

LAWS1021: CRIME & THE CRIMINAL PROCESS

Introduction: Some Themes

- Criminal Law perspectives – **cross traditionalist, philosophical, normative, critical**
- Future directions in criminal law – emphasise **risk and risk analysis** i.e. preventative justice
- **References to policy are condemnations of decisions alleged to depart from fundamental principles**
- English criminal law is grounded in a stable set of established doctrines → ample evidence the arguments and assumptions that influence the development of the law form a disparate group, sometimes conflicting and invoked selectively – political factors influence the shape of legislation
- **Lacey, Legal Construction of Crime**
 - *Mens rea doctrine acts as an ideological counterbalance to the managerialist reality of criminal legal practices in a world in which resources are strictly limited e.g. plea bargaining and diversion from the formal criminal process are endemic, and trial by jury is relatively rare*
- **Principles** – precepts which determine the shape of criminal law – expressed at levels of generality which only go so far as guides to the structure of the laws
 - **He Kaw – Brennan J in referring to the general principles of criminal responsibility**
 - *Criminal responsibility depends not only upon a person's act or omission but also upon the circumstances in which the act is done or the omission made, usually upon his state of mind at that time and sometimes upon the result of his act or omission*
 - **General principle** – acknowledges it does not apply to all, does not always require an inquiry into state of mind and does not insist on proof that a consequence has been caused by defendant's actions
 - General principles do not have to be universal principles, but if they are to be effective guides to the delimitation of specific criminal offences, must go beyond generalities
 - Designed to be descriptive not prescriptive
- Parliament will describe prohibited conduct without going on to spell out the level of personal fault
- **Substantive** – legal definitions of offences and excuses
- **Adjectival** – mechanisms which process those suspected of crime – procedural
- **3 Aims of Codification of the law** → these values may equally well be espoused by those participating in the pre-trial criminal process, but in such a way as to produce a different version of what law is
 - **Comprehensibility** – ensuring the law is as intelligible as possible
 - **Consistency** – including the removal of inconsistencies between principle and policy
 - **Certainty**
- The courts don't operate in a political or economic vacuum, but rather pressure to deliver a technocratic or administrative justice
 - **Critique** – Spigelman noted litigants are not consumers and notions of choice are inappropriate, further courts do not deliver a service but perform a function of government → thus pressures of efficiency must sometimes be deprioritised
- Studying crime is about the **capacity of human behaviour and inevitability of criminality**
- **Recurring Themes**
 - Socio-Political Construction of Crime
 - Not devoid of social context (not a per se phenomena)
 - An irrevocable political dimension
 - Not cross sectional, nor moment in time
 - Temporally dynamic, subject to extraneous influence @ every stage
- **Power, principle, proof, persuasion**

