CHAPTER 1

THE MEANING OF CRIMINAL LAW

> [C]riminal law is the most important area of the law—given that it is in this forum that the community imposes its harshest measures against other individuals.[1]

1.1 Defining crime

At the beginning of the study of criminal law stand the questions 'What is crime?' and—just as importantly—'What is not?' How does one know what crime is? Who decides what it is? What makes crime different from other conduct?

Consider, for example, the following definitions of crime, which can be found in widely used criminal law textbooks. According to Michael Allen, '[a] crime may be defined as an act (or omission or state of affairs) which contravenes the law and which may be followed by prosecution in criminal proceedings with the attendant consequence, following conviction, of punishment.'[2] The *Australian Law Dictionary* defines crime as 'an activity that the state prohibits by law and punishes.'[3] A similar concept of crime and criminal law can be found in Eric Colvin and John McKechnie's *Criminal Law in Queensland & Western Australia*: 'Criminal law involves the use of penal sanctions to enforce the prohibitions which the state imposes on conduct. Conduct constitutes a criminal offence when it has been so defined by the law.'[4] Colvin and McKechnie go on to cite the case *Proprietary Articles Trade Association v AG (Canada)* [1931] AC 310 at 324, in which Lord Atkin held that: 'The criminal quality of an act cannot be ascertained by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?'[5]

In contrast, Louis Waller and Bob Williams provide a very different approach:

> Normally the combination of two factors is to be found in the decision to treat a certain class of conduct as criminal. The first is what may be termed the publicness of the conduct. Normally, an act will only be labelled as a crime if it is thought to be more than an offence against one or more individuals. It must be injurious to the public in general. …
>
> The second element is that of moral wrongdoing. For conduct to warrant classification as criminal, it must involve moral wrongdoing. …
>
> Of course, not every transaction that can be considered morally wrong or injurious to the public interest is treated by our law as crime.[6]

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1 Mirko Bagaric, 'The High Court on Crime in 2016: Outcomes and Jurisprudence' (2017) 41 *Criminal Law Journal* 7, 7.

2 Michael Allen, *Criminal Law* (14th edn, 2017) 1; cf Andrew P Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2016) 1; Glanville Williams, *Textbook of Criminal Law* (2nd edn, 1983) 27.

3 Trischa Mann (ed), *Australian Law Dictionary* (2010) 152.

4 Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (7th edn, 2015) 3–4 [1.2].

5 Cf Michael Eburn et al, *Hayes & Eburn Criminal Law and Procedure in New South Wales* (4th edn, 2014) 1–2 [1.2]–[1.3]; David Ormerod & Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 12–14.

6 Louis Waller & Charles R Williams, *Criminal Law* (11th edn, 2009) 4–5 [1.3]–[1.5]; cf Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 5, 6: 'Crimes are generally acts which have a particularly harmful effect on the public and do more than interfere with merely private rights. […] Crimes, then, are wrongs which the judges have held, or Parliament has enacted, to be sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.'

The law may also treat transactions as crimes that are neither morally wrong nor injurious to the public interest. Richard Card et al observe that '[t]he spheres of social morals and the criminal law are co-extensive up to a point, but many of the rules enforced by criminal law have nothing to do with social morality, and many rules of social morality are not enforced by criminal law'.[7]

In determining what crime is, two different approaches can be identified:

1. Determining crime by the (moral) quality/outlook of the conduct. This approach defines crime by reference to the wrongful quality inherent in the conduct. Seen this way, conduct is criminal when it is intrinsically wrong. Such crimes are sometimes referred to as *mala in se* 'because they are wrong in themselves, that is because they are immoral'.[8]
2. Determining crime by the (legal) status of the conduct. This approach defines crime by reference to legal norms (case law, legislation, and other legal principles). Crimes of this type are sometimes referred to as *mala prohibita* because 'we might say they are wrong by virtue of being declared wrong rather than by any immorality intrinsic to them'.[9] Here, the power of the sovereign (the state, the King, parliament, etc) to identify and punish conduct as 'criminal' is the defining and unifying characteristic of crime. Thus crime is whatever the legislators (or courts) at a particular time have decided to make punishable as a crime.

FURTHER READING

Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 4–5 [1.2]; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 6–11 [1.20]; Colvin & McKechnie, *Criminal Law in Queensland and Western Australia* (7th edn, 2015) 3–5 [1.2]–[1.5]; Eburn et al, *Hayes & Eburn Criminal Law and Procedure in New South Wales* (4th edn, 2014) 1–9 [1.1]–[1.24]; Morrison, 'What is Crime? Contrasting Definitions and Perspectives', in Hale et al (eds), *Criminology* (2005) 3–16; White et al, *Crime & Criminology* (6th edn, 2017) 4–10.

1.1.1 Moral wrongness

Many concepts and definitions of crime make reference to the moral outlook of conduct. Thus it could be argued that the criminal law seeks to protect moral values and punish those that infringe upon them.

According to Simon Bronitt and Bernadette McSherry,

> [m]orality may be conceived either in religious or secular terms. In legal systems where religious and secular law is aligned—for example in jurisdictions applying Islamic or Shariah law—religious morality has legal force. In common law systems, the Christian religion (more specifically the canons of the Church of England) has exerted an influence on secular law through the ecclesiastical jurisdiction by exporting into the criminal law

7 Richard Card et al, *Criminal Law* (16th edn, 2004) [1.68].

8 William Wilson, *Central Issues in Criminal Theory* (2002) 18; cf Eric Colvin & John McKechnie, *Criminal Law in Queensland and Western Australia* (7th edn, 2015) 4–5 [1.3]; George Fletcher, *The Grammar of Criminal Law, Volume 1: Foundations* (2007) 29–32.

9 Wilson, *Central Issues in Criminal Theory* (2002) 18; see further, Andrew P Simester & Andreas von Hirsch, *Crimes Harms, and Wrongs* (2011) 24–29.

> offences against God, such as perjury, blasphemy, sodomy and swearing and cursing, and the (now abolished) procedural defences of 'benefit of clergy' and marital rape immunity.[10]

The following examples from the current laws of Massachusetts, The Philippines, and Fiji illustrate how religion and morals can quite clearly influence the criminal law:

> Chapter 272, s 18 *General Laws of Massachusetts*: Fornication
>
> Whoever commits fornication shall be punished by imprisonment for not more than three months or by a fine of not more than thirty dollars.
>
> Art 202 *Penal Code 1932* (Philippines): Vagrants and prostitutes
>
> The following are vagrants:
>
> 1. Any person having no apparent means of subsistence, who has the physical ability to work and who neglects to apply himself or herself to some lawful calling; …
>
> Any person found guilty of any offences covered by this article shall be punished by *arresto menor*[11] or a fine not exceeding 200 pesos …
>
> Art 232 *Penal Code* (Fiji): Witchcraft and Sorcery
>
> Any person who—
>
> (a) holds himself out as being able to cause by supernatural means, fear, annoyance or injury to another person in mind, person or property; or
> (b) pretends to exercise or who practises, whether on an isolated occasion or otherwise, witchcraft or sorcery,
>
> shall be guilty of an offence and shall be liable on conviction to imprisonment for five years.

