## CRIME AND CRIMINALITY

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INTRODUCTION: UNDERSTANDING CRIMINAL JUSTICE

Crime and victimisation are important issues of concern to the public and policy-makers alike. Part 1 of this book is about crime and victimisation in Australian society. It describes and analyses various kinds of crime-related harm, most of which are deemed to be ‘criminal’ in the eyes of the law. In doing so, it traces the general profile, patterns and trends of various crimes—from traditional street crimes, such as property crime and crimes against the person, to crimes of the powerful, including white-collar crime and state crime to transnational crime, including war crimes, environmental crime and cyber-crime—and explores their social dynamics and consequences. An important theme of Part 1 is the critical influence of social difference in determining who commits which kinds of crime against whom, and how this influences the responses of the state and members of society to both the perpetrator and those impacted by their crimes.

The following chapters commence with a survey of criminological theories or explanations of crime, and an examination of the main categories of crime. The emphasis in this part of the book is on tracing the social construction of crime, the prevalence of various types of criminal or antisocial behaviour, the profile of those who engage in this behaviour and the contours of social harm associated with these acts. The historical evolution of theorising about and responding to victims of crime is also explored, with an emphasis on underscoring the process of social construction of victimhood.

The question of how we define crime, and how we define the perpetrators and victims of crime, is inextricably bound up with social processes. Crime and victimisation are not socially neutral concepts, nor is society’s conceptualisation and response to these phenomena static. For example, men are more likely than women to engage in violent crimes; working-class people are more likely than middle-class people to be prosecuted for offending behaviour, especially in regard to street offences, with the notable exception of sexual assault; and sexual assault is overwhelmingly perpetrated by men against women, who are disproportionately the victims of such crime. In other words, social divisions—based upon aspects of identity such as class, gender, ethnicity, Indigenous status, age, disability and religion—have major influences on who does what to whom and why, as well as how the criminal justice system responds. Inequalities and social differences, and the intersection between these aspects of identity, must be taken into account if we are to understand fully the social nature of crime and its control in Australian society (Bartels 2012a).

Moreover, categories of state-sanctioned crime and recognition of their corollary, victims, change with the passage of time, through the criminalisation and decriminalisation process. This section recognises and explores the influence of social opinion on the conceptualisation of, and state response to, crime and deviance. Instrumental to understanding the social construction of crime is an examination of the media, and its influence on social perceptions of and response to crime.

DEFINING CRIME

‘Crime’ is not a straightforward concept. How crime is defined and viewed varies according to how we answer the question ‘what is crime?’ There are in fact many diverse conceptions of crime, each reflecting a different scientific and ideological viewpoint. Hagan (1987), for example, identifies seven different approaches to the definition of crime, ranging from a ‘legal-consensus’ definition to a ‘human rights’ definition. For present purposes, we can summarise broad differences in definition as follows:

• **Formal legal** definition: regards crime as that activity defined by the state; that is, if an act is proscribed by the criminal law, and is subject to state sanction in the form of a specific penalty, then it is a crime.
• **Social harm** conception: considers crime to involve both criminal offences (e.g. assault) and civil offences (e.g. negligence), given that each type of action or inaction brings with it some type of harm. According to this perspective, all acts resulting in harm should attract some sort of penalty.

• **Cross-cultural universal norms** perspective: states that crime is ubiquitous; in essence, it does not vary across cultures. Thus, murder is murder regardless of the society in which it is committed, and we can therefore postulate conduct norms that cut across diverse cultural backgrounds.

• **Labelling** approach: argues that crime only exists when there has been a social response to a particular activity that labels that activity as criminal. If there is no label, there is, in effect, no crime.

• **Human rights** approach: regards crime as having occurred whenever a human right has been violated, regardless of the legality or otherwise of the action. Such a conception expands the definition of crime to include oppressive practices such as racism, sexism and class-based exploitation.

• **Human diversity** approach: defines crime in terms of the manner in which deviance represents a normal response to oppressive or unequal circumstances. A major focus here is on power relations, and the attempts by dominant groups to restrict human diversity of experience, language and culture (e.g. the interventions of the British Empire in reordering indigenous peoples’ ways of life).

