

LAWS1021: CRIME AND THE CRIMINAL PROCESS

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Class 1 Some Themes

Course introduction; video: 'So Help me God', Campbelltown Local Court (ABC) (pp. 1-4; 7-12; 17-21; 38-42)

Themes the book deals with

1. Issue of whether criminal law can be considered as a unitary field, or whether it is more helpfully considered as a collection of diverse criminal laws.
2. Relationship between substantive criminal law, the formal offences themselves, and criminal process and procedure as it is not possible to study criminal law adequately without recognizing the strong inter-relation between substantive law and process → 'contextual approach' → involves emphasis on pre-trial procedure, an empirical/historical analysis of criminal laws, including recourse to criminal statistics and to historical analysis.
3. Placing criminal law alongside other forms of regulation so that the appropriateness of regulation through the vehicle of the criminal law can be thrown into relief and considered rather than just taken for granted → involves highlighting the political dimension of criminal law.
4. Look for future directions in criminal law, attempting to pick future trends → 'preventive justice'.

Constituting Criminal Law

- Recourse (source of help in difficult situation) to criminal law as a mode of regulation (we look to criminal law as guidance)
- Traditional approach focuses on substantive criminal offences, such as homicide and offences against the person/property and sexual offences. These offences have a long historical tradition, and their origins lie in common law than statute law.
- Questions of the legitimacy of societal intervention through criminal law in core areas such as these offences have been more muted → however starting to change.
- This book seeks to elaborate themes of critical scrutiny established in the previous editions but at the same time, **identify the limits of criminal law**.
- We cannot ignore the selective and partial picture of criminal law which has been painted in the past.
- Book seeks to provide a wider range of materials/commentary and expand on existing conceptions of what is legally relevant. **Includes incorporation of a material above appeal court decisions, law reform proposals and academic commentary**. Most important areas include SEXUAL ASSAULT, DRUG USE AND PUBLIC ORDER.
- Book also sets the rules of substantive criminal law in their historical, procedural and contemporary social context with a view to raising questions about the different roles played by different criminal laws and appropriateness of these roles.
- Book contends that criminal law in fact comprises **a number of different practices with a variety of rationales rather than a single principled response to diverse social behaviour**. We have criminal laws rather than criminal law.
- **We cannot shut our eyes to this by simply excluding from consideration those areas which do not conform to some latent notion of what is real criminal law.**

General principles?

- It is argued that drugs, public order and automobiles share little light on general principles (THIS IS FALSE)
- Development of criminal law has come through drug repeals – example **He Kaw Teh**.
- Primary purpose of the study of criminal law is to identify general principles of criminal law and to elaborate them.
- General principles are not universal
- We must wary of falling into the trap of systematically excluding from detailed examination those areas which question traditional assumptions about the shape of criminal law.
- Rather than a study of legislation creating criminal offences bearing on drug-related behaviour and public order being in some sense peripheral to an understanding of criminal law, it is absolutely crucial in understanding the role and limits of criminal law in Australia at the beginning of the 21st century.
- Authors of book are not prepared to assume that general principles must inevitably exist, or that they are necessarily helpful in determining what role criminal law should play.

General concepts and general principles

- Treatment of criminal law must begin with the discussion of the key concepts – ‘recklessness, negligence, actus rea, mens rea etc’.
- Ultimate aim is to gain a consensus about the use of basic terminology so that we all know what is meant when any concept is used.
- Agreement on basic definitions is essential if we are to engage in discussion about what shape criminal laws should take.
- General principles need to go beyond generalities riven with qualifications if they are to be effective as guides to the delimitation of specific criminal offences.
- Many old common law offences originally developed by the courts have been redefined by parliaments. Without a statutory bill of rights + constitutional recognition of HR, legislature may override safeguards and presumptions. However, Australian courts do have the power of statutory interpretation to provide clarification of fundamental principle as of chapter 2 of the criminal code.
- However in clear expressions or legislative intent, courts are no longer in a position to retrospectively reinstate or imply fundamental liberal principles onto the substantive law through presumptions and statutory interpretations.
- E.g. 40% of offences appear to violate the presumptions of innocence → e.g. strict liability, omissions liability and reverse onus provisions for exculpation.