Offences such as fornication, vagrancy, and sorcery clearly reflect the moral or religious beliefs of a given society. Such 'moral offences' are not unique to traditionalist communities or to developing nations. Witchcraft and fortune-telling, for example, were offences in Queensland until 2000[12] and in Victoria until as recently as 2005.[13] And even today, the *Criminal Code* of Queensland (as well as the Codes of the Northern Territory, Tasmania, and Western Australia) classifies certain offences under the heading 'offences against morality' (chapter 22), which include, for example, offences such as 'bestiality',[14] or 'using the internet etc to procure children under 16'.[15]

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10 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (4th edn, 2010) 60–61 [1.205].

11 '*Arresto menor*' (minor arrest) is a 'light penalty' involving imprisonment between one month and one day to six months: Arts 25, 27 *Penal Code 1932* (Philippines). It also involves the 'suspension of the right to hold office and the right of suffrage during the term of the sentence': Art 44.

12 *Justice and Other Legislation (Miscellaneous Provisions) Act 2000* (Qld), No 58 of 2000.

13 Former s 13 *Vagrancy Act 1966* (Vic)—'Fortune telling and pretending to exercise witchcraft etc: Any person who pretends or professes to tell fortunes or uses any subtle craft means or device by palmistry or otherwise to defraud or impose on any other person or pretends to exercise or use any kind of witchcraft sorcery enchantment or conjuration or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels stolen or lost may be found shall be guilty of an offence.' Section repealed by *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic).

14 Section 211 *Criminal Code* (Qld).

15 Section 218A *Criminal Code* (Qld).

The literature supporting the view that criminal law serves to enforce morals is significant and long-standing. For example, the English judge Lord Devlin argued that morality—that is, Christian morality—is inextricably linked with the law and that morality is the organising principle for criminalisation.[16] According to Devlin, 'the law must base itself on Christian morals and to the limits of its ability enforce them […] for the compelling reason that without the help of Christian teaching the law will fail.'[17] Further, he argues that 'society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'.[18] Similarly, Gerald Abrahams submits that 'the notion of crime, properly understood, is a moral notion',[19] while John Finnis argues that the criminal law should be used to reinforce moral conceptions of right and wrong conduct.[20]

If crime is regarded purely in a religious context, then

> [c]rime is an action against the law of God, whether as revealed in the holy books, such as The Bible, Koran, or Torah or that we instinctively recognize as against God's will, irrespective of what the law books of a State say. If the State law books allow something that we know to be against God's will this does not change its status—it is still a crime.[21]

One of the problems associated with the notion of 'moral wrongness' is the fact that different cultures, different societies, and different times have different moral codes. 'What is thought right within one group may be utterly abhorrent to the members of another group and vice versa', notes James Rachels.[22] Viscount Simonds remarked in *Shaw v DPP* [1962] AC 220 at 268:

> The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessment of human values and the purposes of society.

The legal philosopher Herbert LA Hart, a principal critic of Devlin's theory, was also doubtful that a common morality in fact existed in any one society.[23] The notion of a shared morality is questionable even within small communities and even in relation to such crimes as murder. The offence of murder, which appears to be universal in recognition and serves to uphold the most fundamental of moral principles, namely the right to live, is very controversial when it comes to the legality of suicide and euthanasia.[24]

But even if such a shared, 'positive' morality can be identified, using this morality as a standard to decide whether any conduct is right or wrong and ought to be punished is problematic and

16 Patrick Devlin, *The Enforcement of Morals* (1965).
17 Devlin, *The Enforcement of Morals* (1965) 25.
18 Devlin, *The Enforcement of Morals* (1965) 11.
19 Gerald Abrahams, *Morality and the Law* (1971) 87.
20 John Finnis, *Natural Law and Natural Rights* (1980).
21 Wayne Morrison, 'What is Crime? Contrasting Definitions and Perspectives', in Chris Hale et al (eds), *Criminology* (2005) 11.
22 James Rachels, *The Elements of Moral Philosophy* (3rd edn, 1999) 20.
23 HLA Hart, *Law, Liberty and Morality* (1963) 51.
24 See further, sections 7.1.2 and 7.1.3 below.

dangerous. Morality can easily be used to discriminate against minorities and outsiders, as was done, for instance, in Nazi Germany to single out Jews, homosexuals, gypsies, and others. Or, to take another example:

> Suppose in 1975 a resident of South Africa was wondering whether his country's policy of apartheid—rigid racial segregation—is morally correct. All he has to do is ask whether the policy conforms to his society's moral code. If it does, there is nothing to worry about, at least from a moral point of view.[25]

Hart also questioned Devlin's notion that criminalising immoral acts is essential to preserve society from disintegration, and he found Devlin's proposition that 'a society is identical with its morality […] so that a change in its morality is tantamount to the destruction of society' unacceptable.[26]

Despite these concerns, morality has played a prominent role in the creation, evolution, and enforcement of the criminal law. Up until today, in the eyes of many, the law—and the criminal law in particular—serves to confirm and uphold shared values and morals of a society. Thus, perhaps,

> [t]he most important insight in relation to the role of morals in the criminal law is its symbolic and ideological effect […] [I]t is the symbolic and expressive function of criminal laws in upholding core moral values that are more important than their instrumental effects.[27]

Or, put another way,

> the criminal law's role in advancing society's moral concerns is simply the flip side of a proposition to which all can subscribe, namely that it functions to advance and secure the interests of its members, collective and individual, by punishing deviations from collectively agreed standards of behaviour.[28]

However, as seen in the criticism expressed by Hart and others, the enforcement of morals through the instrument of criminal law has the potential to discriminate, especially against minority groups. The image of a reasonably harmonious, uniform society bound by shared moral values and beliefs may work for isolated or isolationist communities, but this concept does not sit well with the realities of modern secular, pluralistic, and multicultural communities within which disagreement over the morality of issues such as abortion, euthanasia, pornography, prostitution, or drug use is widespread. James Rachels remarks:

> Since the time of Herodotus, enlightened observers have been accustomed to the idea that conceptions of right and wrong differ from culture to culture. If we assume that our ideas of right and wrong will be shared by all peoples at all times, we are merely naïve.[29]

25 Rachels, *The Elements of Moral Philosophy* (3rd edn, 1999) 26.
26 Hart, *Law, Liberty and Morality* (1963) 51; cf Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 20–21.
27 Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 65 [1.210].
28 Wilson, *Central Issues in Criminal Theory* (2002) 18.
29 Rachels, *The Elements of Moral Philosophy* (3rd edn, 1999) 21.

Justice Harper in *Ferguson v Walkley* (2008) 17 VR 647 at 648 similarly noted:

> the majority should be diffident about imposing its view of morality on others. Behaviour, deemed unacceptable by some, may not trouble others at all. The danger therefore is that legislation which turns offensive conduct into a crime, and punishable accordingly, will be employed as a heavy-handed instrument for the imposition, by one segment of society on another, of the former's moral precepts.

