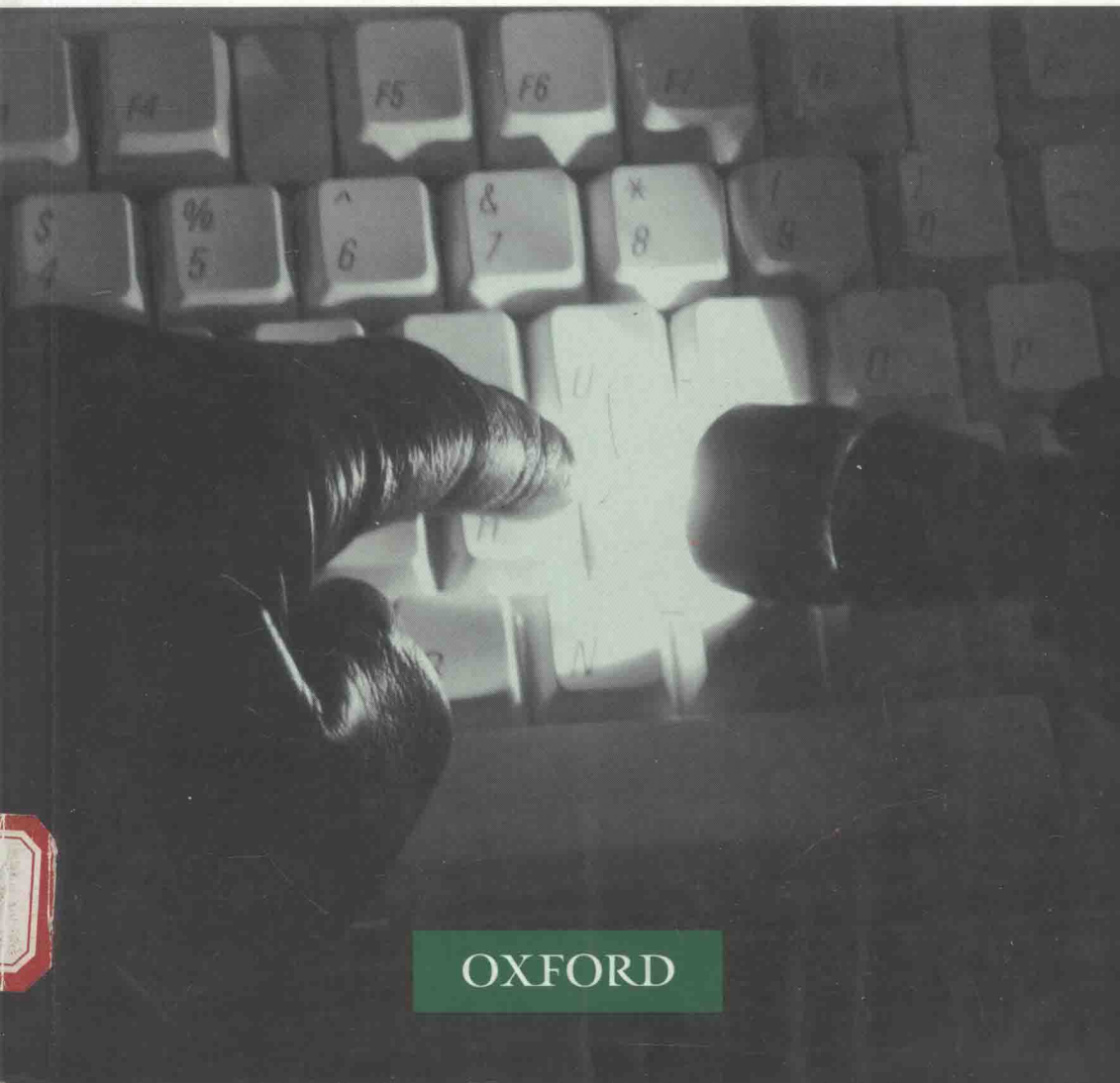


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# CRIME *and* SOCIETY

*Rob White & Daphne Habibis*



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## Acronyms

ABS	Australian Bureau of Statistics
AIC	Australian Institute of Criminology
AIHW	Australian Institute of Health and Welfare
ASOC	Australian Standard Offence Classification
EPA	Environmental Protection Authority (or Agency)
CASA	Centre Against Sexual Assault
HREOC	Human Rights and Equal Opportunity Commission
NCJSF	National Criminal Justice Statistical Framework
RCIADIC	Royal Commission into Aboriginal deaths in Custody

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## Introduction

Crime is one of those topics that people have always found fascinating. It is widely covered in our newspapers and magazines, and is one of the main forms of fiction. Films, television programs, novels, biographies, and games frequently focus on the issue of crime and the law. Most people enjoy a good 'whodunnit' story, while police serials on television are one of the most popular types of shows.