Criminalisation: Defining Crime

- **The Construction of Crime** → **not sui generis** – not a thing with an objective existence
- **Defining Crime** → **needs behaviour and a social response**
 - **Mala prohibida** - wrong because prohibited vs **Mala in se** - wrong in themselves, inherently
- **Penalty** – the broad field of institutions, practices, discourses and social relations which surround the ideas and practices of punishment – social, historical and political
- **Criminalisation** – interlocking practice of **defining (behaviour), and responding** to crime
 - Accommodates institutions and disciplines which bear on their analysis
- **S Cohen, Against Criminology**
 - **Foucault** – question the **3 assumptions of power**: centrally focused; based on & relating back to a privileged state position; property (something X has & W does not); operates in negative, repressive terms → **power is relational, not inherent, a product of social existence**
 - Criminalisation is the **process of identifying something seemed dangerous** to the dominant social order and **designating it as punishable** i.e. Criminal law draws a line of **demarcation**
- **D Husak, Overcriminalisation: the limits of the criminal law**
 - Injustice is most glaring when defendants are sentenced for conduct that should not have given rise to criminal liability at all -... when punishments are imposed for conduct that fails to satisfy our best theory of criminalisation i.e. **many things are criminal which shouldn't be**
 - Far too many criminal laws; **law is beyond comprehension** of laypersons
- **R Hogg & D Brown, Rethinking Law & Order**
 - **Primary Definers** – influential in setting the parameters of debate, i.e. police, judges, Royal Commissioners, AG – primary account of the facts of the matter
 - **Howard Becker**– **hierarchy of credibility** → differences in **power and status institutionally**
 - **Common-sense is partial, rather than wrong** – resisting engagement with systematic bodies of knowledge where they contradict common-sense assumptions
- **The Elements of Law and Order Common-sense**
 - Soaring crime rates → 'worse than ever' law and order nostalgia → criminal justice system soft on crime and does not protect citizens → solution is more police with more powers → tougher penalties → victims should be able to get revenge through the courts
- **J Pratt, Penal Populism**
 - More than just political opportunism → **buying electoral popularity by cynically increasing levels of penal severity**, it is thought that there is public support for this, irrespective of trends
 - Brings to life via tough on crime, tough on causes - welcomes the electoral success it brings
- **M Lee, Inventing Fear of Crime**
 - Feedback loop - research into fear of crime produces criminological object fear of crime statistically and discursively - i.e. **'if nothing works in reducing crime, lets reduce crime fear?'**
- **Summary:**
 - 1. Common-sense – everyone knows crime when they see one is inadequate even in the case of 'core' crimes i.e. murder excuses accidental killings, 'rape' has low reporting & high attrition
 - 2. Content of criminal laws and the forms of criminal agency are constantly changing
 - 3. Wide variety of behaviour treated as criminal at any given time suggests attempts to distil any common essence of criminal conduct is difficult, if not impossible
- **Relativity**
 - **Moral** – inherently religious, mortality & law are not the same, morality affects the law but many crimes are regulatory rather than morally driven
 - **Historical** – what changes over time
 - **Social / Political / Cultural** – what is acceptable & popular
- **G Williams** - a legal wrong that can be followed by criminal proceeding, may result in punishment
- **Lord Atkin** - the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, & the only common nature they will be found to possess is that they are prohibited by the State that those who commit them are punished