The criminal process and competing versions of what the law is

Pretrial process

- There are discretionary aspects of the pre-trial criminal process.
- Police and prosecutors have developed their own versions of what the law is, influencing the way they exercise discretion and play a vital part in determining the facts which are produced for consideration by the courts. E.g. police were historically reluctant to become involved in policing domestic violence that fell short of homicide, even though the formal legal position was the ordinary law of assault applied.
- Statutory offences based on the notion of offensive manner fall into this category. Appellate courts have left it very broad but what does the Crown actually have to prove?

The trial

- When trial judges are correct, we must not assume the jury actually understands them.
- If juries do not understand the verdict, they bring in a merciful verdict. Verdicts of this kind play crucial roles in the reform of official versions of criminal law.
- For example, juries were reluctant to convict of murder battered women who killed their partners → played crucial role in the reform of the law relating to provocation.

The political dimension

- Reform of criminal law and process raises questions about social policy which are the legitimate subject of public debate.
- Lawyers are not experts in this area, for example the shape of the law of homicide and theft does not simply turn on technical legal questions over which lawyers can claim some kind of monopoly. These questions need to be opened up for debate within the broader community.
- Given the strong political dimension around the operation of specific criminal laws, it is important that lawyers contribute to these debates as they have experiences/insights into the operation of criminal laws as they are advocates and represent individuals in cases – by way of media comment, and submissions to reform bodies/government.
- Worrying tendency that funding provided by government are only there to provide ‘front-line’ legal services and not there to engage in advocacy.
- New funding principles:
‘NSW legal assistance services funded by Legal Aid.... Will not include activities...as political advocacy or political activism.
- There is no clear illustration of the political dimension of criminal law reform than the recent history of legislative attempts in NSW to come to grips with offensive behaviour in public places. Police powers in relation to stopping/searching for knives and giving directions to move on have significantly expanded after the 2005 Cronulla riot.
- Development of drug law also show episodes of political struggle → ‘drug summit 1999’, establishment of safe injecting rooms became a major national political issue.
- Sexual assault/domestic violence has also been vigorously politicized over two decades by those approaching the issues from a feminist perspective.
- Mercy-killing by medical practitioners (euthanasia)
- Corporate manslaughter
- Rights of householders in home invasion
- The appropriateness of regulation through the criminal law are essentially political questions.
- Driving the development of increase in imprisonment rates, mandatory sentencing regimes, and schemes that provide for public shaming and humiliation, is the rise of a ‘public voice’ challenging elite penal policy formulation in a democratic if often punitive way. The rise of a victims’ movement contributing to a growing punitiveness; the rise of a victims’ movement often contributing to a growing punitiveness.
 - Rise of popular media, especially talk-back radio, the tabloid press and current affairs television, promoting a visceral, revenge based agenda, and the widespread denigration of judicial/legal/criminology expertise.
- The dangers of a punitiveness as a global unified phenomenon radiating from US to other countries through ‘policy transfer’ is that it tends to gloss over of the same country. The significant differences between countries and indeed between jurisdictions.
 - These dangers include higher imprisonment rates.

- In seeking to win electoral support, the UK labour government attacked courts and criminal justice agencies, loudly seeking to rebalance the criminal justice system in favour of the victim, and weakening civil liberties and protection against wrongful convictions.
 - Tensions between young/old, and well-off/disposed were exacerbated.
 - By talking about the failures of the criminal justice system, the government increased public fears and anxieties, undermining faith in legal institutions.
- Example of undermining of considered law reform is that of bail in NSW which came in May 2014. The reform was considered after shock jock and tabloid outcry over 3 cases. The Hatzistergos Review argue the amendments are premature, unnecessary and create complexity and confusion.
 - The whole episode is another example of law and order politics driven by shock jocks and tabloid media. The authors discern a wider features including the denigration of judicial expertise and lack of concern with evidence and process; the power of the shock jocks, tabloids and Police Association; and the political failure to understand and defend fundamental legal principles that benefit us all and are central to the maintenance of a democratic society and the rule of law.

Class 2 Criminalisation 1

Introduction; Defining Crime; Moral Panics (pp. 46-61; 111-118)

Aims

- **To examine the concept of criminalisation: how crime is constituted and why certain forms of behaviour are proscribed and dealt with as criminal**
- **To understand how the criminal law is historically contingent, culturally specific and socially constructed through race, class and gender**
- **To consider how social reactions to particular forms of behaviour shape popular understandings of crime**

Main topic: What is criminal? What ought to be criminal? And what factors affect the processes of criminalisation?