From a strictly legal perspective, the answer to ‘what is crime?’ is an unproblematic given; it is simply what the law says it is (see White et al. 2012). In this view, the state has a central place in marking out the boundaries of right and wrong by defining what is criminal and what is not. For an act to be criminal it must be legally prohibited by the state and sanctions must apply. A failure to act, where the law imposes a duty to do so (referred to as an omission), is also illegal and punishable by law. According to this perspective, the state thus has the ultimate power to shape the reality of crime and how society responds to that reality. This is the bottom line when it comes to how most criminal justice institutions operate, regardless of how the above-mentioned perspectives might also shape official reactions to behaviour that could be seen as harmful but not legally criminal. One of the key limitations of this definition of crime, however, is that it provides a narrow conception of harm. Furthermore, it often disregards the issue of state-sponsored actions that may themselves be sources of considerable harm, but which are not criminalised by that self-same state (Maier-Katkin et al. 2009; see also Chapters 12 and 13).

Most sociologists and criminologists adopt a much wider definition of crime that encompasses notions of ‘harm’ and ‘deviance’, which are not necessarily acknowledged as criminal by the state. For some theorists, the key emphasis is on a human rights approach to harm, which introduces the concept of universal rights—inalienable rights that all governments should guarantee to all persons, given that a failure to do so negatively impacts human prospects and wellbeing—and the equitable distribution of such. Such rights may include security rights (the prevention of basic physical and psychological harms from genocide, torture, murder, rape etc.), as well as economic rights (the right to private property), political rights (the right to vote public officials into office) and autonomy rights (freedom of speech, assembly and press) (see, for example, Loader & Sparks 2010; Murphy & Whitty 2013; Schwendinger & Schwendinger 1975; Talbott 2010, 2005). In many cases, harmful actions, such as price fixing, tax evasion or preventable workplace ‘accidents’, are ignored or downplayed by agencies of criminal justice, even though they cause great social harm, including death. For others, the emphasis is less on defining certain acts as bad or good than on examining the social processes by which an act comes to be seen as a crime. According to this perspective, the law is not an external, objective truth that is applied consistently; the concern is therefore to explore the group interactions and institutional procedures
that make certain people and certain actions more liable to be labelled criminal than others (see, for example, Muncie 1996; Rubington & Weinberg 1978).

From a historical and cross-cultural perspective, we find that legal definitions of crime are transitory and relative. ‘Crime’ varies greatly depending upon the historical period, and the social and cultural context within which it operates. In medieval Europe, for example, when the Christian Church was the arbiter of what was deemed to be right and wrong, key crimes included heresy (i.e. going against Church doctrine and beliefs) and usury (charging interest on money lent to another person). With the advent of secular systems of law, crime began to be defined less in religious terms and more in respect to property rights (e.g. theft) and acts against the state (e.g. treason). Comparative analysis shows us that what is considered a crime in some countries is not regarded criminal in others and that, within any given country, an act may be defined into (criminalised) or out of existence (decriminalised) over time. Some examples of this national and temporal variability in legislated crime include (Asal et al. 2012; Bartunek 2014; Bibby & Harrison 2014; Conway-Smith 2013; Corderoy 2013; Dow 2013; Grenfell & Hewitt 2012; Hagan 2012; Nossiter 2014; O’Malley 2013a; Powell 2010; Rankin 2011; The Age 2013a; Titterington et al. 2013):