Yet, in many ways our attitude to crime is contradictory. It entertains us as drama but is also a source of revulsion and fear. This does not simply reflect our desire for voyeuristic titillation, but may also be because we all experience crime directly in some way. Fear of crime influences our day-to-day behaviour. We watch our bags and wallets through fear of theft, and worry that our cars will be stolen or vandalised. Some women fear going out alone at night. Often our fears seem justified if we have been a victim of crime ourselves or know someone who has been a victim.

Our interest in crime is due not only to being a victim or potential victim, but also stems from the likelihood that in some areas of our behaviour we are on the wrong side of the law. Most people commit a crime during their lifetime, whether it is the use of an illicit drug such as cannabis, drinking under-age, tax evasion, driving while over the legal limit, or stealing office stationery. In engaging in these acts, we do so in the knowledge that we could end up in court. Many people therefore have the potential to be affected by the punitive sanctions of the criminal justice system even if they do not see themselves as 'criminals'.

How then are we to understand crime? Is the image of crime on our TV screens and video players an accurate representation of crime? Which crimes are not talked about very much, and why not? Should we be afraid of certain types of crimes more than others? Who commits crimes

anyway, and who suffers the most from crime? What do present patterns of crime tell us about the nature of our society and the operation of our institutions of criminal justice? It is these kinds of questions that this book is designed to address.

This book is about crime in Australian society. It describes and analyses various kinds of harm, most of which are deemed to be ‘criminal’ in the eyes of the law. In doing so, the book traces the general trends and patterns of these crimes—from property crime to state crime—and explores their social dynamics and consequences. An important theme of the book is the critical influence of social difference in determining who commits which kinds of crime and how this influences the response of both the state and other social groups.

The book thus has two major strands. Part 1 of the book provides a survey of distinct types of crimes: property crime, violent crime, public order offences, drugs and crime, corporate crime, environmental crime, and state crime. The emphasis in this section is on tracing the contours of social harm associated with particular acts. We want to know the prevalence of certain types of behaviour, who engages in this behaviour, and how we might best explain particular crimes as social phenomena.

Part 2 shifts the focus away from harm to address the social differences influencing offending behaviour and the victimisation process. The question of who is a perpetrator and who is a victim of crime is inextricably bound up with social processes. Crime is not socially neutral. 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. In other words, social divisions—based upon class, gender, ethnicity, indigenous status, and age—have major influences on who does what to whom and why. Inequalities and social differences must be taken into account if we are to understand fully the social nature of crime and its control in Australian society.

## AMBIGUITIES OF CRIME

The meaning of the word ‘crime’ is not as straightforward as it first appears. How **crime** is defined and viewed varies depending on how we answer the question ‘what is crime?’



From a strictly legal perspective, the answer to 'what is crime' is simply what the law says it is (see White & Haines 2004). In this view, the state has a central place in defining what is criminal and what is not. For an act to be criminal it must be legally condemned by the state and sanctions must apply. This is the bottom line when it comes to how most criminal justice institutions operate, regardless of other perspectives that might also shape official reactions to behaviour that could also 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 leaves begging the issue of state acts that may themselves be sources of considerable harm, but which are not criminalised by that same state (for example, acts of genocide or torture).

Most sociologists and criminologists adopt a much wider definition of crime, so as to include notions of 'harm' and 'deviance' that are not necessarily acknowledged as criminal by the state. For some, the key emphasis is on a human rights approach to harm, in which various social ills are deemed to be 'criminal' from the point of view of negative social impacts (see, for example, Schwendinger & Schwendinger 1975). In many cases, harmful actions are ignored by agencies of criminal justice, even though things such as price fixing, tax evasion, or preventable workplace deaths cause great social harm. 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. Here the concern is 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, Rubington & Weinberg 1978).

From an historical and cross-cultural perspective we find that crime definitions are transitory and relative. What is 'crime' varies greatly depending upon the period and the social context. In medieval Europe, for example, when the Christian Church was the arbiter of what was deemed to be right and wrong, the key crimes included heresy (that is, going against Church doctrine and beliefs) and usury (charging interest on money lent to another person). With the advent of more secular systems of law, crime began to be defined less in religious terms than in respect to property rights (for example, theft) and acts against the state (for example, treason). Comparative analysis shows us that what is a crime in some countries (for example, bigamy) is not so in others (for example,

men having up to four wives at the same time). The use of drugs, such as alcohol or cannabis, is subject to widely varying rules and sanctions depending upon the country. At the international or global level, there continue to be disputes and negotiations over how to define war crimes, terrorism, and environmental crimes. Conflicts between states may stem, in part, from disagreements over what is considered a crime (for example, bulldozing residential buildings in an occupied territory) or simply national security (for example, preventing terrorist attacks).