1. Introduces notions of criminalisation/overcriminalisation; defining crime, role of commonsense, historical and cross-cultural relativity and change; the production of knowledge about crime and the difficulties of defining crime.
2. Normative theory of criminal law – a theory which ought to determine the appropriate limits to the criminal law, enabling the specification of what sorts of behaviour are appropriately criminalised.
3. Key factors that have influenced the criminalisation of specific behaviour, touching on historical forces which have operated to produce the present, with emphasis on impact of colonial/postcolonial criminal law on Indigenous.
4. Examination of key factors that have influenced decisions to criminalise: the public/private distinction, harm, risk, morality and offensiveness.
5. Social reaction → regulation and governmentality, and governing through crime.
6. Penalty through an examination of justification for punishment and the current heavy over-representation of Indigenous people in Australian criminal justice institutions (prison).

N Lace, 'Legal constructions of crime'

- Criminalisation is a conceptual framework within which to gather the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice and criminological studies on the other.
- Escaping notions of crimes as 'given', the idea of criminalisation captures the dynamic nature of the field as a set of interlocking practices in which the moments of 'defining' and 'responding to' crime can rarely be completely distinguished and in which legal and social constructions of crime constantly interact.
- Criminalisation accommodates a variety of social factors and institutions (citizens, the media, police, prosecution agencies, courts, judges, lawyers etc...)

S Cohen, Against Criminology

- Thinking about crime in categories can restructure its legal implications.
- Criminalisation is the process of identifying an act deemed dangerous to the dominant social order and designating it as criminally punishable.
- The criminal law model as a 'single and accurate' system as a weapon to social danger and its ambition to apply the same yardstick in unique and different situations is the weakness of crime as a form of social control.
- Criminalisation is a reaction to a defined social problem. The question is, under what conditions do certain people consider that a given conflict requires state intervention, and if it does, should intervention take the form of criminal justice (rather than civil law)
- What do we gain by defining the problem in terms of crime?
- Defining a problem in terms of crime, provides solutions: no crime or less crime. Crime is not a property inherent in any social problem and its peculiar defect is that its criterion of solution is particularly elusive. It becomes more elusive the more we try to stretch the category. If we define more acts of sexual exploitation as crime, the result cannot be less crime but more crime. And if we succeed in raising consciousness about those acts, then more of them will be reported.

D Husak, Overcriminalisation: The limits of the Criminal Law

- Reasons to be concerned with so many criminal laws
 1. Placing prospective defendants on notice about whether their conduct is criminal
 2. Persons should be forced to guess whether their behaviour has been proscribed, and must be afforded a fair opportunity to refrain from whatever conduct will incur penal liability
 3. Complexity of criminal statutes, potential lawbreakers may not receive adequate notice of their legal obligations.
 4. Law exists largely to guide behaviour, but this objective is undermined in our climate of overcriminalisation.
 5. Law is beyond the comprehension of laypersons and can only be understood by skilled attorneys. Even lawyers will have problems.
 6. Overcriminalisation leads to opportunity costs. Is there no better way for the use of enormous resources we expend on criminalisation/punishment? These resources can be used to reduce taxes, public education or prevent crimes we really care about.
 7. Issue of police powers → even if not convicted → humiliation/costly/inconvenient.
 8. Undermines the principle of legality
 9. Results in unjust punishments. The primary victims of this injustice are persons who incur penal liability. The main problem derives from its impact on those who are punished, our culture of compliance, the rule of law, or society generally. Injustice is most glaring when defendants are sentenced for conduct that should have given rise to criminal liability at all.

Commonsense: the case or murder

- Problems with commonsense, there are so many categories in murder – lawful killing (self-defense/provocation) → changes in 1982 in regards to laws of provocation in domestic violence cases
- Industrial deaths often treated as accidents rather than homicide.

