

LAWS1016 Course Summary

1. Crime, Law and Morality

Defining Crime

- **Glanville Williams: a crime = a legal wrong that can be followed by criminal proceedings which may result in punishment**
 - Positivists (the law is determined by a particular social practice) may argue that crime is whatever legislators decide at a particular time is punishable as a crime
 - It may also be argued that CL is rational and principled, and is understandable without reference to politics and social forces
 - **But crime is culturally defined and history/context are crucial (Alan Norrie)**

Competing Principles Underlying CL:

- Criminal law is the product of the interplay between the competing principles of individual autonomy vs. community welfare
- The competing influences of autonomy and community protection seem to explain the criminal law's ambivalent approach to subjective mental states

Aims of CL:

Liberalism/individual autonomy (JS Mills):

Individuals should be afforded as much freedom as possible; CL should be used as a last resort, only to prevent harm to others

- Calls for individuals to be accorded as much freedom as possible, subject only to the minimum restrictions required to provide other individuals sharing the community with those same freedoms. CL should therefore be used only against behaviour that injures rights/interests of other people
- **Individual autonomy is vital:** links criminal responsibility to **personal awareness** of consequences of one's freely chosen conduct
 - This links to **subjective fault** (the accused's actual state of mind at the time of the offence - i.e. the intention to do something)
- **Criticisms:**
 - But is limited to physical harm or does it include psychological, economic, etc. harm?
 - The broader the definition of harm → the greater the impact on individual freedom (thus counter-productive)
 - Fails to adequately explain the use of CL in certain areas (e.g. the use of CL as a deterrent to ensure seatbelts are worn by drivers and passengers)

Community welfare:

CL should be used to protect the wellbeing of the community

- Places a premium on community interests/wellbeing and would be prepared to override individual autonomy for the greater good of the community (e.g. impose criminal liability on drug users, those who don't use seatbelts and helmets, etc)
 - Links to **objective fault** (what the state of mind of a reasonable person would have been if they were in the accused's position)

Findlay, Odgers & Yeo / Ashworth & Horder: justice to the individual and society is best served by careful balancing of these competing principles

Moral wrongness (Lord Devlin):

CL should be used to deter immoral behaviour

- Devlin: moral conduct underpins the social fabric of society, these values must be preserved or else there will be social chaos
 - Immoral conduct (which erodes the fabric of society) should be criminalised

- 'Moral' conduct depends on the prevailing norms of society (immoral is what disgusts the people)
- Examples - criminalisation of homosexuality, suicide, temperance movements securing prohibition of alcohol, 'war on drugs'
- **Criticisms:**
 - This definition of moral wrongness is too imprecise; feelings may stem from irrational prejudices than reasoned moral indignation
 - HLA Hart: doubted shared common morality
 - It is too easy to discriminate against minorities
 - No evidence that society disintegrates without criminalising immoral acts
 - Most crimes are regulatory - devoid of the morality link

Punishment of the offender:

Aims of punishment:

- **Retribution:** principle of **proportionality** (large amount of harm = more punishment) , 'just deserts' (linked to **denunciation**)
- **Deterrence:** to prevent crime
 - **Specific:** deter the offender from committing future crimes
 - **General:** deter other people from committing crimes
- **Rehabilitation:** prevention through treatment (e.g. Drug Courts; youth sentencing)
- **Incapacitation:** protecting the community by incapacitating the offender (e.g. Veen (No. 2))
- **Restorative Justice:** attempts to repair the harm caused (e.g. youth justice conferencing for young offender who have committed lower-range offences to meet with the victim to apologise and agree to remedy harm caused)

Elements of a Crime:

Actus Reus (AR)

- The **criminal act (conduct)**
- Must have been done **voluntarily** (the ability to exercise control over one's bodily movements)
- For some crimes, the conduct must be a **cause** of the resulting harm (but not for other crimes - e.g. speeding (the conduct itself is enough)
 - Where causation is an issue, the conduct must be a **substantial cause** of the resulting harm