- Bigamy is considered illegal in Australia, whereas in many traditional Islamic countries, polygamous relations, whereby men are permitted to have up to four wives at the same time, are permitted.
- While permissible in Australia, some countries, including the Netherlands, France and Belgium, have recently moved to outlaw the wearing of traditional Islamic dress, including the burqua.
- Euthanasia—the right to die, either by physician-assisted suicide, active euthanasia (doctor administering a lethal injection) or peaceful deliverance (suicide via self-administered intervention)—is illegal in Australia but permitted in some form in Belgium (minimum age of 12), Sweden, Luxembourg and the Netherlands.
- The physical punishment of children (smacking) is prohibited in 33 countries, including Germany, New Zealand, South Sudan and Venezuela, but is considered legal in Australia, the United States, Canada and Britain.
- The use of drugs, such as alcohol or cannabis, is subject to widely varying rules and sanctions across countries. For example, after years of prohibition across the United States, two states (Washington and Colorado) have recently legislated to legalise marijuana, and 20 other states have approved the use of marijuana for medical purposes. New Zealand has legalised all psychoactive substances (e.g. synthetic cannabis) that contain ingredients that meet safety standards.
- Female genital mutilation (surgical cutting of the genitalia to ensure virtue by controlling sexual desire), which is illegal in Australia, is considered a traditional rite of passage into womanhood in many Muslim nations, including Somalia and The Gambia.
- Same-sex marriage has been legalised in 16 countries, including the United States (some states), Britain, New Zealand, Canada and Iceland, but remains illegal in Australia.
- Homosexuality and sodomy, decriminalised in Australia some years ago, remain illegal in approximately 70 countries, primarily Muslim (38 of the 54), attracting severe penalties such as life imprisonment (e.g. Uganda) and corporal and capital punishment (e.g. Nigeria).
- Transgender status has recently been recognised by the High Court of Australia, paving the way for representations of ‘sex’ to move beyond the normative gender binary of male and female currently reflected in the law and legal documents.
• Abortion laws have been liberalised to varying degrees in Australia from 1998 and in most other countries, while abortion remains totally illegal in seven countries in Latin America and Europe.

• Laws have been introduced in Australia to criminalise violation of privacy in public by use of emerging information and communication technologies (e.g. ‘upskirting’ and ‘downblousing’) and the unauthorised distribution of sexual imagery (e.g. sexting).

• At the international or global level, there continue to be disputes and negotiations over how to define war crimes, terrorism and environmental crimes, and the acceptability of practices such as state-sanctioned torture.

• Conflicts between states may stem, in part, from disagreements over what is considered a crime (e.g. bulldozing residential buildings in an occupied territory, such as Gaza) or simply national security (e.g. the military occupation of Iraq as a forward defence against terrorist attacks on Coalition allies).

We could also consider the question ‘what is crime?’ from the perspective of mass media portrayals (see Chapter 2). The popular image of crime is unquestionably that of street crime, involving assaults, murder, theft and sexual assault, largely committed by strangers. These images are bolstered by advertising that explicitly uses the fear of crime as a means to sell security devices and promote private policing as the answer to the presumed problem. The media emphasis tends to be on certain types of predatory crime, and such crime tends to be sensationalised. Moreover, much emphasis is given to the distinctiveness of criminals (e.g. features such as skin or hair colour), and the appropriateness of victim behaviour (e.g. how they were dressed or how much alcohol they had consumed); hence, criminality and victimhood are frequently based on stereotype and caricature. In the main, complex crimes and crimes of the powerful tend not to be dealt with in either mainstream or fictional accounts of crime.

Finally, if we ask the question, ‘what is crime?’ from a commonsense and everyday perspective, we might find that it operates as a loose notion based upon morality. Most people break the law at some stage in their lives, but common crimes (e.g. use of ‘soft’ illegal drugs) do not always translate into the offenders being perceived or responded to as criminals by members of society at large. Crime is frowned upon, but certain types of crime are nevertheless more likely to be regarded as socially acceptable despite such behaviours being legally proscribed (e.g. minor or victimless crimes such as speeding, fare evasion, vagrancy and prostitution). Of course, there are no universal moral truths; perceptions of moral appropriateness reflect the sociological composition and values of any given society. Furthermore, morality and the law are not always congruent. Some actions considered lawful (e.g. the sale and distribution of non-violent and non-child-related pornography, prostitution and abortion) may be wholly or partially legal, but still be considered immoral, especially by those with strong religious beliefs. It is for this reason that law and, by extension, the definition of crime, is seen by some as less of an expression of morality and more of an expression of power (Cotterrel 2011). In the end it is the state that assigns a criminal status to individuals, regardless of general public opinion or sentiment. The second part of this book explores how, over time, public opinion and shifting conceptions on morality can influence changes in the criminal law and thus a shift in what is considered a criminal, health or moral problem.