Law and order common-sense

- Key assumptions tend to form the bedrock of much public and policy debate around crime they are routinely unquestioned and frequently regarded as unquestionable by the major public actors in law and order debates
- **Russell Hogg and David Brown, Rethinking Law and Order (1998)**
 - ‘Common-sense’ is built by repetition by popular or authorities sources of a number of views and assumptions.
 - The primary definers (Politicians, police, judges, media, campaigns/lobbies) rely on practical methodologies and understandings of the issues and commonly deny the need or worth of research or of any more rigorous analysis of social reality
 - Howard Becker coined the term ‘hierarchy of credibility’ which demonstrates how not all people are given the same right to define reality
- These assumptions require no empirical verification and attract no criticism or contradiction
- They form the mainstream policy debate about law and order
- Howard Becker – “hierarchy of credibility”– derives from the power and status within particular institutional settings.
- Right to define reality is not equally distributed, the dominant agent or group commands greater authority/credibility for their understanding of events and issues
- Operates in favour of a select few – their views circulate public arena and become “commonsense”.
- Common-sense is not wrong but partial, resist contradicting knowledge
- Main assumptions that crime problems are criminal justice problems and justice agencies such as police are unable to deal with the problem due to lack of resources, inadequate power and the guilty offenders escaping conviction.
- (Williams 1985): Not a crisis of law and order but ‘a crisis of perspective’

Elements of Law and Order Common-sense

- Soaring crime rates
- “Its worse than ever”
- The future is New York or LA (though now slightly outdated)
- The criminal justice system is “soft on crime”
- The “solution” is more police with more powers
- We need “tougher” penalties
- Victims should be able to get revenge through the courts

Penal Populism – J Pratt (tough on crime)

- Penal: involves punishment, populism: political philosophies of the People’s Party
- Penal populism should not be understood merely in terms of political opportunism, although politicians do exploit these opportunities

- The rise of penal populism is the reflection of a fundamental shift in the axis of contemporary penal power brought about by these changes, even if the extent of the shift differs from society to society
- There is a rise of bodies insisting they speak for 'the people'. However these new bodies seem to cause problems that are not able to be controlled (p48)
- Because of the rise of crime and the fact that modern society is changing in ways that are threatening and unwanted by many people want people are represent their 'say' by simple fixes → rise of penal populism
- Populist hold out promises of being able to repair declines in authority and social order thereby providing a vision of the future that seems less fraught with menace and uncertainty
- Assumption in threat that epidemic in crime - politicians exploit these fears
- Examples can be the one-punch legislation with the distinguishing factor of it being more serious if the person is intoxicated
- The Sorcerer's apprentice revisited
- **Instead of being driven by efficiency, economy and humanitarianism populism is overwhelmed by emotions and the expectations of security and order that are almost always disappointed.**
- Analogy on p48 basically saying do not start something without knowing how to stop it, politicians often bring to penal populism to life by invoking 'tough on crime' → electoral success but this does nothing in reality
- Example is where legislation is not thought out thoroughly and the consequences may be worse – lock-out laws

Historical relativity and change

- Historically some acts were condemned which are not today and vice versa
- Homosexual acts between men are decriminalized
- Drug offences are now criminalized.

The Criminal Prosecution and Capital Punishment of Animals

- Examples of animals being trialed.
- Can the state be culpable of a crime?
- Yes - Green and Ward define state crime as 'state organised deviance involving the violation of human rights'
 - Grewcock argues Australian state has engaged in state crime in braches of international humanitarian law through the alienation, criminalisation and abuse of unauthorized migrants.

Cross-cultural perspectives

- A commonsense view of crime – that everyone knows what a crime is. However this concept cannot be applied to criminal law → there is no commonsense, it is not black or white
- One way to test commonsense views is to examine societies that are different from our own

C Geertz, Local Knowledge

- Geertz argues that the comparative study of law/justice or adjudication should train its attention on the 'imaginative, or constructive, or interpretive power, a power rooted in the collective resources of culture rather than in the separate capacities of individuals.
- We can only look at phenomenons by discarding the assumptions that govern the way we interpret and make sense of the world on the one hand and understanding that we can only make sense of the

phenomenon by reflecting those assumptions and ways of seeing, by including them in our study and analysis.

- Law/anthropology → a way to question assumptions is by doing a comparative analysis of different societies, then you can question it.

Production of knowledge

- Power and knowledge are implicated and entwined.
- The information put out is governed by political players.

