LAWS1021

Criminal Laws

Faculty of Law, UNSW Sydney

Primary Text: Brown, Farrier, McNamara et al, Criminal Laws (7th edn, Federation Press, 2020)

Course Coverage

Week 1: Criminalisation and Penality

Week 2: Components of Criminal Offences -- actus reus, mens rea, causation, omissions, strict liability, burden of proof

Week 3: He Kaw Teh; Policing as Social Control -- suspect populations, discretion, LEPRA

Week 4: Police Powers -- arrest, interrogation, right to silence, s 89A LEPRA, stop and search

Week 5: The Criminal Process -- two tiers of justice, DPP, summary justice, Feeley's process as punishment

Week 7: Deaths in Custody; Bail -- Royal Commission, Bail Act 2013, show cause, unacceptable risk

Week 8: Prosecution Discretion; Miscarriages of Justice -- EAGP, DPP guidelines, wrongful conviction

Week 9: Public Order -- offensive language, move-on powers, graffiti, sex work, riot and affray

Week 10: Drug Offences -- war on drugs, DMTA scheme, deemed supply, Commonwealth Code

WEEK 1: CRIMINALISATION AND PENALITY

1.1 Introduction

Criminalisation refers to the processes and principles through which particular forms of conduct become defined as criminal. Penality describes the broader field of penal practices, institutions and discourses surrounding punishment. These are the foundational concerns of Chapter 2 of Brown et al, *Criminal Laws* (7th edn, 2020).

Core questions the chapter addresses:

- What is crime and what ought to be crime?
- What factors drive the decision to criminalise particular conduct?
- Is the criminal law principled, or historically contingent?
- How do criminological and normative approaches differ?
- What is penality, and why does it matter beyond the rules of individual offences?

1.2 Contextualising Criminal Law -- Key Concepts

1.2.1 Overreach and the Crime Tariff

Source: *Morris and Hawkins, The Honest Politician's Guide to Crime Control (1969)*

> "The prime function of the criminal law is to protect our persons and our property; these purposes are now engulfed in a mass of other distracting, inefficiently performed, legislative duties. 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. This unwarranted extension is expensive, ineffective, and criminogenic."
>
> *-- Morris and Hawkins (1969) at 2-3*

The Crime Tariff Effect: Criminalising consensual or 'victimless' conduct (drugs, gambling, prostitution) operates as a 'crime tariff' that raises prices, entrenches organised crime, generates corruption, diverts policing resources, and lacks the presence of complainants making enforcement difficult.

Morris and Hawkins' seven-point decriminalisation program: public drunkenness; drug possession/use; all gambling; disorderly conduct/vagrancy (replaced with precise provisions); abortion by licensed practitioner in a registered hospital; all sexual behaviour between consenting adults in private; juvenile jurisdiction confined to conduct criminal if done by an adult.

1.2.2 Overcriminalisation

Source: *Husak, Overcriminalization: The Limits of the Criminal Law (2008)*

Husak provides the most systematic contemporary treatment of overcriminalisation. His central claim: we have too much punishment, and much of that punishment is unjust not because it is disproportionate but because it is imposed for conduct that should not have been criminalised at all.

Five harms of overcriminalisation:

Harm	Mechanism	Example
Notice / fair opportunity	Citizens cannot know the law; lawyers are unfamiliar with most statutes	Even professors know only a fraction of applicable criminal statutes

Opportunity costs	Resources diverted from serious crime to trivial enforcement	California corrections spending outstrips education funding
Stigma depletion	As criminal liability expands, the censuring function of conviction is diluted	If everything is criminal, nothing is truly condemned
Arrest powers	Expanded criminal law creates more powers to arrest and harass	14 million arrests in the US in 2004; many not prosecuted
Rule of law	Criminalisation outsources content to non-criminal laws; legality eroded	Criminal liability for breaching non-criminal regulatory standards

1.2.3 Law and Order Commonsense

Source: *Hogg and Brown, Rethinking Law and Order (1998)*

'Law and order commonsense' is a set of taken-for-granted assumptions that resist empirical challenge. These assumptions form the bedrock of mainstream policy debate and are routinely reproduced by 'primary definers' -- politicians, police, magistrates, and media figures who set the parameters of debate.