CRIME AND CRIMINAL LAW
The criminal law identifies those behaviours deemed by lawmakers to be deserving of punishment and control. Which acts are considered wrongful reflects a historical process; over time various acts are prohibited (or, conversely, legalised) into the future because of the legal precedents set by the past.
This can make law reform slow and difficult, as demonstrated by the prolonged processes of recasting the concept of spousal conjugal rights to intercourse as a criminal offence in the case of spousal rape (Larcombe & Heath 2012). Under the law of coverture, women were seen to be fused into the legal identity of men upon marriage. In such a (fictional) legal unity, there could be no concept of rape and, furthermore, it was assumed that women granted consent to sexual relations upon entering the marriage contract. It took a concerted struggle before harm within the marriage contract was socially and legally acknowledged. It was not until 1993 that the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women, which established marital rape as a human rights violation. To this day, some UN member states only criminalise rape in marriage where the individuals are legally separated, and non-member states vary widely in their conceptualisation of non-consensual marital intercourse (UNICEF 2008).

Which acts are considered harmful is also a political process, in which the contemporary tenor of law-and-order politics sets the parameters and tone of legislation relating to crime and crime control (see further Chapters 23 and 24). To put it differently, criminal laws are a human product, but cannot be reduced to human behaviour. They are social constructions forged in historical and social circumstances that put their unique stamp upon what and who is considered to be harmful enough to be criminalised at any point in time (Matthews 2009). Clearly, not all harmful acts (interpersonal or social) are criminalised. This alone makes it clear that decisions about the criminal law are contested rather than technical. The overall aim of criminal law is to prevent certain kinds of behaviour regarded as harmful or potentially harmful, and to do so through a rational system of adjudication and punishment. The challenge for lawmakers is to choose which harms to criminalise and which to deal with through other types of social regulation (e.g. civil proceedings).

The key purposes of criminal law are encapsulated in three broad objectives (Findlay et al. 2005):

- **moral wrongness**: the criminal law is a vital instrument in deterring immoral behaviour
- **individual autonomy**: the criminal law should only be used against behaviour that injures the rights and interests of other people (‘harms to others’ approach)
- **community welfare**: the principal purpose of criminal law is to protect the physical wellbeing of members of a community.

Importantly, the different reasons or purposes of criminal law are frequently in conflict with each other, and these contradictory rationales, in turn, reflect specific ideological or philosophical differences. For instance, conservative versions of New Right thinking about law and order see the upholding of certain moral standards as a crucial aspect of criminal law. Libertarian perspectives within the broad New Right framework, however, see such legislation as an encroachment upon individual rights and liberty. While the first perspective favours criminalisation of activity deemed to be immoral, the second seeks to keep out of the criminal court those activities freely chosen by individuals, which appear to do no real harm to others around them (see Chapter 24; White et al. 2012).

**THE ACT AND THE INTENT**

In most cases, according to criminal law, two elements must be present to constitute a crime—the act and the intent:

All crimes comprise some form of prohibited conduct which may be an act or (in rare cases) an omission. This conduct element denotes the external or physical component of a crime. Another element found in
many (but not all) crimes is the mental state of the person at the time when the prohibited conduct was performed. This may take several forms such as intention, recklessness or knowledge in relation to the prohibited conduct. However, there are many crimes, known as offences of strict liability and of absolute liability, which do not require any such awareness at all. (Findlay et al. 2005: 20)

Conduct elements of a crime refer to the accused’s conduct (actus reus); that is, ‘guilty act’. This refers to the physical aspect of committing a crime. The prohibited conduct must have been performed voluntarily (e.g. not being forced to do it, or not doing it while sleepwalking). The mental element of a crime refers to a determination that the accused’s conduct was accompanied by a prescribed state of mind (mens rea); that is, ‘guilty mind’. This reflects the idea that people ought to be judged by their free choice of action.