Mens Rea (MR)

- The **mental state at the time of the crime**
- Mens rea consists of one or more of the following mental states, depending upon the statutory or common law definition of the crime:
- **Subjective (prosecution must prove that this went through the accused's mind):**
 - **Intention:** the purpose to achieve a certain result
 - **Recklessness:** a foresight of a risk that a consequence might occur and proceeding to act in a way that brings about that risk
 - **Knowledge:** awareness that a specified circumstance exists/consequence will occur
- **Objective (the accused has failed to live up to the standards of a reasonable person):**
 - **Negligence:** assesses the individual's behaviour according to what a reasonable person in the same situation ought to have known or done

Temporal Coincidence

- The MR must be present at the time of the AR
- But there are some cases where the courts extend the period of time in which these must coincide (i.e. a sequence of wrongful acts may be regarded as elements of a single episode of unlawful conduct)

Philosophical Background

- The law cares about conduct, causation and mens rea
- But there is a deeper problem discussed by philosophers - do all offenders and people have free will?
 - Role of social disadvantage (e.g. Bugmy)
 - Role of biology (e.g. head injuries, foetal alcohol syndrome)
 - Norrie (2005) argues that contextual factors are relevant in the determination of whether the accused has acted freely, given the link between structural disadvantaged socio-economic backgrounds and crime

Constructive Liability

- Where people are convicted of serious crimes in which they lacked the mental state normally required for those crimes (e.g. a person may be guilty of murder if, while in the course of committing an offence punishable by imprisonment for 25 years (e.g. armed robbery with wounding, he accidentally killed someone)

Strict Liability

- Offences for which a person may be convicted with just an AR, and there is no need to prove any MR (e.g. speeding)

Euthanasia:

Types of Euthanasia

- **Voluntary:** intentionally taking life at request of the sufferer
- **Non-voluntary:** intentionally taking life when sufferer is unable to communicate (e.g. sufferer in persistent vegetative state)
- **Involuntary:** intentionally taking life against the known wishes of the sufferer
- **Physician-Assisted Suicide:** sufferer is given medical means to take own life

Euthanasia (State Level)

- Almost all forms of euthanasia are illegal per Crimes Act 1900 (NSW)
 - Intentionally taking life = murder (s 18) = max life imprisonment
 - Assisting suicide (s 31C) = max 10 years imprisonment
- Dozens of legislative attempts have been knocked back
- NSW and VIC introduced 'Voluntary Assisted Dying Bills' in 2017
 - NSW bill failed to pass by 1 vote
 - VIC passed its legislation [start in 2019]

Euthanasia (Commonwealth Level)

- Rights of the Terminally Ill Act 1995 (NT): enables an adult suffering terminal illness to request a doctor assist in their death
- But this was repealed by the Cth: Euthanasia Laws Act 1997 (Cth) - forbid the NT, ACT and Norfolk to make such laws

Arguments FOR

- **Autonomy:** every adult of sound mind has the right to determine what shall be done to their body
- **Beneficence of 'mercy killing'** rather than protracted painful death

Arguments AGAINST

- Human life has inherent value - ethical taboo re: deliberately ending human life

- 'Slippery slope' argument - legalisation may lead to deliberate killing of individuals who are not competent to make death decisions
- Medical practitioners have an ethical obligation not to deliberately end life

Bland (1993) UK (HoL)

- **Facts:** Victim of Hillsborough disaster - severe brain damage; parents and doctors sought permission to discontinue artificial nutrition and hydration
- **Issue:** what is in the best interests of the patient?
- **Held:**
 - Given the patient was in a permanent vegetative state, there is no benefit to continue treatment
 - **No duty on staff to provide indefinite treatment**
 - **Because no duty to act, no criminal liability for an omission, thus withdrawal of treatment is not criminal**
- **Principle:**
 - **Bland sets a distinction between allowing death by removing treatment (lawful), and killing by lethal injection (unlawful)**