- **Lord Williams of Mostyn** → behaviour is sufficiently serious to warrant intervention / mischief cannot be effectively dealt with by existing or other remedies / proposed offence is enforceable, tightly drawn and legally sound / penalty in line with seriousness → **few laws bear resemblance**
- **A Ashworth, Is the Criminal law a lost cause**
 - Current trends - strict liability, omissions liability and reverse onus provisions for exculpation
 - Rhetoric of English law - mens rea is a prerequisite, liability for omissions is exceptional, **the one golden thread running through is that the prosecution bears the burden of proving guilt**
- **Harm** – characteristic, experience shared by all forms of criminal action is that they are harmful → **only harmful acts should be criminal** - immediate apparent plausibility → **J S Mill, On Liberty**
 - What degree of harm? → arguable the harm principle is collapsing under the weight of its own success – claims of harm have become so pervasive, principles meaningless
- **Public Interest** → **Blackstone**
 - Public wrongs are an offence against the whole community
 - Compensation through civil, and ensures order and peace via prevention/punishment
 - Flaws → is breach of contract a crime as it harms interest of honouring contract?
 - Alternatively – only a crime if actually done in public // in private → exceptions include those always in the public eye (homelessness), crimes irrespective (domestic violence)
- **Morality**
 - Immoral conduct undermines social cohesion and should be criminal (i.e. ‘harm’ to social order rather than the individual) → immorality is reason & necessary for crime
 - **In the alternative** → **P Devlin argues for consideration of morality** in that
 - Must be tolerant of individual freedoms
 - The limits of tolerance shift → the law is always slow to act
 - Privacy should be respected
 - **Further alternative** → **Hart argues morality has no place in law**
 - Society does not depend on shared moral beliefs
 - Paternalism (protecting people against themselves) was perfectly coherent
- **Offensiveness**
 - Offensive behaviour often involves publicness (i.e. distinction between what is done in public v what is done in private) – Moral behaviour is possible offensive in public
 - Immoral behaviour may be legal permissible in private
 - Morally neutral behaviour such as public drunkenness CAN be offensive
 - In points 1 & 2 → publicness rather than immorality are the concerns – more assimilable to harm therefore **offensiveness is a hybrid of public and morality theory**
- **I Hunder, D Saunders and D Williamson, On Pornography: Literature, Sexuality and Obscenity Law**
 - The fault w the harm principle is that social coercion of individuals is set by whether their actions are likely to cause harm to others → widely interpreted – gendered / enviro etc.
- **NSW Prisoners Action Group** re: Nagle Commission used the concept of aggregate social harm to challenge the focus on individual criminal responsibility and existing classifications of particular harm
- **P Hillyard & S Tombs Beyond Criminology?**
 - Social harm - ref. to cultural safety, autonomy, development and growth, access to cultural, intellectual and informational resource → encompasses physical, financial, emotional
- **Risk and the Rise of Preventative Justice**
 - Risk justifies the state’s responsibility to protect & prevent see: driving offences
- **Emilie Durkheim** → crime was a normal part of society → people come together and confirm their shared values in denouncing the criminal act, it helps them define themselves as a community
 - **Division of Labour** → an act is criminal when it shocks the common conscience, “crime brings together upright consciousness and concentrates them”
- **Moral Panic** – muggings, Biker gangs, war on terror, etc
- **Language** – ‘war’, ‘corruption’, ‘cancer’ – need to be cleansed of – a threat to innocence
- **Regulation & Economic** – cost v benefits – tort law, educative & preventative strategies, regulation

Criminalisation: Colonialism and the Indigenous Experience; Deaths in Custody

- **Death of Mulrunji (P304) // Mr Ward (P308) // Kwementyaye (P310)**
- **History of Criminalisation**
 - The idea of 'criminal class' → criminal law is NOT simply an instrument of the dominant class
 - In the alternative → e.g. women & AVO benefits – favouring victims
- Justification for differential treatment of two individuals charged with the same offence → **differences between the objective facts**
 - In history: special criminal offences applicable only to Aboriginals – idea they were subhuman
 - Explicit links between stolen generation and criminal law / behaviour
 - *“Potentially positive forms of familial and community-based socialisation and authority, the major bulwark against offending and criminalisation are severed”*
 - **CD Rowley, Outcasts in White Australia**
 - No jury representation, wider range of offences, heavier penalties, impartial trials
 - Witnesses brought in with chains on their necks, Stolen Generation
 - Underpinned by key doctrinal issues (Terra Nullius) & 'settled colony'
 - **Stolen Generation**
 - **Penal welfarism**
 - **Colonial paternalism** 'arrest for own protection'
 - **Epistemic Violence** - ripping open the symbolic and cultural world of the colonised and imposing new forms of knowledge
 - **Overrepresentation of Indigenous** → 15x national avg. – most imprisoned race in the world
 - Clear relationship between **race, imprisonment and crime** as opposed to population density or levels of industrialisation
 - CJS at this less visible though busy end is predominantly directed at the management of social marginality → **police custody emerges as an apparatus for managing the disreputable poor rather than prosecuting serious crimes**
- **The Limits of Punishment**
 - **D Garland, Punishment and Modern Society**
 - **Punishment** – apparatus for dealing w criminals – legal-admin entity – expression of state power, collective morality, sensibilities and symbols which display a cultural ethos, creating social identity
 - Social institution defining nature of society, kind of relationships which compose it, kind of lives it is possible and desirable to lead
 - Punishments regularly fail in the respect of achieving high reform/ crime control rates
 - Punishment is a coercive back up – never to succeed because conditions which do most to induce conformity lie outside jurisdiction of penal institutions