It may instead be argued that in some liberal societies, morality has been replaced by tolerance:

> The moral code of our own society has no special status; it is merely one among many. […] It is mere arrogance for us to try to judge the conduct of other people. We should adopt an attitude of tolerance toward the practice of other cultures.[30]

Others, in contrast, may find that the only alternative to morality is immorality and anarchy. Thus, it is perhaps unsurprising that much of the 'moralistic debate' that emerged in the United Kingdom in the 1960s stemmed from proposals to decriminalise homosexuality and from arguments that 'the state has no place in the bedroom of the nation'.[31]

FURTHER READING

Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 8–10 [1.10]–[1.14]; Ashworth, *Principles of Criminal Law* (7th edn, 2013) 35–38; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 60–66 [1.205]–[1.215]; Carpenter & Hayes, 'Crimes against Morality', in Hayes & Prenzler (eds), *An Introduction to Crime* (2007) 151–163; Caruso et al, *South Australian Criminal Law* (2014) 8–13 [1.14]–[1.24]; Crofts & Burton, *The Criminal Codes* (6th edn, 2009) 33–35 [2.130]–[2.150]; Cutcheon, 'Morality and the Criminal Law: Reflections on Hart–Devlin' (2002) 47 *Criminal Law Quarterly* 15–38; Dine et al, *Cases & Materials on Criminal Law* (6th edn, 2011) 10–15; Fletcher, *The Grammar of Criminal Law, Volume 1: Foundations* (2007) 190–217; Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 8–10.

1.1.2 Legal positivism

The way in which Australian criminal law is generally conceptualised reflects a positivist approach to the law. In relation to criminal law, the positivist approach presumes that whatever is a crime can be objectively verified and is institutionally certain. 'Crime is dependent on the institutions and processes essential for its definition. Law is paramount among these. Could it be argued therefore that there is no crime without law?', asks Mark Findlay.[32]

As seen earlier in the definition by Allen, a positivist approach may define a crime as an act or omission prohibited and punishable by the criminal law, and this approach sees the criminal as the agent who carries out such an act or omission. This view is supported by Peter Gillies:

> Crime is, then, conduct which is recognised by the law (as made by the courts and legislatures) as being criminal. This conduct is criminal law when it is treated as criminal

30 Rachels, *The Elements of Moral Philosophy* (3rd edn, 1999) 23.

31 Pierre E Trudeau, then Minister of Justice of Canada, as cited in 'Pierre Elliott Trudeau 1919–2000' (2000) 44(1) *Criminal Law Quarterly* 4, 4; see further, Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 8–9.

32 Mark Findlay, *Criminal Law: Problems in Context* (2nd edn, 2006) 19–20.

> by the machinery under the authority of the State. The definition of crime is, as has often been recognised, rather circular, but it is impossible to be more precise, for what is criminal at any given time does depend simply upon what is treated as being criminal by the State, acting through the machinery of justice.[33]

Section 2 of the *Criminal Code* (Qld) defines the term 'offence' in a similar fashion as 'an act or omission which renders the person […] liable to punishment'.

Andrew Simester et al identify 'three salient functions of criminal law':

> The first might be called criminalisation: the law sets out for citizens those things which must not be done. The second thing the law does is convict persons who are proved to have transgressed its prohibitions. Finally, it may punish those whom it convicts; and, more generally, the criminal law offers the prospect of punishment to reinforce its function of criminalisation.[34]

The concept and consequences of legal positivism have been the subject of controversial debate. A key problem is that these definitions of crime 'tell us that acts become criminal when the law says they are criminal, but shed little light on why or how.'[35] 'Why should some behaviour be criminalised, while other behaviour is permitted?' ask Simester et al.[36] The fact that some conduct is criminalised says nothing about the nature of that conduct:

> When Parliament enacts that a particular act shall become a crime or that an act which is now criminal shall cease to be so, the conduct does not change in nature in any respect other than that of legal classification. All its observable characteristics are precisely the same before as after the statute comes into force.[37]

According to Bernadette McSherry and Bronwyn Naylor, the positivist approach to crime and criminal law raises a number of problems:

> Some definitions fail to take into account differences in the nature and gravity of offences. […]
>
> If crime is an act or omission prohibited and punishable by the criminal law, then it is possible for a government to decree that any form of conduct is a crime. If a law is passed making it an offence to eat sandwiches at lunchtime, that will be a crime, despite its nonsensical nature. […]
>
> [I]f one accepts [the positivist] definition of crime, all that needs to be done is to abolish the relevant Criminal Code or Criminal Law Act […]
>
> If an act is prohibited, but the consequence is not punishment, but is some form of restitution or community service order, or a civil or administrative penalty, is it still a crime?

33 Peter Gillies, *Criminal Law* (4th edn, 1997) 5.

34 Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2016) 5–6.

35 Janet Ransley & Tim Prenzler, 'Defining Crime', in Hennessey Hayes & Tim Prenzler (eds), *An Introduction to Crime* (2007) 17, 18.

36 Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2016) 7.

37 Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 3–4.

> [The positivist] definition of crime fails to explain why certain types of behaviour are considered criminal and others are not. The positivist approach fixes clear boundaries to the criminal law and does not extend its analysis beyond case law and legislation.[38]

Simester et al observe that:

> The criminal law, then, is a powerful and condemnatory response by the State. It is also a bluntly coercive system, directed at controlling the behaviour of citizens. Criminalisation involves rules backed up by threats. In a sense, the criminal law is the means by which the State bullies citizens into complying with its injunctions.[39]

In his book *Outsiders*, Howard Becker argues that crime (or deviance):

> is created by society. […] Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.[40]

According to scholars such as Becker and Emile Durkheim, crime is seen as normal in society because there is no extra social or natural dividing line between criminal activity and other—perhaps reprehensible, but more acceptable—activities.[41] 'In accordance with this reasoning', remarks Richard Sullivan,

> a heroin addict is no more abnormal or deviant than a nicotine addict. Through a historical accident, the act of possessing heroin has been declared criminal while the act of possessing the dangerous drug nicotine has not. The nature of the addictions is not so very different, in that, given our present knowledge, the heroin user is no less rational than the nicotine user. The law has simply driven up the price for the heroin addict's article of consumption, and, as a result, has often forced the addict to resort to illegitimate earnings.[42]

FURTHER READING

Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 11–14 [1.30]; Caruso et al, *South Australian Criminal Law* (2014) 7–8 [1.10]–[1.13]; McSherry & Naylor, *Australian Criminal Laws* (2004) 3–5.

38 McSherry & Naylor, *Australian Criminal Laws* (2004) 5.

39 Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2017) 6.

40 Howard Becker, *Outsiders* (1963) 8–9; see further, Thomas J Bernard et al, *Vold's Theoretical Criminology* (6th edn, 2010) 227–231; Katherine Williams, *Textbook on Criminology* (6th edn, 2008) 420–433; Charis E Kubrin et al, *Researching Theories of Crime and Deviance* (2009) 198–217; Rob White et al, *Crime & Criminology* (6th edn, 2017) 95–112.

41 Emile Durkheim, *The Division of Labor in Society* (1964) 52. Cf Ransley & Prenzler, 'Defining Crime', in Hayes & Prenzler (eds), *An Introduction to Crime* (2007) 17, 18–19.