NSW Department of Health Guidelines (2005)

- **Recognises the ability of healthcare professionals**, in consultation with patients' families, to **withhold or withdraw life-prolonging treatments where expert opinion determines the treatment has no real therapeutic benefit**
- But euthanasia + assisted suicide = involve deliberate acts/omissions that are undertaken with the taken with the intention of ending a person's life and are inconsistent with the duties of medical practitioners

Cases

- **Motive is a relevant factor in determining culpability (Norrie)**
- **Discretion has a major impact on liability**
 - Ashworth: "the exercise of discretionary power provides the key to practical instances of criminalisation"
 - Police = 'gatekeepers' of CJS
 - Power to filter people out of the CJS at many stages - pre-trial decision-making (apprehension, arrest, diversion, charge, questioning)
 - Critics of their reactions to certain groups/types of inaction e.g. domestic violence, sexual assault complaints
 - Prosecution & Defence
 - Pre-trial decision-making (plea bargaining)
 - Judges
 - Discretion at trial (admission of evidence, directions to jury, sentencing)
 - Influences on discretion:
 - Individual characteristics and personal values of decision-makers themselves
 - Implicit biases
 - Extraneous events in life

Sutton & Sutton (2007):

- **Facts:** Couple killed their blind, disabled son out of love and desperation - plead guilty to manslaughter.
- **Held:**
 - Couple placed on good behaviour bonds
 - "Nothing that the court can do by way of sentence can add to the offenders' suffering. The need for further punishment is spent"

Mathers (2011):

- **Facts:** Elderly man assisted his elderly partner with severe spinal pain to commit suicide. M was charged with murder, but manslaughter plea accepted
- **Held:**
 - Imposed 2-year suspended sentence because:
 - **M's motives of love/compassion influenced his acts, he pled guilty and was genuinely remorseful**
 - **V wanted to end life**
 - **M's decisions impaired by depression and anxiety**

Justins [2010] NSWCCA:

- **Facts:** Woman was charged with murder, but convicted of manslaughter, of a de facto partner who was suffering from Alzheimer's. She provided him with a drug. In the past, the deceased had attempted suicide and applied to a Swiss organisation for assisted suicide.
- **Issue:** Did the deceased have the mental capacity to commit suicide? If he did not, then the accused caused his death and was guilty of homicide. But if he did have the capacity, then the accused was not guilty of murder or manslaughter as she had not completed the actus reus of homicide in that she had not caused his death.
- **Held:**
 - Mental capacity to commit suicide = whether the deceased was able to make a reasoned, but not necessarily informed or rational, decision to take his own life

2. The Scope and Principles of Criminal Law

Key issue: what kind of conduct should be criminalised?

Normative theory of criminalisation (Ashworth & Horder)

- Normative = what ought to happen (not what does happen)
- As per Husak: in a liberal democratic state, there is virtually a right not to be punished
- Therefore, criminalisation requires justification (the burden of proof should be on those who wish to turn non-criminal activity into an offence)
- Criminalisation has serious consequences for people
 - Deprivation of liberty, stigmatisation, impact on self
- But the main determinants of criminalisation continue to be political opportunism and power
- Two fundamental elements in criminalisation:
 - Individual autonomy
 - Welfare principle

Autonomy

- Individuals who have capacity and free will to make choice should be treated as responsible for their own behaviour (except where they have some lawful excuse for their conduct)
 - These people should be the subject of CL
- Hart (2008): individuals should not be held criminally liable unless they had the capacity and a fair opportunity to do otherwise (criminality should be contingent on one's choices)
- Criticism:
 - Hudson: notion of 'free choice' is a perspective of the privileged; contrast to those whose lives are constricted by material/ideological handicaps
 - Norrie: individuals commit crimes under the direct influence of social circumstances, not as the product of rational choice made in abstraction from such circumstances (so undermines theories of retribution and deterrence)