Primary definers (Hogg and Brown; Hall et al): key institutional actors whose accounts are perceived as authoritative and neutral. They frame the dimensions of the crime problem and provide the 'most viable' solutions, establishing the criteria by which all subsequent contributions are judged.

Seven elements of law and order commonsense:

Element	Claim Made	Empirical Challenge
Soaring crime rates	Crime is always rising	Statistics fluctuate; crime rates are socially constructed products of reporting, policing and recording practices
It is worse than ever	Law and order nostalgia for a tranquil past	Same rhetoric appears in Sydney Morning Herald editorial of 1844; no evidence any tranquil era existed
The future is New York / LA	Australia will follow US crime trends	Cross-national comparison requires accounting for radically different social structures
System is soft on crime	Courts too lenient; criminals go free on technicalities	Conviction rates are high; most sentenced offenders receive non-custodial orders; prison population grows
More police with more powers	The solution is always a stronger state	Policing is one of many factors; structural causes of crime not addressed by adding police numbers
Tougher penalties	Longer sentences will deter crime	Certainty of detection, not severity of penalty, is the principal deterrent; recidivism rates not reduced by incarceration

Victims deserve revenge	Criminal justice should be a mechanism for victim retribution	Conflates punishment with satisfaction of private grievance; many victims seek acknowledgment not revenge

1.2.4 Penal Populism

Source: *Pratt, Penal Populism (2007)*

Penal populism is not mere political opportunism. Pratt argues it reflects a deep structural shift in democratic governance beginning in the 1970s: declining deference to experts and elites, fragmentation of social institutions, and growing public insistence on direct participation in penal policy. Pratt uses the 'Sorcerer's Apprentice' fable to describe the dynamic: politicians invoke populist penal magic and find they cannot control what they have created.

Key features of penal populism:

- Extra-establishment groups claiming to speak for 'the people' share or displace expert advisers in policy formation
- Emotional drivers -- fear, anger, intolerance -- displace efficiency and humanitarianism
- Promises of security through tough sentencing cannot be fulfilled; the fabled crime-free era never existed
- Failure of populism redoubles rather than discredits it; disillusionment is redirected at experts who 'stand in the way'
- Politicians who help create penal populism find they cannot make it stop -- 'tough on crime, tough on the causes of crime' becomes a trap

1.2.5 Historical Relativity and Change

What counts as criminal is historically contingent -- it varies across time and culture:

- Heroin, morphine and marijuana were freely and legally available a century ago; now attract the heaviest penalties
- Homosexual intercourse between consenting adult males in private decriminalised in NSW: Crimes (Amendment) Act 1984
- Animals were formally prosecuted and executed until the 18th century (Evans, Criminal Prosecution and Capital Punishment of Animals (1987))
- Industrial deaths are rarely prosecuted as homicide despite the formal conditions of manslaughter liability often being present
- 'State crime' -- state-organised human rights violations -- challenges the predominant view that crime is individual behaviour

1.2.6 Cross-Cultural Perspectives

Commonsense views of crime assume universality. Cross-cultural comparison reveals that what counts as criminal is not universal. Foucault's reference to Borges' 'Chinese encyclopaedia' (The Order of Things) serves as a reminder that accepted categories of thought are always culturally situated and contingent. A cross-cultural perspective on crime challenges the idea that 'everyone knows what a crime is'.

1.2.7 The Production of Knowledge

We can only know crime through the processes that produce knowledge about it: police statistics, victim surveys, self-report studies, court data. Each involves selection and construction. 'Dark figures' of unreported crime are not accessible through official statistics. This means that the object 'crime' does not stand outside the practices of criminal justice -- we are only enabled to know it through those processes.

1.2.8 Various Forms of Regulation

Criminal law is one mechanism in a wider regulatory field. The common dichotomy of 'criminalised' versus 'unregulated' is false: conduct may be regulated through civil law, torts, contracts, welfare, medical, public health, insurance, licensing, and administrative law. Foucault and Simon's concept of 'governmentality' captures how modern states govern conduct through multiple regulatory modalities beyond criminal law.