42 Richard Sullivan 'The Economics of Crime' (1973) 19 *Crime & Delinquency* 138, 140–141.

1.1.3 Observations

The previous sections have shown that there is no single or simplistic answer to the question 'What is crime?' Different individuals and different societies understand and define the term differently. Different disciplines (philosophy, law, criminology, sociology, politics, and so on) conceptualise crime differently. William Wilson observes that:

> No one explanation is capable of accounting for the large number of different criminal offences. We cannot say, for example, as once was fashionable, that the coercive norms of the criminal law necessarily embody collectively acknowledged moral standards. No doubt many of the rules of the criminal law do embody such standards. […] But the vast majority of criminal offences embody norms which are not direct reflections of underlying moral norms.[43]

Janet Ransley and Tim Prenzler note that:

> decisions about what behaviours should be criminalised change over time. This can occur because of:
>
> - social change (e.g. recognition of the rights of women led to the crime of rape in marriage);
> - techonological change (e.g. new crimes to do with computers);
> - evolving morality (e.g. the legalisation of homosexual acts); or
> - campaigns to update and reform criminal law (e.g. provisions to deal with new circumstances such as the spread of [HIV]).[44]

The definition, structure, and analysis of crime and criminal law warrant a high degree of suspicion and inquisitiveness. Throughout this book, readers are asked to approach the criminal law critically. Crime and criminal law are not things that are God-given or written in stone. They are subject to constant change. McSherry and Naylor remark:

> We accept that criminal laws are necessary to the proper functioning of society, but we do not have to unquestioningly accept the laws that do exist. …
>
> It is more realistic to think of crime as relative in both time and space and as being culturally defined. What is deemed criminal in one society may not be deemed criminal in another. New crimes may develop […] while others are taken out of legislation […]. Certain crimes and defences to them exist in some jurisdictions and not others.[45]

FURTHER READING

Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 15–17 [1.40]; McSherry & Naylor, *Australian Criminal Laws* (2004) 3–4.

43 Wilson, *Central Issues in Criminal Theory* (2002) 17–18.
44 Ransley & Prenzler, 'Defining Crime', in Hayes & Prenzler (eds), *An Introduction to Crime* (2007) 17, 22.
45 McSherry & Naylor, *Australian Criminal Laws* (2004) 4–5.

1.1.4 Legitimacy of punishment

A separate question relating to the meaning of criminal law is that of the legitimacy of punishment based on the principle of legality; that is, the rule of law. 'Legality', writes Alan Norrie, 'depends upon making and applying legal rules in a non-arbitrary way. It depends upon a system of norms that do not contradict each other, that are consistently coherent.'[46] 'There must be no crime or punishment except in accordance with fixed, pre-determined law.'[47]

The legitimacy of punishment is manifested in three fundamental principles of the criminal law:

1. No person may be punished except for a breach of law established in the ordinary manner before the courts.
2. No person is above the law. Every person is subject to these laws without exception, thus ensuring equality before the law.
3. No person may be held criminally responsible for acts or transactions which he or she has not personally, or in some other way, engaged in.

These principles are also embodied in the maxims *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no punishment without law), and *nulla poena sine culpa* (no crime without guilt). These maxims can be traced back to pre-Roman time and are recognised by common law and civil law jurisdictions worldwide and also in international criminal law.

The principle of legality is based on the idea that no one should be punished for a crime that has not so been defined in advance by the appropriate authority—generally the legislature or, at common law, the judiciary. Criminal responsibility and punishment can only be based on a prohibition imposed by 'existing applicable valid law': *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 601–61 per Deane J. *Nullum crimen sine lege* relates the 'punishability' of conduct by stating that no one may be convicted for conduct that was not defined as being criminal at the time of the offence under some applicable law.

Similarly, the maxim *nullum poena sine lege* holds that no one may be subjected to punishment that was not authorised and specified under an applicable law. The effect if this maxim 'is twofold: the legislature cannot impose punishment for conduct that it has not already defined as a crime, and punishment cannot be imposed only because of in the view of the legislature or a court the conduct is "immoral, anti-social, or in some way undesirable".'[48]

These principles further prohibit retrospective criminal laws and punishment without trial. The principles also emphasise that at the heart of criminal law is the punishment of criminal conduct, not criminal types:

> [T]he *nulla poena* principle has important implications not only for the procedures of justice but also for the substantive criminal law. It speaks to the questions, What is crime? and Who is criminal? The *nulla poena* concept assumes that persons become criminals because of their acts, not simply because of who or what they are.[49]

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46 Alan Norrie, *Crime, Reason and History* (2nd edn, 2001) 8.

47 Glanville Williams, *Criminal Law: The General Part* (2nd edn, 1961) 575.

48 Guy Cumes, 'The nullum crimen, nulla poena sine lege Principle: The Principle of Legality in Australian Criminal Law' (2015) 39 *Criminal Law Journal* 77, 80, citing PJ Fitzgerald, *Criminal Law and Punishment* (1962) 169.

49 Francis A Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* (1996) 15, as cited in Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94, 107 (emphasis removed).

FURTHER READING

Bonnie et al, *Criminal Law* (2nd edn, 2004) 85–92; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 8–10 [1.25]; Herring, *Criminal Law* (8th edn, 2013) 11–13; Herring, *Criminal Law: Text, Cases and Materials* (6th edn, 2014) 9.

1.2 Aims of the criminal law

1.2.1 General considerations

To understand the criminal law it is necessary to reflect on its purposes and aims. What does the criminal law seek to achieve? Why does certain conduct warrant criminalisation? Why should offenders be punished? Barbara Hudson, for instance, offers the following answers to the latter question:

- Because they deserve it;
- To stop them committing further crimes;
- To reassure the victim that society cares about what has happened to him/her;
- To discourage other people from doing the same thing;
- To protect society from dangerous or dishonest people;
- To allow offenders to make amends for the harm they have caused;
- To make people realise that laws must be obeyed.[50]

Contemporary criminal law has several competing aims and effects ranging from revenge and retribution to deterrence, reformation or rehabilitation, and incapacitation. Chief Justice Mason in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476 stated that:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

The diversity and complexity of the aims of the criminal law is also reflected in statutory provisions, such as Queensland's *Penalties and Sentences Act 1992*. Section 9(1) of the Act expressly states:

> The only purposes for which sentences may be imposed on an offender are—
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
>
> (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
>
> (c) to deter the offender or other persons from committing the same or a similar offence; or

50 Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2nd edn, 2003) 3.

(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or

(e) to protect the Queensland community from the offender; or

(f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Attitudes towards the role of criminal law and punishment change over time. Different societies place different emphases on the objectives and functions of the criminal law. The competing and often conflicting aims of the criminal law are examined in the following sections. These include retrospective purposes, such as revenge, and retribution—concerned with already committed crimes—and prospective purposes, such as deterrence and reformation, which are concerned with preventing future crimes.

FURTHER READING

Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 25–30 [1.42]–[1.53]; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 17–32 [1.45]–[1.100]; Findlay et al, *Australian Criminal Justice* (5th edn, 2014) 210–212; McSherry & Naylor, *Australian Criminal Laws* (2004) 17–22; Wilson, *Central Issues in Criminal Theory* (2002) 41–76.

1.2.2 Revenge

Revenge relates to the most basic and natural—yet perhaps most primitive—expression of the human instinct to retaliate when harmed. Anybody who has wrong done to them is left with a feeling of revenge and wants to 'get even' with those who have hurt them and 'teach' the wrongdoer how it feels to be treated in a certain way. Revenge is an understandable response to wrongs committed against innocent victims. Crime is a wrong that of its very nature justifies the infliction of punishment upon the criminal.

