

LAWS1021 CRIME AND THE CRIMINAL PROCESS

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CRIMINALISATION

Contextualising Criminal Law

- The term criminalisation constitutes an appropriate conceptual framework within which to gather together 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
- The meaning of what goes on in criminal courts can only be understood by tempering our interpretation of legal-doctrinal arguments with socio-legal facts about how cases are selected for trial and processed after conviction, about the operation of rules of evidence and procedure, and about the institutional structure of criminal courts
- Part of an integrated process of criminalisation
- The issue of criminalisation interrogates the principles, motivations and forces behind decisions to characterise certain forms of behaviour as criminal
- “Criminal law can and should be understood as part of integrated process of criminalisation incorporating all stages from the articulation of offences through investigation, diversion, prosecution, trial, sentencing, the royal prerogative, and the execution of punishment” N. Lacey 2016 [53]

Lacey: Varieties of Criminalisation

1. Criminalisation as a pattern or outcome (descriptive/normative)
 - Formal criminalisation (legislation, judicial decisions, international treaties)
 - Substantive criminalisation (actual implementation or formal norms)
2. Criminalisation as a social practice (descriptive/normative) → (who criminalises, or should criminalise, on what assumptions and according to what processes and principles)
 - Formally (in the books)
 - Substantively (in action)

Criminalisation involves an examination of police powers and the laws of evidence and criminal procedure, for these are intimately entwined in and with substantive offences, indeed are partly constitutive of the offence itself.

Cohen: Against Criminology

- 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

Morris and Hawkins: Overreach and Crime Tariff

- When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks
- Overcriminalisation is objectionable mainly because it produces too much punishment
- A substantial amount of contemporary punishments are unjust because they are inflicted for conduct that should not have been criminalised at all
- Expanding criminal justice system incurs massive opportunity costs
- The quantity of criminal law undermines the principle of legality

Husak: Overcriminalisation

- Too much criminal law
- Unjustified arrests have led to certain offences treated as being unconstitutional
- The lives of citizens are unfairly disrupted when overcriminalisation occurs

Hogg and Brown: Common Sense - The Case of Murder

- Central to criminal law theory is the idea that there are certain wrongs, rape especially and also murder, which are self evidently blameworthy and so call for, and legitimate, theories of criminal responsibility
- Law and order common sense form the foundation of much public and policy debate around crime
- Hierarchy of credibility operates in favour of the views of a select few authoritative sources whose views circulate widely in the public arena, and over time become incorporated into public common sense

Pratt: Penal Populism

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, depending on their local impact

Historical Relativity and Change

- Morphine, heroin and marijuana used to be legal, homosexual intercourse was illegal
- Also applies to the question of criminal agency, what sorts of agents are made criminally responsible in different historical periods

Defining Crime

- Wrong because prohibited → mala prohibita
- Wrong in themselves → mala in se
- “We are confronted not with a crisis of law and order but with a crisis of perspective”
– G Pearson

Theories of Criminalisation: Contextual vs Normative

Normative Theories of Criminalisation

Specifying the legal conditions that ought to apply before particular forms of behaviour should be criminalised.

- Draws together and builds upon key course themes such as the contingent nature of criminal law and the processes of criminalisation
- Addresses the absence/dilution of ‘general principles’ in the expanding body of statutory law
- Raises questions about the purpose and legitimacy of criminal law as a vehicle for regulating behaviour and punishing ‘wrongdoing’.
- Poses questions about the possibilities of/limits to a unified theory of criminal law as opposed to a contextual approach
- Provides a basis for critically analysing criminal justice policy and evaluating offences such as consorting

Justifications for Criminal Law

- The harm principle
- Social harm
- Risk and the rise of preventative justice
- The rise of the algorithm
- Morality: the Hart/Devlin debate
- Offensiveness: the public/private distinction
- The “legislation of morality”

A Ashworth “Is the criminal law a lost cause?” (2000)

- Governments often take the view that the creation of a new crime sends out a symbolic message that, in blunt terms, may “get them off the hook”
- Principled core of criminal law:
 - o Principle that the criminal law should only be used to censure persons for substantial wrongdoing
 - o Principle that criminal laws should be enforced with respect for equal treatment and proportionality
 - o Principle that persons accused of substantial wrongdoing ought to be afforded the protections appropriate to those charged with criminal offences
 - o Principle that maximum sentences and effective sentence levels should be proportionate to the seriousness of the wrongdoing
- Horder: Criminal laws values and fabric
 - o Intrinsic values such as personal and interpersonal good
 - o Life in common: the importance of public goods
 - o Protecting “fragile” public goods

Antony Duff “Answering For Crime” (2007)

- Communicative or relational theory of criminal responsibility

- Rational moral agent who is a citizen is called to account by a criminal law acting on behalf of fellow citizens and the polity for core wrongs legitimately established in its substantive and procedural norms
- The accused is required to give an account of their actions if they are to escape responsibility
- Based on the idea that the criminal hearing or trial is a moral communication between citizens, with the defendant respected by being treated as a full moral agent answerable for their conduct
- What might be the implications for his theory of criminal responsibility if the defendant has, through various forms of discrimination and injustice, been denied the benefits of citizenship and full participation in the polity

D Husak "Overcriminalisation: The Limits of the Criminal Law" (2008)

- Seven general principles or constraints to his theory of criminalisation designed to limit the authority of the state to enact penal offences
- External constraints → depend on a controversial normative theory imported from outside the criminal law itself
 1. The state must have a substantial interest in whatever objective the statute is designed to achieve
 2. The law must directly advance that interest
 3. The statute must be no more extensive than necessary to achieve its purpose
- Internal constraints → derived from the criminal law itself
 1. The proscribed harm must be non-trivial or evil
 2. 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 (in some sense) wrongful
 3. The desert constraint: [is that] Punishment is justified only when and to the extent it is deserved. In other words, undeserved punishments are unjustified
 4. Burden of proof should be placed on those who favour criminal legislation
- Legislators must: identify a state interest → determine its legitimacy → decide whether that interest is substantial
- Few potential offenders are aware of more than the broadest outline of how the majority of statutes pertain to their conduct

- Only 2% of all indictable offences result in a conviction
- Four distinct principles to limit the authority of the state to punish persons who engage in conduct that creates the risk of harm rather than harm itself
 1. There must be a substantial risk
 2. It must actually prevent/decrease the likelihood of the ultimate harm
 3. Criminalising prevention only justified if the actually causing harm also justified criminalisation
 4. Defendant must act culpably with respect to the ultimate harm risked
- Many implicit offences of risk prevention are almost certainly overinclusive and presumptively unjustified

Antony Duff “The Realm of Criminal Law” (2018)

- Based on his notion of a citizen as “a rational moral agent”
- Criminalise too many types of conduct that should not be criminal
- Overcriminalisation exposes too many people to the prospect of prosecution, conviction and punishment for conduct that does not merit such a response
- This response can be destructively oppressive
- Normative theorists problem with the quality of the decision processes that lead to the creation of new crimes
- Criminalisation processes have become unprincipled
- A followed normative theory of criminalisation will prevent this unprincipled nature
- To justify a claim that a behaviour is to be criminalised is to argue that it is a public, not private, matter
- The conduct must be wrongful in the context of the polity’s civil order, thus justifying calling the wrongdoer to public account
- The polity therefore has in principle the standing to intervene

Lindsay Farmer “Making the Modern Criminal Law: Criminalisation and Civil Order” (2016)

- The paradox of modern criminal law is that despite being shaped by a liberal sensibility about the scope of state power and the desire to respect individual rights