In some instances, the law will ignore the subjective approach (which focuses on the mental element) in favour of arguments based on the community welfare grounds of public interest (particularly if future crime is to be prevented or reduced). This is particularly the case, for example, in regards to environmental law.

The issue of legal personhood is wrapped around the notion that all adults have the necessary mental capacity to make judgments and take responsibility for their actions. Exceptions to this mental responsibility element of crime have to be proven in court, as in the case of those who can show that they were insane (within certain defined legal prescriptions) at the time when the prohibited behaviour took place—this is known as the M’Naghten Rules (see Finnane 2012 for a review of its historical application in Australia). The age of criminal responsibility in Australia across all states and territories is 10—an age below which a child is deemed by law to be incapable of committing a criminal offence. Furthermore, between the ages of 10 and 14, children are presumed incapable of wrongdoing under legislation or common law (this is known as the legal doctrine of doli incapax), and this presumption must be rebutted before criminal proceedings can be brought against them (i.e. the prosecution must prove beyond a reasonable doubt that the child knew that the act was wrong ‘as distinct from an act of mere naughtiness or childish mischief’ (Lord Lowry in C (A minor) in v DPP [1955] 2WLR 383; see also Richards 2011; Schetzer 2000; Urbas 2000).

The issue of criminal responsibility can, however, be problematic. This is especially true in relation to corporations, where the concept of mens rea is difficult to apply. Notwithstanding, the concept of corporate criminal responsibility has been successfully established, to varying degrees, in many jurisdictions, including Australia, the United Kingdom and the United States (see, for example, Perrone 2000; Taylor & Mackenzie 2013; Woodley 2013), albeit to limited practical effect in the specific area of criminal law.

**THE CRIMINALISATION PROCESS**

Assessment of the conduct and mental elements of crime provide some inkling into the social dynamics that underpin criminality. What is deemed to be criminal and who is defined as an offender involves a social process in which officials of the state formally intervene and designate certain acts and certain actors as warranting a criminal label. Until an act, or actor, has been processed in particular ways by the state, there is no ‘crime’ as such. This is regardless of the actual behaviour that takes place. In other words, crime does not ‘exist’ until there has been an official reaction to the event.

To become a criminal is to be labelled so by the criminal justice system. To understand this, we have to shift the focus away from the discussion of varying definitions of crime (including arguments regarding different types of social harm and whether to criminalise these) to an analysis of the ways in
which something or someone becomes institutionally recognised as being criminal. In this account, the emphasis is on the factors that determine the social status of an event or person.

What is important, for present purposes, is that how criminal justice officials (especially the police) intervene in any given situation has a direct impact on whether any particular event, or any particular individual, will be officially criminalised. The criminalisation process is contingent upon how discretion is used throughout the criminal justice system. Our attention is thus drawn to the role of the criminal justice institutions in constituting crime, rather than to the actual act or conduct itself.

To illustrate this point, it is useful to consider how the process of becoming a young offender involves a number of steps and pathways into, or diversions from, the criminal justice system, such as (Australian Bureau of Statistics (ABS) 2014a):

- A young person enters into the criminal justice system as a result of someone reporting an event to the authorities, or the police observing a young person in the act of doing something illegal or antisocial.
- The police officer intervenes and an investigation is undertaken, which involves questioning of the young person. A crime may be deemed to have been committed but, in the case of a minor offence, the investigating officer may exercise their discretion, simply deciding to move the young offender along with or without issuing an unofficial caution.
- Depending on the nature of the behaviour observed or reported, and the attitude and cooperation demonstrated by the young person, the police officer may decide to proceed further against the alleged offender. The young person is taken to the police station, and the crime and victim(s) (if applicable and identifiable) are recorded by police. At this stage, the officer may decide to pursue non-court action against the young person. Where this involves a formal caution, the young person’s parent(s) or where unavailable, an independent third person, are called into the station for a tripartite discussion about the incident (police, young person and their parents).
- Alternatively, the young person may be charged but diverted from court via the option of doing police-assigned community work (as is possible in South Australia) or, more likely, participation in a juvenile conference (or equivalent). In the latter case, the young person will be required to meet with any victims, as well as others affected by the offence, in order to work out some kind of reparation for the harm caused.
- If the incident is more serious, the police officer may decide to formally proceed against him or her via court action. Once formally charged with an offence, the young person will generally be issued with a summons, which outlines the date the person is required to attend court and the reasons why.
- If the incident or alleged offence is very serious, then the young person may be required to apply for bail. This enables the defendant to remain out of custody awaiting trial, on the basis of a monetary guarantee and/or pledge to present before the court at the required time.
- In some instances, the option of bail will not be offered or an application for such will be declined, and the young person will be placed in detention on remand (i.e. in secure custody awaiting trial).
- If the young person proceeds to court (usually a children’s court, which has special rules and procedures to take into account the special needs and circumstances of children), his or her guilt or innocence is legally determined.
- If found guilty of an offence, the judge or magistrate can impose a variety of sanctions (alternative penalties or dispositions), which range from simply issuing a warning to imposing a fine or placing
the young person on some kind of community-based behavioural order (which restricts his or her activity, or demands that he or she attend special training or drug and alcohol sessions), through to incarcerating a young person in a youth detention centre.