Seen that way, the purpose of punishment is punishment itself. Revenge is largely determined by the rage of the party offended against; it does not satisfy requirements of proportionality or consistency. Vengeance, says Wilson, 'looks only to the deed—the wrong done to them—and not to the context of the deed and its motivation.'[51]

In the view of the English judge Sir James Stephen, 'the real aim of the criminal law was to provide an organised means for controlling the passion of revenge'. He argued that:

> unless a community provides for the punishment of offenders, the people injured by offences would take matters into their own hands, to the general detriment to the community. In short, blood feud would run riot. […] It was said that as a community became organised, it replaced the institution of blood feud by an organised system …[52]

FURTHER READING

Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 5–6 [1.3].

51 Wilson, *Central Issues in Criminal Theory* (2002) 75.

52 Thalia Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 5–6 [1.3].

1.2.3 Retribution

The theory of retribution is based on the concept of retaliation, neutralisation, and 'paying back'. Retribution has been described as 'backward-looking' because it focuses on the criminal act and the offender's individual criminal responsibility. According to retributive theories, crime is a wrong that because of its wrongness justifies in return the infliction of sanction and punishment upon the criminal. In contrast to revenge, to limit the punishment inflicted on an offender, retribution holds that an offender should not receive unlimited punishment but that the punishment should be proportionate to the harm caused and the offender's blameworthiness.[53] Minor crimes should attract mild punishment while major crimes should draw harsh punishment. The punishment must 'fit' the crime and like cases must be treated alike.[54]

The principle of proportionality is expressed in the phrase 'an eye for an eye' (also known as *lex talionis* or the law of retaliation), which can be traced back to the Babylonian Code of Hammurabi of about 1772 BC.[55] It defines and restricts the extent of retribution in the laws of the Torah to the value of loss: a person who has injured the eye of another is instructed to give the value of his or her own eye in compensation.

The principle has found significant support in judicial decisions[56] and by many ethical philosophers. Georg Friedrich Wilhelm Hegel, for instance, argues that crime is a negation and punishment is a negation of that negation. According to Richard Bonnie:

> The substantive criminal law implements the principle of proportionality in at least two ways. First, the system grades offences, i.e. legislatures establish the relative severity of different crimes in the abstract […] by establishing the maximum penalty that can be imposed upon conviction, and the relative seriousness of a given offence is determined by comparing that sanction with those authorised for other offences. […] Second, the principle of proportionality requires some assessment of whether a sentence actually imposed fairly reflects blameworthiness of the individual wrongdoer and the gravity of his or her crime. The question here is whether a particular penalty is or is not disproportionate for a particular crime, in the light of all the surrounding circumstances.[57]

In *Hoare v The Queen* (1989) 167 CLR 348 at 354, the High Court recognised that 'a basic principle of sentencing law is that the sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.'

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53 Cf McSherry & Naylor, *Australian Criminal Law* (2004) 17–18.

54 On proportionality in the criminal law see further, John Gardner, *Offences and Defences* (2007) 213–238.

55 The term 'an eye for an eye' is a pronouncement of equality that is as old as civilisation. King Hammurabi of Babylon used that concept in ancient times to describe enforcement of equality wherein evils done by one individual to another were punishable by returning the same evil to the guilty party. Moses imposed such a law in Israel as 'an eye for an eye and a tooth for a tooth'. It is repeated three times in the Torah, and is found in three passages in the Old Testament (Ex. 21:23, 24; Lev. 24:19, 20; and Deut. 19:21), most explicitly in the Book of Exodus as 'Thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot'.

56 See, for example, *Hoare v The Queen* (1989) 167 CLR 348; *R v Aston (No 2)* [1991] 1 Qd R 375; *Veen v The Queen (No 2)* (1988) 164 CLR 465; cf *R v Chivers* [1993] 1 Qd R 432.

57 Richard J Bonnie et al, *Criminal Law* (2nd edn, 2004) 11.

Thalia Anthony et al observe that, strictly speaking, the retributive theory of punishment requires that punishment be inflicted even though it would serve no apparently useful purpose. They point to the philosopher Immanuel Kant who urged that even if we knew the world would end tomorrow, it would be our moral duty to hang a convicted murderer today.[58] 'According to the retributive philosophy', remarks Bonnie, 'retribution requires punishment whether or not the punishment produces beneficial social consequences.'[59]

Closely associated with the notion of retribution are restitution and compensation. Any unfair advantage that an offender has gained through his or her activity will be offset by the punishment imposed. The convicted offender will have to return what he or she gained through the criminal act so that 'crime does not pay'. This principle is also manifested in so-called 'proceeds of crime' laws which provide for the seizure, confiscation, and forfeiture of illicitly earned assets.[60] Further, more recent legislative changes provide for greater rights of victims of crime to regain their lost assets or otherwise claim compensation. These models of punishment, aimed at elevating the status of the victims of crime, are referred to as 'restorative justice'.[61]

FURTHER READING

Allen, *Criminal Law* (14th edn, 2017) 10–12; Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 25 [1.43]; Bonnie et al, *Criminal Law* (2nd edn, 2004) 6–14; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 18–19 [1.50]–[1.55], 26–31 [1.95]; Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489–511; Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2016) 16–18; Wilson, *Central Issues in Criminal Theory* (2002) 55–61.

1.2.4 Deterrence

Deterrence is concerned with the prevention of crime. Deterrence 'is "forward looking", by emphasising the capacity of the criminal law to prevent individuals (either the accused or the general public) from breaking the law'[62] and causing harm.

The theory of deterrence largely stems from the work of the Italian criminologist Cesare Beccaria and the British legal philosopher Jeremy Bentham. Beccaria argues that:

> The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and the mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impression on the mind of others, with the least torment to the body of the criminal.[63]

58 Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 25 [1.43].

59 Bonnie et al, *Criminal Law* (2nd edn, 2004) 12 (emphasis removed).

60 See, for example, *Proceeds of Crime Act 1987* (Cth); *Proceeds of Crime Act 2002* (Cth).

61 For further reading, see, for example, Arie Freiberg, 'Sentencing', in Duncan Chappel & Paul Wilson (eds), *Issues in Australian Crime and Criminal Justice* (2005) 158–160; Carolyn Hoyle & Lucia Zedner, 'Victims, Victimization and Criminal Justice', in Mike Maguire et al (eds), *The Oxford Handbook of Criminology* (4th edn, 2007) 461, 473–486.

62 Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 20 [1.65].

63 Cesare Beccaria, *An Essay on Crimes and Punishment* (1743) 43, cited in White et al, *Crime & Criminology* (6th edn, 2017) 29.

In his work, Bentham argues that every human being has the desire to achieve pleasure and avoid pain. It follows that 'if the apparent magnitude, or rather value of that pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it'.[64] 'For most members of society', notes Allen, 'the criminal law may serve to educate them on acceptable and unacceptable conduct creating thereby unconscious inhibitions against offending.'[65] Such deterrence is thus seen as the purpose of the criminal law.[66]

Tom Tyler points out that deterrence strategies 'are based on the assumption that the primary factors motivating human behaviour are incentives and sanctions'.[67] Similarly, Bronitt and McSherry remark that:

> Deterrence is modelled on particular assumptions about human nature, namely, that since individuals are rationally motivated to maximise pleasure and avoid pain, they will freely choose not to commit crimes. It is the threat of punishment, rather than the moral 'goodness', that ensures compliance with the law. To motivate rational people, the punishment must also be proportionate to both harm and culpability.[68]

Two kinds of deterrence can be identified:

1. The effect of inflicting punishment on the offender in deterring others from committing similar acts is called general deterrence. Punishment is thus seen as a warning to others: committing such offences has potential (negative) consequences.
2. Specific (or special, individual, or particular) deterrence is the effect of prospective punishment on the offender either to deter him or her from committing an act, or to deter him or her from committing similar acts in the future. It is based on the assumption that imposing punishment on the offender will make that offender afraid of re-offending.