We could also consider the question of ‘what is crime’ from the perspective of mass media portrayals. Certainly the popular image of crime is that of street crime, involving assaults, murder, theft, and car theft. These images are bolstered by advertising that explicitly uses the ‘fear of crime’ as a means to sell security devices and 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 the criminal, and the appropriateness of the victim; hence, criminality and victimhood is frequently based on stereotype and caricature. 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 (such as the use of ‘soft’ illegal drugs) do not always translate into the offenders being perceived or responded to as a criminal by members of the society at large. Crime is frowned upon, but certain types of crime are nevertheless seen as ‘acceptable’ (for example, victimless crimes, or crimes committed by teenagers as they explore adult activities). In the end it is the state that assigns a criminal status to individuals, regardless of general public opinion or sentiment. Over time, the latter may lead to changes in the criminal law and thus a shift in what is considered a criminal, or a 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 an historical process, in which various acts over time are

prohibited (or conversely, not prohibited) into the future because of the precedents set by the past. This can make law reform slow and difficult. Such was the case, for example, with making rape in marriage a recognised criminal offence. 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.

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. To put it differently, criminal laws are a human product, forged in historical and social circumstances that put their unique stamp upon what is considered to be harmful enough to be criminalised at any point in time. Not all harmful acts are criminalised either. 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 (for example, such as civil proceedings).

Box 1.1 provides a summary of the key purposes of criminal law. Importantly, the different reasons or purposes are frequently in conflict with each other. The rationale behind any particular criminal law, therefore, can be framed in relation to specific purposes that, 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. The first favours criminalisation of activity deemed to be immoral; the second wishes keep out of the criminal court those activities freely chosen by individuals, which appear to do no real harm to others around them (White & Haines 2004).

Generally speaking, there tends to be broad agreement that certain types of activities are harmful and represent significant enough wrongdoing to warrant state sanctions. These include, for instance, crimes

## PURPOSES OF CRIMINAL LAW

### Moral wrongness

- Morality is seen as underpinning the social fabric of society. Criminal law is a vital instrument in deterring 'immoral' behaviour.
- This perspective is closely allied to Conservative social philosophy in which the point of intervention is to uphold certain morals.
- There is a tendency to expand laws relating to 'moral' issues, such as pornography, to enact harsher penalties in order to enforce the legal and moral code, and for concerns about order and conformity to take priority over concerns about justice.

### Individual autonomy

- Individual autonomy and freedom are the most important social values.
- The criminal law should only be used against behaviour that injures the rights and interests of other people ('harms to others' approach).
- This perspective is closely allied to 'libertarianism', in which the point of intervention is to facilitate freedom and to minimise the restrictions to which people are subjected.
- There is a tendency to restrict the number and use of laws, reduce laws relating to 'victimless' crime, and emphasise individual liberty as the basis for justice.

### Community welfare

- Community interests are the most important social values to the extent that individual autonomy may be sacrificed for the greater good of the community.
- The principal purpose of criminal law is to protect the physical well-being of members of a community.
- Community welfare is the key principle in deciding which behaviour should or should not be criminalised in respect of a full range of 'anti-social' behaviour.

Source: drawn from Findlay et al. (1994).

involving death (homicide, manslaughter, infanticide), crimes involving bodily injury (physical assaults, sexual assaults), and a number of property offences (robbery, theft, damaging property). More contentious is

how best to deal with social harms relating to things such as occupational health and public safety offences (physical injury in workplace, injury from consumption of goods), offences against public order (rioting, offensive language), and environmental offences (pollution, toxic and hazardous waste). Particularly volatile areas of dispute are those dealing with 'paternalistic' offences (gambling, prostitution, obscene literature), as these tend to highlight major philosophical differences regarding the place and role of the criminal law in society.

In most cases, according to criminal law, the intent and the act must both concur to constitute the crime:

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. 1994: 20).

Conduct elements of a crime refer to the accused's conduct (*actus reus*) that caused the crime. The prohibited conduct must have been performed voluntarily (for example, not being forced to do it, 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*). 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).

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 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. In law, children under the age of 10 are treated as being incapable of committing criminal offences in most Australian states. Furthermore, until

a child reaches the age of 14 it is presumed that they are incapable of wrongdoing (this is known as the legal doctrine of *doli incapax*), and this presumption must be rebutted before criminal proceedings can be brought against them (that is, 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’; see Schetzer 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. After all, where do we find the state of mind of a company and, even if we could, how could or should this be represented in juridical practice?