R Hogg, Perspectives on the criminal justice system

- Many existing behaviours that might be regarded as harmful are not visible or treated as criminal. Much behaviour are treated as criminal in one text will not be in another.
- E.g. killings by police are not deemed unlawful – no logical explanation.
- Until we begin to deconstruct the methods of this production, we will work with a quite narrow conception of reform and a limited understanding of how criminal justice relate to police and political processes.
- The author goes on to question how domestic violence has been silent for so long, is producing knowledge a complex one that is bound by questions of power and of political intervention. Power operates in and alongside the processes of knowledge formation, designating certain objects of knowledge, blocking others, constraining the analyses that might be construed.
- Foucault argues ‘there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations (
- If we are to change the criminal justice system, we do not do it by imposing logic from above which in turns sustains/bolsters it, but by dissecting and deconstructing it from below, analysing the practices which constitute it as a field of power, sources, effects and the myriad networks of power and knowledge they enter.

Murray Lee, Inventing Fear of Crime

- Fear of crime used as a political tool.
- Police sees reduction in fear of crime almost as important as the reduction of crime itself.
- Fear of crime feedback loop → government uses victim surveys to inform the citizenry that they are indeed fearful – creating more fear
- Politicians can use statistics to their advantage

Defining crime

- Statutory regulations are prosecuted by the states and also carry a penalty. Yet they are not contained in the Crimes Act nor do they have the same harshness of penalty. Why are these not crimes?

G Williams, Textbook of Criminal Law

- Crime is a legal wrong that can be followed by criminal proceedings, which may result in punishment. Is this definition circular? No.
- Essentially, a wrong that follows this procedure is a crime.
- A crime is an act that is condemned sufficiently strongly to have induced authorities to declare it to be punishable before the ordinary courts.
- Definition by Paul Tappan: allow judge/administrator to attribute the status criminal to any individual which he conceive nefarious.
- Consequence of committing a crime for the convicted defendant will usually be form of punishment. Whether punishment can be justified for the penalty is a separate question.

- Does the criminalisation approach help regulation or will it lead to greater secrecy, intimidation, corruption of law and damaging consequences for victims? Are there any other forms of regulation that can be more effective?

Andrew Ashworth ‘is the criminal law a lost cause?’ (p51):

- Examines the nature of criminal offences created in English statutes in 1997 against certain professed elements of principle, finding them lacking
- Glanville Williams concluded that there is no workable definition of a crime in English law that is content-based: only the different procedures of criminal can serve as reliable
- P52 goes through the different sanctions and procedures related to crime
- Things to note about existing criminal law:
 1. The bulk of new offences may be described as ‘regulatory’ (form part of statutory scheme) and are enforced by regulatory authority rather than police
 2. Bulk of new offences are characterised by three features – strict liability, omissions liability and reverse onus provisions for exculpation
- Lord Williams of Mostyn has stated that the creation of new crime should only be done if definitely necessary and factors taken into account include: (52)
 1. Behaviour in question is sufficiently serious to warrant intervention by criminal law
 2. Mischief could be dealt with under existing legislation or by using other remedies
 3. Proposed offence is enforceable in practice
 4. Proposed offence is tightly drawn and legally sound
 5. Proposed offence is commensurate with seriousness of offence

Of muggings, media and moral panics

- A variety of factors influence the reaction of the social audience.
- Example in S Hal et al, Policing the Crisis: Mugging, the State and law and order – press/politicians/police and the public reacted strongly to the mugging crisis. However according to the study, there was no supported statistical evidence. In fact, mugging was an issue except it was under different categories of petty theft, bodily harm etc.
- Other factors included Britain’s post war decline, influx of immigrants, and role of the media and public leaders who defined/amplified the situation.
- Australian examples include the creation of law and order crisis in NW-NSW, WA juvenile offender legislation arising out of a series of high speed chases, and stereotyping of ethnic young gangs.
- Bali bombings → (male middle-eastern appearance).

S Poynting, G Noble, P Tabar and J Collins: Bin Ladin in the Suburbs: Crimanlising the Arab Other (2005)

- Offers a detailed media and political analysis to support the argument that ‘the social imagining of the criminal contemporary Australia increasingly involves the invocation of the Arab Other as a primary folk devil of our times...’
- Introduced a criminalisation of a range of cultural practices whose only offence is their perceived difference → racial violence, repressive measures, and social exclusion.
- Bizarre leap to assume a link between the criminal activity of some Australian citizens of Middle Eastern ancestry and the terrorist activities of extreme Islamic fundamentalists in different parts of the world – also linked to refugees and cultural traditions of the Arabs.