Anthony et al point to several difficulties in Bentham's theory. In particular, they argue that the theory appears to dispense altogether with the notion of wrong. Another problem with the theory is that it is apt to conflict in certain cases with the deep-rooted human instinct for justice. Further, there is likely to be confusion between the effect of general deterrence and the effect of specific deterrence.[69]

While there are some limitations to the way in which the deterrence theory can explain the existence (or the 'if') of crime, the theory has been very useful in analysing the level (or the 'how much') of crime. The 'particular force' of this theory

> lies in the fact that it is almost impossible to imagine what it would be like to live in a community where nothing was punishable. Experience has shown that when the official law-and-order machinery breaks down […] there is likely to be an unwelcome increase in crime, and citizens have to form themselves into vigilante groups to get some measure of protection for their lives, persons and property.[70]

64 Jeremy Bentham, *The Rationale of Punishment* (1830) 19.
65 Allen, *Criminal Law* (14th edn, 2017) 13.
66 Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 26 [1.44].
67 Tom Tyler, *Why People Obey the Law* (2nd edn, 2006) 269.
68 Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 21 [1.65].
69 Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 26–27 [1.45]–[1.46].
70 Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 27 [1.47].

In *Munda v Western Australia* (2013) 249 CLR 600 the High Court of Australia qualified the significance of deterrence by noting that (at 620):

> the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

FURTHER READING

Allen, *Criminal Law* (14th edn, 2017) 12–14; Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 26–27 [1.44]–[1.47]; Bagaric, *Ross on Crime* (6th edn, 2013) 1348–1349 [19.1900]; Bentham, *Introduction to the Principles of Morals and Legislation* (1982); Bonnie et al, *Criminal Law* (2nd edn, 2004) 14–24; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 20–23 [1.65]; McSherry & Naylor, *Australian Criminal Laws* (2004) 18; Shanahan et al, *Carter's Criminal Law of Queensland* (21st edn, 2016) 1059–1060 [s 650.50.1]; Wilson, *Central Issues in Criminal Theory* (2002) 47–55, 61–65.

1.2.5 Reformation and rehabilitation

Reformation and rehabilitation are also concerned with preventing crime. The punishment is inflicted for the purpose of reforming the criminal and inducing him or her to lead a non-criminal life in the future.

In essence, proponents of reformation and rehabilitation view crime as a 'social disease' or a maladjustment that can be cured or adjusted through proper treatment and care. Thus it has been held that '[r]ehabilitation uses a medical or pathological model [by searching] for latent abnormalities of offenders which are seen as the underlying causes of crime.'[71] Reformative punishment is designed to change an 'evil person' into a 'good person'.

There are some problems associated with this theory, in particular the costs associated with reformation and rehabilitation as well as potential infringements on human liberty. Moreover, some extremist supporters of the reformation theory would argue that convicted offenders should be incarcerated for as long as they remain unreformed.

Although contemporary criminal justice and correctional services no longer leave prisoners locked up with bread and water, and significant effort and money are spent on training prisoners in practical skills and giving them access to education, resources for these measures are severely limited. The prevalence of populist 'law and order' and 'zero tolerance' policies in Australia and

71 Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 24 [1.70].

elsewhere confirm that spending additional money on correctional services is very unpopular with the voting public. Put simply, elections are not won on platforms that propose to put more money into the prison system and to increase spending on rehabilitating criminal offenders.

On the other hand, although many theories have been advanced as to what types of punishment may be regarded as curative or reformative, no theory as yet has been demonstrated as working in practice. This is most convincingly reflected in the high rate of persons who are released from prison and re-offend. However, there is general consensus that reformation and rehabilitation have an integral role to play in contemporary criminal justice.[72]

FURTHER READING

Allen, *Criminal Law* (14th edn, 2017) 16; Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 27–28 [1.48]–[1.49]; Bagaric, *Ross on Crime* (6th edn, 2013) 1350 [19.1915]; Bonnie et al, *Criminal Law* (2nd edn, 2004) 29–33; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 23–24 [1.70]–[1.75].

1.2.6 Incapacitation

Incapacitation primarily serves to protect society by removing the criminal, either permanently or for a set period. This is particularly relevant for those offenders for whom the other objectives of punishment have (seemingly) no effect. Punitive considerations of proportionality, rehabilitation, and deterrence cannot be applied to an accused who, for example, is not criminally responsible for his or her actions, or who is incapable of rational decision-making. Nevertheless, the person who is dangerous and mentally impaired (or otherwise non-culpable) needs to be prevented from committing further harm.

The concept of incapacitation was initially applied to justify the (indefinite) detention and treatment of individuals suffering from mental impairment or who posed a danger to themselves or to others. In Queensland, a court can order such detention under s 163 of the *Penalties and Sentences Act 1992* for violent offenders who present a serious danger to the community. Similar provisions exist in the other states and territories.[73]

Incapacitation is often used as an argument to justify preventive legislation that extends the incarceration of prisoners deemed to be dangerous beyond the term of their original sentence (so-called preventive detention). This is best manifested in the case law that has evolved in Australia over the past two decades starting with the case of Mr Robert Veen in New South Wales in 1978 (see below), and followed by similar cases in Victoria (*AG (Vic) v David* [1992] 2 VR 46), New South Wales (*Kable v DPP (NSW)* (1996) 189 CLR 51) and, more recently, Queensland (*Fardon v AG (Qld)* (2004) 78 ALJR 1519).

In the first of these cases, *Veen v The Queen (No 1)* (1978) 143 CLR 458 at 460, the High Court stated that in determining the punishment it is not permissible to embark 'on a policy of preventive detention without legislative warrant', and to pass sentences 'purely on the basis of protecting

72 For further reading, see Andrew von Hirsch & Andrew Ashworth, *Principled Sentencing: Readings on Theory & Policy* (2nd edn, 2004) 9–43.

73 Cf s 65 *Sentencing Act 1995* (NT); ss 22, 23 *Criminal Law (Sentencing) Act 1988* (SA); s 19 *Sentencing Act 1997* (Tas); s 18A *Sentencing Act 1991* (Vic); s 98 *Sentencing Act 1995* (WA).

the community. A sentence must relate to the offence committed, not to possible future offences.' This position was reiterated in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 487, where Justice Wilson argued:

> What is not permissible, in my opinion, is that the maximum appropriate sentence be increased to some longer sentence solely because of the imperative to protect the community. To do that is to punish the offender, not for the offence of which he has been convicted but for the potential offences which he may commit in the future.

The decisions in *AG (Vic) v David* [1992] 2 VR 46[74] and *Kable v DPP (NSW)* (1996) 189 CLR 51[75] also support the view that preventive detention based on assumptions or predictions about possible future criminal behaviour is, for the most part, not permissible and that Parliament must not pass legislation to keep potentially dangerous offenders behind bars beyond their original sentence.