## THE CRIMINALISATION PROCESS

Issues surrounding how best to assess the conduct and mental elements of crime provide some inkling into the social dynamics that underpin criminality. What is formally 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 actual behaviour that takes place. In other words, crime does not ‘exist’ until there has been an official social reaction to the event.

To become a ‘criminal’ is to be labelled so by the criminal justice system. Consider the following observation:

Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling 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 the label has been successfully applied; deviant behavior is behavior that people so label (Becker 1963: 9).

This perspective shifts the focus away from the discussion of varying *definitions of crime* (and arguments about the nature of different types of social harm, and whether or not to criminalise these) to an analysis of the ways in which something or someone becomes *institutionally recognised* as being criminal. In this processual 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 or not 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, we can consider how the process of becoming a young offender has a number of steps and dimensions. The pathways into, and diversions from, juvenile justice go something like this:

- Someone reports an event, or the police see a young person doing something that they feel the young person should not be doing.
- The police officer intervenes, and may simply tell the young person to go on home or move along.
- Depending on the nature of the offensive behaviour, and the attitude and cooperation shown by the young person, the police officer may decide to issue a formal caution (this entails taking the young person to the police station, recording the offence, and having a chat with the young person’s parents about the incident).
- If the incident is a bit more serious, the police officer may decide to charge the young person (to formally proceed against the young person).
- If a young person is formally charged with an offence, they will generally be issued with a summons (which outlines when they have to come to court and why).
- If the incident or alleged offence is serious, then the young person may be required to apply for bail (some kind of money and behaviour guarantee that they will show up in court at the required time).
- In some instances, bail will not be offered, and the young person will be placed in detention on remand (that is, in secure custody until the court case goes forward).
- Instead of going to court, the young person may be offered the option of either doing police-assigned community work (as is possible in South Australia), or more likely will be asked to participate in a juvenile conference (or equivalent) where they 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 they have caused.

- If they go to court (usually a Children's Court, which has special rules and procedures to take into account the special needs and circumstances of children), the guilt or non-guilt of the young person is legally determined.
- If found guilty of an offence, the judge or magistrate can assign a range of sanctions (alternative penalties or dispositions), which range from simply giving a warning, imposing a fine, or placing the young person on some kind of community-based behaviour order (which restricts their activity, or which demands that they attend special training or drug and alcohol sessions), through to incarcerating a young person in a youth detention centre.

This story of progress through the system will vary greatly in practice depending upon a wide range of factors. Some of these factors are described in box 1.2.

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 worth dealing with officially, then it will be considered worthy of recording officially. The crime then becomes a 'fact'.

## MEASURING CRIME

Crime is ambiguous and complex. It is socially constructed through the imposition of particular definitions, different types of publicity and media coverage, and through management of the data collection process. The ways in which we 'measure crime' are thus intertwined with both 'how crime is defined' (and what is deemed to be serious and harmful) and 'how it is responded to by institutions of criminal justice' (through specific campaigns, programs, and interventions). To take one example of the complexities of crime measurement, the sources of criminal law vary around the country as there is no single body of criminal law governing the whole of Australia. Each state and territory has its own set of criminal laws, and there is also Commonwealth criminal law. Major differences can thus exist in relation to things such as definitions of offences, their range of seriousness, the definitions of defences, and prescribed punishments.



## SOCIAL FACTORS AFFECTING THE CRIMINALISATION PROCESS

- whether or not the incident was a crime and, if so, how serious it is
- how visible the crime was
- who reported the incident, and whether they were taken seriously by the police
- whether the police have the resources to deal with particular kinds of crimes, and whether it was serious enough in the light of existing resources to respond to it
- the nature of the evidence available to police
- the characteristics and behaviour of the young person
- if and how well the police know the young person, and their family and friends
- the statutory options available for processing the young person, such as police cautioning schemes or juvenile conferencing options
- the influence of 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 appearance and demeanour of the young person in court
- the quality of legal representation
- the previous criminal record of the young person

From the point of view of analysis, social scientists also have their differences when it comes to crime and crime statistics (see Nettler 1984; Jupp 1989; Jupp et al. 2000). Three broad strands within criminology that deal with measurement issues can be identified (White & Haines 2004: 9–10):

- The *realist approach* adopts the view that crime exists 'out there' in society and that the '**dark figure**' of crime needs to be uncovered and recorded. The 'dark figure' of crime refers to crimes that are unreported. There are limitations to the gathering of official statistics (such as reliance solely on police records of reported offences), and one of the roles of criminology is to supplement official statistics (those generated by the