Dangers in moral panics

- Tendency to generate into a media-based conspiracy theory

- Paradoxically replicating the same style of analysis being decried – self-fulfilling prophecy
- Danger of equating moral regulation with conservative politics.
- Danger of overgeneralization

J Quiter, One punch laws, mandatory minimums and alcohol fuelled as an aggravating factor: Implications for NSW criminal law

- Quiter argues the intense media and public campaigns pushed the government to create a poorly drafted legislation over the manslaughter of Thomas Kelly → sentence was doubled.
- Sydney's newspapers, Herald – 'Safer Sydney' campaign and the telegraph's 'Enough' campaign.
- In many critiques of penal populism (like the one above), the media distorts the facts and failed to provide information to the public in a balanced way so fostering punitive opinions. Campaigns also calling for lockdown measures across CBD

C Lumby, Sex murder and moral panic: Coming to a suburb near you'

- Pedophile case – Lumby's views the sorts of anxieties felt by families are not adequately understood through a moral panic based critique of tabloid media exaggeration and sensationalism for which the solution is a dose of rational and informed debate.
- It's not just Lewthwaite (pedophile) that is the reason of social anxiety of fear but the potential harm by popular media and allied marketing.

Moralising about panic

- Politicians/media producers forced to compete for public attention – triggering moral panics → understanding, rather than decrying, the role and languages of popular media and understanding how to conjure their audiences → making the audience betray their own class interests
- Cannot draw on common-sense in a world where there is little experience of commonality.
- More productive to listen, rather than talk sense into, groups who perceive themselves at risk from social phantoms and ultimately to try understand the deeper forces that pose a threat to their status.

Class 3 Criminalisation 2

Normative theories; History and Class(pp.61-82)

Normative Theories of Criminalisation

- Push for a normative approach that seeks to establish boundaries for the criminal law, particularly by outlining the legal conditions that ought to apply before particular forms of behaviour should be criminalized.

Is the criminal law a lost cause? A Ashworth 2000

- Ashworth considers whether it is possible to identify criteria or standards that ought to be satisfied before it is decided to criminalize certain conduct
- Ashworth argues criminal law is a lost cause from the point of view of principle.
- Ashworth identifies four principles of criminal law
 1. Criminal law should only be used to censure persons for substantial wrongdoing
 - Appropriately targeted social, educational and housing policies may well have a greater preventive effect than the enactment of a criminal offence and the conviction of offenders, a point rarely acknowledged by political/media discussion.
 - What is substantial? Different for everyone

2. Criminal laws should be enforced with respect for equal treatment/proportionality
 - Should not remain hidebound by traditional divisions of responsibility that fail to reflect proper assessment of the culpable wrongs involved.
 3. Persons accused of substantial wrongdoing ought to be afforded protections appropriate to those charge with criminal offences.
 - Should be a violation to whittle down the protections the accused has.
 - The charging, bail, sentencing system OR
 4. Maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing
 - Sentencing should be proportional
- Core idea is that if a particular wrong is thought 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.
 - Minor wrongs would go under civil violations or administrative offences

A Ashworth and J Hoarder, Principles of Criminal law

- Despite Ashworth's pessimistic assessment of a principled criminal law as a lost cause, he has attempted to confront criminalisation and to 'identify some general principles and values that the it is submitted, ought to be considered when deciding whether or not to make conduct criminal.
- A system of criminal law may be justified as a mechanism for preservation of social order.
- Because of punishment is so severe, the decision should not simply be made on balance.
- Range of actual/potential crimes are so wide/varied that it seems unattainable to find some general theory whether or not conducts should be criminalized.
- Minimalist approach of criminal law is based on principles of autonomy and welfare and to other forms of social welfare.
 - Principle of respect for human rights
 - The right not to be subjected state punishment
 - Criminal law should not be invoked unless other techniques are inappropriate.
 - Conduct should not be criminalized if the effects of doing so would be worse than not doing so
- Main determinants of criminalisation continue to be political opportunism and power, both linked to the prevailing political culture of that country. Despite this. Ashworth and Horder provide some general principles that remain true to harm, wrongdoing and offensiveness, which may melt into political ideologically of the time.
- Main building blocks of criminalisation decisions are harmful, wrongful and of public concern.
- Ashworth and Horder set out a number of principles that ought to influence the substance of criminal law. They group these principles and policies into criminal law (criminalisation), rule of law and conditions of liability