The decision in *Fardon v AG (Qld)* (2004) 78 ALJR 1519, however, demonstrates a subtle shift in the High Court's position.[76] This case involved the enactment of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). The central provisions of this Act authorise the Attorney-General of Queensland to apply to the Supreme Court for the continuing detention of a person who is imprisoned for a serious sexual offence: s 5.[77] Section 8 of the Act enables the court to issue an interim detention order for a 'risk assessment' of the prisoner to determine 'whether the protection of the community is adequately ensured': *AG (Qld) v Francis* [2007] 1 Qd R 396.[78] Subject to the findings of this assessment, the court may order the continued indefinite detention of that person: s 13. On June 17, 2003, the Queensland Attorney-General filed an application under s 5 of the Act for an order that Mr Robert John Fardon, a repeat sex offender, be detained for an indefinite period under s 13. Mr Fardon appealed to the Queensland Court of Appeal[79] and later to the High Court, but in a majority decision the High Court dismissed his appeal and confirmed the validity of the Act.[80] Since this High Court ruling, New South Wales, Victoria, and Western Australia have introduced legislation similar to that of Queensland.[81]

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74 See further, Paul Fairall, 'Violent Offenders and Community Protection in Victoria—The Gary David Experience' (1993) 17(1) *Criminal Law Journal* 40–53; Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 953–955 [14.53]–[14.60]; CR Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the *David* Case' (1990) 16(2) *Monash University Law Review* 161–183; David Wood, 'A One Man Dangerous Offenders Statute—The Victorian *Community Protection Act 1990*' (1990) 17 *Melbourne University Law Review* 497–505.

75 See further, Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 955–957 [14.61]–[14.63]; David Brown et al, *Criminal Laws* (6th edn, 2015) 1275–1279; Paul Fairall, 'Before the High Court: Imprisonment without Conviction in New South Wales: *Kable v Director of Public Prosecutions*' (1995) 17(4) *Sydney Law Review* 573–580.

76 See further, Anthony Gray, 'Preventive Detention Laws' (2005) 30(2) *Alternative Law Journal* 75–79; Brown et al, *Criminal Laws* (6th edn, 2015) 1279–1283.

77 'Serious sexual offence' is defined as 'an offence of a sexual nature … (a) involving violence; or (b) involving children': schedule *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

78 See also *AG (Qld) v HTR* [2007] QSC 19 [93] per Lyons J; *AG (Qld) v Beattie* [2007] QCA 96 [32]; Bernadette McSherry & Patrick Keyzer, *Sex Offenders and Preventive Detention* (2009) 19–39.

79 *AG v Fardon* (unreported, Qld Sup Ct, No 416, de Jersey CJ, McMurdo P, Williams JA).

80 On 9 November 2006, however, Fardon was released from custody and placed under conditional supervision. An appeal by the Attorney-General against the release order was dismissed: *AG (Qld) v Fardon* [2006] QCA 512.

81 Cf *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Sexual Offenders Act 2006* (WA).

In dissent, Justice Kirby, along with many academic scholars, disagreed with the High Court majority's view on preventive detention. He stated that:

> Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. […] In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed. […] In Australia, such punishment […] is not available for crimes that are feared, anticipated or predicted to occur in the future on evidence that is notoriously unreliable and otherwise would be inadmissible and by people who do not have the gift of prophesy.[82]

Bernadette McSherry argues that:

> the High Court's decision in *Fardon* has opened the door to new regimes of preventive detention that seriously undermine the traditional principles of the criminal process. […] Preventive detention legislation, even with safeguards, is of great concern from a policy perspective. The preventive detention regime under the *Dangerous Prisoners (Sexual Offenders) Act 2003* breaches the principle of legality, the principle against double punishment and the principle that criminal detention should only follow a finding of guilt.[83]

And Patrick Keyzer et al find that:

> The effect of an order based on the risk assessment contemplated by ss 8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act* is to imprison someone for something that they might do in the future. […] The immediate consequence of the Act, as it stands, is that a person is in prison, unsure of whether or when he will be released from prison. He cannot 'do his time', as he has not committed an offence. […] It is difficult to see what purpose prison is intended to serve under the new legislation, since a continuing detention order can only apply to someone after completing their term of imprisonment, at a point where the person has already been punished for their offence.[84]

In April 2010, the United Nations Human Rights Committee also expressed serious concerns about Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003*, arguing that detention under the Act is punitive in nature, amounts to double punishment, and effectively leads to the warehousing of dangerous prisoners. Specifically, the Committee ruled that the Queensland legislation violates the prohibition of arbitrary arrest and detention in Art 9 of the *International Covenant on Civil and Political Rights (ICCPR)*. The Committee also concluded that the Act breaches the guarantee of a fair trial in Art 14 of the *ICCPR*, and the guarantee against retroactive infliction

82 *Fardon v AG (Qld)* (2004) 78 ALJR 1519, 1543.

83 McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94, 110.

84 Patrick Keyzer et al, 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11(2) *Psychiatry, Psychology and Law* 244, 248, 250, 251.

of punishment under Art 15.[85] Despite this ruling, it is unlikely that the Queensland Act and similar legislation elsewhere will change as Australia is under no legal obligation to comply with the Committee's decision.[86]

Since 2012 in Queensland, additional steps have been taken to prevent the release of persons who have previously been convicted for serious sexual offences. In October 2013, the Attorney-General introduced the *Criminal Law Amendment (Public Interest Declarations) Amendment Bill 2013* to provide for the continuing detention of 'persons incapable of controlling sexual instincts' if their detention is 'in the public interest'. Persons deemed to be in that category are no longer controlled by the *Dangerous Prisoners (Sexual Offenders) Act 2003*, which requires regular assessments of the dangerousness of the person. Instead, the Bill, which passed Parliament on 17 October 2013, added a new Part 4 to the *Criminal Law Amendment Act 1945* (Qld) permitting a continuing detention order to be made by the Governor in Council at the instigation of the Attorney-General and without involving any scrutiny by the courts. The intended effect of the legislation is that any person who has been convicted twice for a sexual offence punishable by life imprisonment will receive a mandatory life imprisonment and will not be eligible for parole after 20 years.[87]

FURTHER READING

Anthony et al, *Waller & Williams Criminal Law* (12th edn, 2013) 953–958 [14.53]–[14.67]; Bonnie et al, *Criminal Law* (2nd edn, 2004) 24–29; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 24–26 [1.85]; Brown et al, *Criminal Laws* (6th edn, 2015) 1275–1289; Douglas et al, *Criminal Process in Queensland and Western Australia* (2008) 381–385 [12.350]–[12.360], 386–393 [12.380]–[12.410]; McSherry & Keyzer, *Sex Offenders and Preventive Detention* (2009); McSherry & Naylor, *Australian Criminal Laws* (2004) 18; Shanahan et al, *Carter's Criminal Law of Queensland* (21st edn, 2016) 1063–1064 [s 650.50.25].