This story of a young person’s progress through the criminal justice system will vary greatly in practice, depending upon a wide range of factors, including:

• whether the incident was deemed a crime and, if so, the degree of seriousness involved
• how visible the crime was
• whether there were any victims involved and, if so, the nature and extent of the harm occasioned
• who reported the incident, and whether they were taken seriously by the police
• whether the police have the resources to deal with the particular kind of crime reported or observed, and whether it was serious enough, in the light of existing resources, to elicit a response
• the nature and strength of the evidence available to police
• the characteristics, attitude and behaviour of the young person
• if and how well the police know the young person, and his or her family and friends
• the statutory options available for processing the young person in the particular jurisdiction, such as police cautioning schemes or juvenile conferencing options
• the influence of official reports by social workers and other professionals on how best to deal with the young person
• the ‘acting’ skills of the young person in court and in the police station
• the attitude of the magistrate or judge, in relation to the offence at issue and the appearance and demeanour of the young person in court
• the quality of legal representation
• the previous criminal record of the young person.

As indicated in the scenario outlined above, for any crime to be officially recognised and recorded as a crime, the gatekeepers of the system—the police—have to make initial assessments regarding the nature of the offence, the status of the reporter, the status of the offender and the status of the victim. When the assessment concludes that the event is considered worth proceeding with officially, then it will be considered worthy of recording officially. The crime then becomes a ‘fact’.

CONCLUSION

Generally speaking, there tends to be broad consensus that certain types of activities are harmful and represent significant enough wrongdoing to warrant state sanction, notwithstanding that there may be a degree of uncertainty regarding the moral quality of the wrongdoing in particular instances. These include, for example, crimes involving death (murder and manslaughter), crimes involving bodily injury (e.g. physical assaults and sexual assaults) and a number of property offences (e.g. robbery, theft and damaging property). More contentious is how best to deal with social harms relating to things such as occupational health and public safety offences (e.g. physical injury in the workplace, and injury resulting from the consumption of or exposure to hazardous goods), offences against public order (e.g. rioting or offensive language) and environmental offences (e.g. pollution, or toxic and hazardous waste). Particularly volatile areas of dispute are those dealing with ‘paternalistic’ offences (e.g. gambling,
prostitution, pornography or obscene literature), as these tend to highlight major philosophical differences regarding the place and role of the criminal law in society.

The intention of Part 1 of this book is to disentangle the varying forms and types of social harm and, in so doing, provide an analysis both of their substantive content and the reasons underlying their incorporation into, or exclusion from, mainstream processes of criminalisation. Before doing so, however, it is useful to explore further the concept of the various sociological and criminological theories postulating explanations for why crime occurs and how criminality generally is perceived.

In reviewing the broad spectrum of theories on crime, it is imperative that appropriate account be taken of their historical, philosophical and political positioning. The discipline of criminology has evolved over time to provide a conceptual framework for systematic and critical analysis of crime theorising and societal responses to crime. Chapter 1 provides an overview of criminology and its current state, and briefly outlines criminological data and research methods.