Range of criminal law

- Principle of minimum criminalisation
- Policy of social defence, view that criminal law may properly be used against any form of activity which threatens good order
- Principle liability for acts not omissions
- Principle of social responsibility, a welfare based proposition that society requires a certain level of co-operation and mutual assistance between citizens.
- Conflicting rights and principle of necessity → in some certain circumstances it may be permissible to use force including taking of life
- Principle of proportionality, limits amount of force that may be used in conditions of necessity

Rule of law and fair procedure

- Non-reactivity principle – a person should never be convicted except in accordance with a previously declared offence.
- Thin ice principle – citizens who know their conduct is borderline of illegality take the risk that their behaviour will be heard criminal
- Principle of maximum certainty – offences must be defined with precision in order to provide certainty/predictability and fair warning.
- Policy of social defence – contrary to maximum certainty principle, provide some vagueness in the definition of offences in order to provide enforcement flexibility.
- Strict construction – any doubts in legislation interpretation should favour the defendant.
- Purposive approach
- Presumption of innocence.
- Policy of ease of proof - allow reverse onus provisions → strict liability

Condition of liability

- Principle of mens rea, an offence must have(subjective) mens rea or fault element
- Policy of objective liability – thought permissible to impose liability based not on subjective intent, knowledge, awareness, belief or reckless, but on the objective failure to fulfill a duty of care.
- Principle of correspondence – must be correspondence between the defendant's mens rea or fault element and the conduct/physical element of the crime.
- Constructive liability – a breach of principle of correspondence, that the fault element does not correspond with the conduct element so that a person is liable to conviction for a higher crime than that contemplated (for example, a person is convicted of murder upon proof of an intention to inflict grievous bodily harm.
- Principle of fair labeling – distinctions/categories of offences and degrees of wrong doing to represent fairly the nature and magnitude of the law breaking
- Efficiency of administration – fair labeling can be dispensed with interests of economic efficiency
- Principle of contemporaneity – fault element and conduct element must exist (mens rea and actus reus)
- Doctrine of prior fault – an exception to the contemporaneity principle where some prior fault element can fill in for the later absence of a contemporaneous fault element (for example, someone has intent to kill and becomes intoxicated in order to summon up the courage to do the act, even if when the act was committed the person is incapable of forming the requisite intention).
- Defensive criminal law → principle of maximum certainty, strict construction, fair labeling, presumption of innocence → emphasizing the value of fair warning and predictability (heart of legality)
- Welfare based principles and policies of social defence are more relevant to criminalisation decisions
- The principles must be weighted up against one another where they come into conflict; whether a multi-principle conception of criminal law which features no ordering of those principles really counts as principled in the sense generally understood by philosophers and criminal theorists; and how far is it is either appropriate or realistic to suggest that policy considerations should not, as a matter of principle, be weighed in the same balance as issues of principle.

N Lacey, Principles policies and politics of criminal law (co-ordination + legitimation)

- Continental European systems have removed most of regulatory/administrative (mala prohibita) offences from the criminal law. Whereas in the English system they have not, making it increasingly difficult to rationalize the content, let alone the distinctive social functions of criminal law.
- One can locate criminal law more firmly in an analysis of what we might call the political economy of criminal justice – an analysis of the upshot of recent legislative changes in criminal law for its meaning, functions and significance as a social institution

- Secondly, one can work to develop a more explicit account of two fundamental dynamics which are at work within systems of law → co-ordination and legitimation. Any system of criminal law must face two structural challenges.
 - Must achieving minimum co-ordination → in terms of defining criminal law norms, motivating compliance with them, providing institutional arrangements for allowing effective enforcement (notably, policing, trial/sentencing process, testing evidence and execution of sentence of court.
 - Second is to achieve level of legitimation of criminal law/process across the populace.
 - These two imperatives are internally related: without adequate coordinating institutions, legitimation is beside the point; without adequate levels of perceived legitimacy, coordinating institutions re unable to achieve their ends.

Criminal responsibility and citizenship

- Anthony' Duff 'communicative'/relational theory of criminal responsibility
- In Duff's theory a rational moral agent who is a citizen is called to account by a criminal law acting on behalf of its fellow citizens and the polity for core wrong doings based on the idea that the criminal hearing is amoral communication between citizens, with the defendant being treated as a full moral agent answerable for their conduct. In 'Answering for Crime', he addresses the implications of his theory if the defendant has been denied the benefits of citizenship and full participation in the polity (discrimination/injustice).