Contractual governance (Garland): modern regulation increasingly works through contracts -- licence conditions, conditional benefits, behaviour agreements -- that 'design out' crime rather than responding to it. Risk management rather than censure becomes the organising principle.

1.2.9 Defining Crime

Williams' circular definition: 'A crime is a legal wrong that can be followed by criminal proceedings which may result in punishment.' (Glanville Williams, Textbook of Criminal Law (1983)). Not circular because criminal proceedings can be described without the word 'crime'.

Lord Atkin's formulation: '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, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.'

HM Hart's challenge: 'If one were to judge from the notions apparently underlying many judicial opinions... the solution to the puzzle is simply that a crime is anything which is called a crime... So vacant a concept is a betrayal of intellectual bankruptcy.' ((1958) 23 Law and Contemp Problems 404.)

Mala in Se vs Mala Prohibita

Mala in se: wrongs in themselves (murder, rape, assault) -- the ordinary content of criminal law courses
Mala prohibita: wrong only because prohibited (parking, pollution, regulatory contraventions) -- these share some characteristics of central cases but differ in penalty, enforcement agency, and stigma

1.2.10 Is the Criminal Law a Lost Cause?

Source: *Ashworth, 'Is the criminal law a lost cause?' (2000) 116 LQR 225*

Ashworth surveyed all statutes passed in England in 1997 and found that the content of English criminal law is 'historically contingent': not principled, but driven by successive governments, media campaigns, pressure groups, and political opportunism. The bulk of new offences feature strict liability, omissions liability and reverse onus provisions, inconsistent with the criminal law's declared principles.

Government's professed criteria (Lord Williams): offences should be created only when absolutely necessary; the behaviour must be sufficiently serious; the mischief cannot be dealt with under existing law; the offence is enforceable; the offence is tightly drawn; the penalty is commensurate with seriousness. Ashworth found these criteria were routinely ignored in 1997.

1.3 Normative Theories of Criminalisation

1.3.1 Ashworth's Four Principled Core Principles

Despite his pessimism, Ashworth identifies a principled core:

1. **Substantial wrongdoing:** criminal law should only censure persons for substantial wrongdoing. Prevention is a reason, not a sufficient reason, for criminalisation.
2. **Equal treatment and proportionality:** enforcement must reflect the relative seriousness of wrongdoing, not be hidebound by traditional divisions of responsibility.
3. **Procedural protections:** persons accused of substantial wrongdoing must have procedural protections appropriate to the charge.
4. **Proportionate sentencing:** maximum sentences and effective sentence levels must be proportionate to seriousness; this requires root-and-branch revision.

1.3.2 Lacey: Disaggregating Criminalisation

Source: *Lacey, In Search of Criminal Responsibility: Ideas, Interests and Institutions (2016)*

Lacey argues criminalisation must be understood as part of an integrated process from offence articulation through investigation, diversion, prosecution, trial, sentencing and execution of punishment. Criminal responsibility is 'nested in and shaped by a broader field of regulation'. The regulatory actors include legislatures, courts, governments, regulatory agencies, police, prosecutors, probation, prisons, NGOs, private security, and individual members of the public.

Regulatory modalities (Lacey's four-fold framework): hierarchical control; normative or community-based methods; competition-based methods; design-based methods. Each serves three tasks: standard-setting; monitoring; and behaviour modification/enforcement.

Formal Criminalisation	Substantive Criminalisation
Legislation / case law creating offences	As actually enforced in practice
Pattern / outcome (descriptive or ideal)	Social practices (structured by rules, capable of theoretical/practical analysis)

1.3.3 Duff: Public Wrongs Theory

Duff argues that criminal law is appropriately concerned with 'public wrongs' -- conduct that violates a polity's civil order and wrongs the political community itself, not merely private parties. This justifies state prosecution (as distinct from civil action by the individual wronged). The public wrong theory sets an external limit on criminalisation: only public wrongs warrant criminal sanction.

Challenge from Naffine: Naffine uses rape to challenge 'core crime' theories. In practice, rape is not practically condemned -- low reporting, high attrition rates mean the vast majority of rapes are effectively lawful. Rape loses its clarity as a 'core crime' when actual criminal legal norms and practices are examined rather than philosophical ideals.

1.3.4 Husak: Internal and External Constraints