ‘the fact(s) of the matter’, in the process setting the parameters of the debate.
- The media creates the sense that society itself is under imminent threat, that it is in the grip of powerful negative forces. We are confronted not with a crisis of law and order, but with a ‘crisis of perspective’.
- **Elements of Law and Order Commonsense**
 - soaring crime rates
 - “it is worse than ever”: law and order nostalgia
 - the future is New York or LA
 - the criminal justice system is “soft on crime” and does not protect citizens
 - the “solution” is more police with more powers
 - we need “tougher penalties”
 - victims should be able to get revenge through the courts

Penal Populism

John Pratt, *Penal Populism* (2007)

- Penal populism rises when it seems as if the pillars on which the security and stability of modern life had been built are fragmenting, while at the same time the authority of the state and its representatives is declining, creating fear.
- People give their support to populist organisations or politicians who seem to be speaking for them and offering simple, understandable solutions to crime and other problems.
- Instead of being driven by concerns about efficiency, economy and humanitarianism, penal strategy and thought has to incorporate, and is sometimes overwhelmed by, the emotive forces that populism unleashes.
- It creates expectations of security and order that are almost always disappointed.
- In this way populism victimises the revictimises all those 'ordinary people' in whose name it claims to speak.

Defining Crime

- *Mala prohibita* (wrong because prohibited or regulatory offences) # *mala in se* (wrong in themselves)

G Williams, *Textbook of Criminal Law* (1983)

- A crime (or offence) is a legal wrong that can be followed by criminal proceedings which may result in a punishment.
- The definition of crime cannot tell us what sort of conduct is a crime.
- A crime is an act that is condemned sufficiently strongly to have induce the authorities (legislature or judges) to declare it to be punishable before the ordinary courts.

Andrew Ashworth, "Is the Criminal Law a Lost Cause?" (2000) 116 LQR 116

- Offences should be created only when absolutely necessary; in considering whether new offences should be created, factors taken into account include whether:
 - the behaviour in question is sufficiently serious to warrant intervention by the criminal law
 - the mischief could be dealt with under existing legislation or by using other remedies
 - the proposed offence is enforceable in practice
 - the proposed offence is tightly drawn and legally sound
 - the proposed penalty is commensurate with the seriousness of the offence.
 - that there is, as far as practicable, consistency across the sentencing framework.

The Production of Knowledge

- Power and knowledge are directly implicated and entwined.

R Hogg, "Perspectives on the Criminal Justice System" (1983)

- It is important to recognise that routinely produced knowledge about crime and crime-fighting role of the agencies of criminal justice provides the raw material for, and forms the commonsense centre of, the models or theories of criminal justice. This is the object around which 'the system' is organised

both in practice and in social scientific thought. However, this object, crime, is not external to the practices of criminal justice: we are only enabled to know it through these practices.

- Power operates in and alongside the processes of knowledge formation, designating certain objects of knowledge, blocking others, constraining the analyses that might be constructed.

Murray Lee, *Inventing Fear of Crime* (2007)

- The 'fear of crime feedback loop' is inclusive of the productive power of disciplines such as criminology that seek to know and define fear of crime. As a model it provides a way of conceptualising the intensification of discourse without locating a central source in any one of the institutions through which it operates or is exercised...
- Once the researchers and pollsters began enumerating crime fear and called it fear of crime, an object was not discovered — rather, a discourse and problematisation was born; a concept was invented.

Criminal Statistics

- A key source of knowledge about criminal justice is criminal statistics. Criminal statistics are not the unmediated reflection or measurement of some "real" levels of crime but are themselves social constructions.
- Different statistical collections measure different things.
 - police statistics (crimes reported to/recorded by police)
 - court statistics (record of persons charged; outcome of court hearings)
 - prison statistics (persons imprisoned)
 - self-report studies (results of surveys asking people whether they had committed a crime)
 - victimisation surveys (results of surveys which ask people whether they have been victims of a crime)
- An Australian Institute of Criminology report noted "how tenuous are the links between actual rates of offending and the rates of arrests, conviction and imprisonment", illustrating the point with the following figures:
 - 1000 "crimes" committed
 - 400 reported to police
 - 320 recorded by police as offences
 - 64 cleared up
 - 43 persons convicted
 - 1 person imprisoned

History

- Early in the 18th century, legislation known as the *Black Act* created a long list of offences which not only took away traditional hunting rights but also provided capital punishment for those caught hunting red or fallow deer, hares, rabbits or fish in enclosed parks or forests.
- In conjunction with *Enclosure Act* which converted common land to private property, this amounted to a very radical redefinition of behaviour.
- The *Black Act* and the *Enclosure Acts* emanated from a Parliament which was dominated by men of property. Property became the measure of social and political worth in the 18th century England.

- The new death penalty offences primarily protected the gentry's property rights.

D Hay, "Property, Authority and the Criminal Law" (1975)

- In the countryside the power of gentlemen and peers to punish or forgive worked in the same way to maintain the fabric obedience, gratitude and deference. The law was important as gross coercion; it was equally important as ideology. Its majesty, justice and mercy helped to create the spirit of consent and submission, the "mind-forged manacles" which bound the English poor.
- The private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy in the most exact meaning of the word. The king, judges, magistrates and gentry used private, extra-legal dealings among themselves to bend the statute and common law to their own purposes.
- The ideology of the law was crucial in sustaining the hegemony of the English ruling class. This argument, if sound, helps us to explain their resistance to suggestion for drastic legal reform. It also casts some light on the membership of that ruling class and the character of their society...

Social Class

- The existence of a "criminal class" was widely accepted in England at the turn of the 19th century.
- Traditional criminal investigations face a number of difficulties, including the difficulty of gaining access to investigate the behaviour and financial affairs of wealthy individuals shielded by powerful corporate, professional or political interests.
- Finally, assuming a criminal conviction is obtained against a wealthy and powerful person, class factors are often fairly blatantly evident in the sentencing process. As Paul Barry points out, Alan Bond's release after 1298 days of imprisonment on charges of a \$15 million fraud involving the Manet painting *La Promenade* and a \$1.2 billion fraud on shareholders of Bell Resources: "means that he has spent roughly one day behind bars for every million dollars he stole. Recently in the Northern Territory a young Aboriginal man was sentenced to a year in prison for stealing \$23 worth of cordial and biscuits. Had the same formula been applied to Mr Bond he would have been locked away from 50 million years" (SMH, 2000).
- At a more mundane level, "celebrity" offenders often seem to receive favourable treatment on sentence in relation to driving offences.
- Many writers have argued that social class strongly influences decisions about which activities will be criminalised. Although some activities of the most powerful groups in society cause greater harm than those of working class and less powerful groups, such actions are often not defined as criminal.