A Duff, Answering for Crime (2007)

- Example of black South American brought to trial in the apartheid era (time of segregation).
- Being treated as a citizen is not just being held criminally responsible but being included to share in both the burdens and benefits of citizenship (social benefits, goods, medical/education benefits).
- How can we be sure that we have collectively treated with the proper respect/concern that are due to them as citizens. We know that people/groups in our society have suffered various kinds of disadvantage that should be seen as social injustice rather than of bad luck. We know they have been excluded from, not offered decent opportunities to achieve or participation in the rights and benefits of citizenship.
- How can we claim that we have the right to account for their wrongs?
- Imagine as jurors and we honestly look at this person, a member of a disadvantaged group and condemn for his crime? Do we have a moral standing to judge this person?
- May motivate us to see disadvantages as possible defences.
- If we fail to treat a person with the respect/concern, we lose the moral standing to call them to account to judge/condemn though for the wrongs that they commit as citizens.
- How to fix these injustices?
 - We ourselves must be collectively ready to be called to account, and show ourselves accountable for the injustices such defendants have suffered at our collective
 - Develop more nuanced legal procedures, or post-conviction procedures that would leave room for genuine recognition of social injustices and also look at restorative justice.

Internal and external constraints on criminalisation

- To combat the trends of too much criminal law and too much punishment, a theory of criminalisation is needed.
- Husak suggests 7 general principles or constraints designed to limit the authority of the state to enact penal offenses.
- External → depend on a controversial normative theory imported from outside the criminal law itself
- Internal → from criminal law itself

- For what conduct may the state persons to punishment?
 - Limitations on the penal sanction can be found by deciding when persons are ineligible for punishments. If we can identify constraints that any acceptable defense must satisfy, we might be able to show that some criminal laws should be placed beyond the reach of the punitive sanction. Penal statutes that fail to satisfy these constraints will make offenders eligible for punishments that cannot be justified. No respectable theory of criminalisation should tolerate this result.
 - Penal liability is unjustified unless it is imposed for an offense designed to proscribe a **nontrivial harm** or evil and may not be inflicted unless the defendant's conduct is **wrongful**.
 - **Desert principle** – punishment is justified only when and to the extent it is deserved.
 - A stringent test of justification must be applied to all penal legislation.
- The state should not deliberately subject persons to hard treatment and stigma unless each of these conditions are satisfied.
- Although these restrictions appear harmless, these internal constraints have the potential to retard the phenomenon of overcriminalisation by jeopardizing many of the new kinds of offense that clutter our criminal codes. In particular, these will reduce the number of mala prohibita offenses.

External

- State must have substantial interest in whatever the objective the statute is designed to achieve.
- The law must directly advance that interest
- The statute must be no more extensive than necessary to achieve its purpose.
 - Must be ready to evaluate alternate means → that alternate means are not effective than the statute in question
- 'What' legislation to 'how' → requiring empirical evidence rather than unsupported speculation that the legislative purpose will actually be served.
- A government should be especially resistant to criminals' status with no realistic prospects of attaining their goals.

Assumptions before rules can expected to change behaviour

- Potential offenders must be aware of rule
- Their knowledge must be able to influence their behaviour at the moment of the decisions made
- Must believe the perceived costs outweigh the benefits of the perceived costs of offending
- Husak then talks about crimes of risk prevention such as attempt, incitement and conspiracy. He argues there are four principles that limit the authority to punish persons who engage in conduct that create the risk of harm than harm itself. The implications of his argument are that many implicit offences of risk prevention such as drug possession are almost over inclusive and presumptively unjustified.
 1. Substantial risk requirement
 2. Prevention requirement (actually decreasing the likelihood of ultimate harm)
 3. Consummate harm requirement (when a statute proscribing conduct that deliberately and directly causes that very harm would be justified)
 4. Culpability (when defendants act culpably with respect to the ultimate harm risked).
- Risk prevention in recent years → terrorism/motorcycle gangs, preventive detention beyond expiration of the original sentence such as repeat sex offenders and bail.

Rape: a challenge to the core crime theory

N Naffine, 'Moral uncertainties of rape and murder' (2009)

- We need to question the natural wrongness of the core wrongs, and whether they are really doing the job they should, then we begin to unsettle criminal law theory where it is meant to be most secure.
- We should think about core wrongs and how/why/whom we actually choose to and manage to criminalise.