1.2.7 Reconstructing criminal law: New approaches to criminal law

In addition to the approaches to criminal law outlined above, there is a broad range of other theories that offer alternative perspectives on criminal law. The body of literature is significant and fast growing. Some of the main schools of thought are briefly outlined in the following sections. Other theories, not further discussed here, include the 'public interest theory'[88] and the so-called 'republican theory'.[89]

Common to the theories outlined below is the understanding that the purpose of the criminal law is inextricably linked to the protection of rights, especially human rights and fundamental freedoms, such as civil liberties, political rights, social and cultural rights, and economic rights. This

85 UN Human Rights Committee, *Communication No 1629/2007*, UN Doc CCPR/C/98/D/1629/2007 (12 Apr 2010).

86 See further, Patrick Keyzer, 'The United Nations Human Rights Committee's View about the Legitimate Parameters of the Preventive Detention of Serious Sex Offenders' (2010) 34 *Criminal Law Journal* 283, 288–291.

87 The Hon Jarrod Bleijie, Queensland Attorney-General and Minister for Justice, 'New Legislation to Protect the Community' (Media statement, 16 October 2013), <http://statements.qld.gov.au/Statement/2013/10/16/new-legislation-to-protect-the-community>.

88 Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 66–68 [1.225].

89 John Braithwaite & Philip Petit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990); cf White et al, *Crime & Criminology* (6th edn, 2017) 186–208; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 70–75 [1.235]–[1.240].

concept is supported by the development of international human rights norms in the second half of the 20th century.[90] Crime and punishment thus serve to protect individual and collective rights and freedoms. Seen this way, homicide, for instance, is a crime because it infringes on the right to live. Assault and other offences against the person seek to protect a person's physical integrity; sexual offences protect sexual integrity, and so on.

FURTHER READING

Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 55–76 [1.190]–[1.245]; Crofts & Burton, *The Criminal Codes* (6th edn, 2009) 26–32 [2.40]–[2.120]; McSherry & Naylor, *Australian Criminal Laws* (2004) 17–22; Ransley & Prenzler, 'Defining Crime', in Hayes & Prenzler (eds), *An Introduction to Crime* (2007) 17, 19; Wilson, *Central Issues in Criminal Theory* (2002) 16–42.

1.2.7.1 Criminal law and individual autonomy and freedom

Liberalist theories on criminal law consider punishment as interference with individual autonomy and freedom. In summary, these theories seek maximum protection of personal liberty and argue that infringement of those liberties by lawmakers and courts requires proper justification. Consequently, there must be no intervention without proper justification. The criminal law should therefore be used only against behaviour that injures the rights and interests of others.[91]

This liberalist approach finds its origin in John Stuart Mill's 'harm principle'. His work argues that restrictions on individual liberty must be curtailed and are justifiable only in order to prevent harm to others:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise, or even right.[92]

Thus, the criminal law should not be used to prohibit non-harmful behaviour, or to prevent individuals from harming themselves,[93] or simply to enforce a particular conception of morals or the public interest.

Hart uses Mill's harm principle as his starting point, but qualifies it further by arguing that the legislator is permitted to enact laws to protect the vulnerable from exploitation. He writes:

> Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do whatever he wants, even if others are distressed when they learn what it is he does—unless of course there are other good grounds for forbidding it.[94]

90 See, for example, *Universal Declaration of Human Rights (UDHR)* of 1948, UN Doc A/81; *International Covenant on Civil and Political Rights (ICCPR)* of 1966, 999 UNTS 171; *International Covenant on Economic, Social, and Cultural Rights* of 1966, 993 UNTS 3.

91 Mark Findlay et al, *Australian Criminal Justice* (5th edn, 2014) 9.

92 John Stuart Mill, *On Liberty* (1974 [first published 1859]) 68.

93 See, however, the law on suicide (section 7.1.2 below) and consent to assault and similar offences (section 8.5 below).

94 Hart, *Law, Liberty and Morality* (1963) 47, as cited in McSherry & Naylor, *Australian Criminal Laws* (2004) 20.

The 'harm principle', as it is sometimes referred to, has played an influential role in the criminal law. The theories were particularly prominent during the 1960s and 1970s in debates over whether homosexuality and prostitution posed sufficient threat of harm to warrant criminalisation.

The primary difficulty with the harm principle is that the central notion of 'harm' and 'harm to others' as the definition of what constitutes harm is notoriously unstable and difficult to apply.[95]

FURTHER READING

Ashworth, *Principles of Criminal Law* (7th edn, 2013) 28–31; Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 58–60 [1.200]; Carpenter & Hayes, 'Crimes against Morality', in Hayes & Prenzler (eds), *An Introduction to Crime* (2007) 158–159; Caruso et al, *South Australian Criminal Law* (2014) 13–15 [1.26]–[1.28]; Findlay et al, *Australian Criminal Justice* (5th edn, 2014) 9; Fletcher, *The Grammar of Criminal Law, Volume 1: Foundations* (2007) 39–41, 156–162; Herring, *Criminal Law: Text, Cases and Materials* (6th edn, 2014) 19–24; Herring, *Great Debates in Criminal Law* (2nd edn, 2012) 1–23; Ormerod & Laird, *Smith and Hogan's Criminal Law* (14th edn, 2015) 10–12; Simester et al, *Simester and Sullivan's Criminal Law* (6th edn, 2016) 6; Simester & von Hirsch, *Crimes Harms, and Wrongs* (2011) 35–52.

1.2.7.2 Criminal law and community welfare

Similar to theories emphasising the need to protect individual rights and freedoms are those that emphasise the role of the criminal law in upholding and protecting collective rights and freedoms. According to these theories (sometimes referred to as the 'community welfare' doctrine), the question of what is, or should be considered, a crime depends upon an evaluation of what is best for society as a whole. Justice serves the maximisation of the common good. Crime is understood not as a moral sin, but is seen as an injury to the common good—as conduct that infringes upon the organisation and operation of society.

The objective of the community welfare doctrine is to avoid and reduce unnecessary hardship and financial cost to the community. For example, drug offences are regarded as causing harm to public health; tax evasion and fraud are infringements on public budgets. Thus, the protection of community welfare warrants the criminalisation of such conduct because of the costs—financial and social—to the community.

Anders Lundstedt, for example, argues that law, including criminal law, should be directed at what is socially useful.[96] Nicola Lacey defines community welfare as those values, needs, and interests that a society has decided are fundamental to its collective social functioning, and that therefore require protection by the criminal law.[97]

In most instances, theories of community welfare do not seek to substitute other theories on criminal law. They usually operate as complementary attempts to balance collective interests with

95 See further, Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984); Jonathan Schonsheck, *On Criminalisation: An Essay in the Philosophy of the Criminal Law* (1995); Joel Feinberg, *Offense to Others* (1985).

96 Anders V Lundstedt, *Legal Thinking Revised* (1956).

97 Nicola Lacey, *State Punishment* (1988) 104.

those of the individual.[98] This is manifested, for example, in the context of consent to offences against the person; here—as will be discussed in later parts of this book[99]—liberalist theories uphold the principle that individuals can consent to assaults. This, however, is subject to limitations deemed necessary in the public interest.[100]

FURTHER READING

Bronitt & McSherry, *Principles of Criminal Law* (4th edn, 2017) 68–70 [1.230]; Findlay et al, *Australian Criminal Justice* (5th edn, 2014) 9–10; McSherry & Naylor, *Australian Criminal Laws* (2004) 21–22.

98 Cf Andrew Ashworth, *Principles of Criminal Law* (7th edn, 2013) 26–27.

99 See section 8.5 below.

100 *R v Brown* [1994] 1 AC 212, 213, 217, 219. See also section 8.5 below.