

What is a Crime? Defining Criminal Conduct in Contemporary Society

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CRIME IS NOT AN OBJECTIVE PHENOMENON. This collection of essays affords us the opportunity to reflect on the role of law in society and the range of options we employ to deal with undesired behaviour. *What is a Crime? Defining Criminal Conduct in Contemporary Society*¹ examines the driving social forces behind our subjective response strategies to criminalizing certain unwanted behaviour.

This book employs a multi-disciplinary methodology to define crime, criminal law and its enforcement by drawing upon scholarly traditions in criminology, law, sociology and socio-legal studies. It is to be noted at the outset that Nathalie Des Rosiers and Steven Bittle, on behalf of the Law Commission of Canada, provide a well written, succinct introduction and summary of the contributing authors' case studies and their revealing themes.² I will rely on some of their conclusions in this review. The question "what is a crime?" has perplexed scholars from diverse disciplines for many decades. Scholars continue academic work that illustrates the subjective nature of crime and continue to question the role of law in dealing with complex social issues. This book is a useful addition to existing literature and will assist scholars, students and workers in understanding the concept of crime in contemporary society.

Des Rosiers and Bittle point out critical feminist, race and Aboriginal literatures that not only reveal the subjective nature of crime, but also illustrate the stark differences between the letter of law and its enforcement. They note other scholarly literature and government reports produced in the late 1970s and early 1980s that have cautioned against the reflex application of criminal law to deal with complex social issues. Taken together, they conclude these works reveal that "crime is a product of power relations in society".³

Contributing authors to this collection of six essays bring together a range of multi-disciplinary and critical perspectives on the question of "what is a crime?" and how we define criminal conduct in contemporary society. These case studies reflect on the social processes that lead to our definition of crime, criminal law and its enforcement, as well as the implications of our decisions to criminalize unwanted behaviour in diverse areas, including immigration and refugee law, copyright infringement, insurance fraud, practical jokes and

1. Law Commission of Canada, ed., *What is a Crime? Defining Criminal Conduct in Contemporary Society* (Toronto: UBC Press, 2004) [*What is a Crime?*].

2. Nathalie Des Rosiers and Steven Bittle, "Introduction" in *What is a Crime?*, *supra* note 1 at vi.

3. *Ibid.* at ix.

environmental regulation in ensuring the safety of drinking water.

Des Rosiers and Bittle highlight four central themes canvassed in the six respective case studies: (1) the subjective nature of crime and its realities; (2) the differences between written law and its application and enforcement; (3) the notion of exercising social control beyond government; and, (4) the challenge to avoid the reflex application of criminal law since law is not a panacea for complex social issues. As stated above, they provide a sound synopsis of these issues and themes in their introductory chapter.

In "What is a Crime? A Secular Answer",⁴ Jean-Paul Brodeur, with Geneviève Ouellet, explore the debate on the nature of crime and the nature of punishment. Brodeur adopts a pragmatic approach to reforming criminal law by focusing on what is currently criminalized under the law. He addresses the complexities and contradictions found within criminal law in its current form and practice. He further explores the practical implications and inconsistencies in the processes of criminalization, decriminalization and legalization with an illustration of two case studies on gun control and gambling.

Brodeur argues that as a category of behaviour, crime has been traditionally characterized according to the heterogeneous nature of its elements, thereby making it impossible to formulate a common intrinsic characteristic of a behaviour that implies "total disapproval".⁵ He notes a wide variety of behaviours are criminalized in the *Criminal Code of Canada*,⁶ but their application is varied and subjective. For example, he raises the issue of violence in sports, like hockey, that display the same features of a natural offence yet they have not been criminalized. He goes on to illustrate these inconsistencies with the example of state monopolies over gambling. If the definition of crime involves a description of harmful behaviour, why is the state permitted to legalize gambling for its own financial gain when society is experiencing exponential growth in organized crime?

Brodeur analyzes the "phenomenon of the classification of offences"⁷ in the *Criminal Code* in order to demonstrate that the process of criminalizing behaviour is not exclusively determined by the nature of the act; it has its own logic and serves functions other than crime prevention and suppression. His analysis of the systematic use of qualifying offences in the *Criminal Code* leads to four conclusions: (1) qualification is an exercise in penology—it differentiates offences instead of defining them for the purpose of determining appropriate sentences to be imposed; (2) qualification is an exercise in resolving legal problems and occurs on an *ad hoc* basis; (3) qualification is used as a public relations tool for developing legislation in response to pub-

4. Jean-Paul Brodeur, with Geneviève Ouellet, "What is a Crime? A Secular Answer" in *What is a Crime?*, *supra* note 1 at 1.

5. *Ibid.* at 5.

6. R.S.C. 1985, c. C-46.

7. Brodeur, *supra* note 4 at 28.

lic opinion; and, (4) criminalization is a communication tool that generates conformity out of deference to its symbolic value.

Brodeur notes that Canadian criminal law is a product of British codification dating back to 1892 despite numerous efforts of criminal law reform over the years. He criticizes the expanding criminal law provisions in the *Criminal Code* that have made Canadian criminal law "impenetrable".⁸ Brodeur argues we must avoid the reflex to apply criminal law given the growing number and variety of offences that are occurring on a global scale. He suggests the view that the ultimate threat of imprisonment is necessary to deter crime is a "repressive illusion"⁹ and we need to break away from the traditional structure of "legal maxima"¹⁰ of imposing sanctions in an effort to redefine crime, criminal law and its enforcement.

In "Undocumented Migrants and Bill C-11: The Criminalization of Race",¹¹ Wendy Chan considers the shift in immigration policies in the last two decades and the driving social forces and politics behind new immigration and refugee legislation in Canada. She explores the interplay between racial differences and the notions of citizenship and belonging. Chan suggests that the Canadian government's reaction to recent events, through the enactment of successive amendments to immigration policies that include increasingly harsher and punitive measures, stems from racist beliefs and not from any real threat to our society. She argues that in this "culture of criminalization",¹² the "'illegal' criminal immigrant"¹³ has become the ideal scapegoat in Canadian society due to media sensation after events such as the 1999 boatload of Chinese migrants who landed in Western Canada and post 9-11 security concerns.

Chan considers the introduction of Bill C-11¹⁴ the most recent example of the culmination of a "criminalizing and retributive tone that is now commonplace",¹⁵ marking an important era in Canadian immigration policy-making. She examines the Bill's specific focus on criminality and its adoption of specific criminal justice processes that attempt to create more effective enforcement mechanisms. In her opinion, Bill C-11 promotes a racist and xenophobic agenda under the guise of boosting national security and protecting public safety. She goes further to argue the provisions covering

8. *Ibid.* at 13.

9. *Ibid.* at 30.

10. *Ibid.* at 29.

11. Wendy Chan, "Undocumented Migrants and Bill C-11: The Criminalization of Race" in *What is a Crime?*, *supra* note 1 at 34.

12. *Ibid.* at 46.

13. *Ibid.* at 52.

14. Bill C-11, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger (the Immigration and Refugee Protection Act)*, 1st Sess., 37th Parl., 2001 (as passed by the House of Commons 1 November 2001).

15. Chan, *supra* note 11 at 34.

enforcement contained in the bill “criminalizes and demonizes racialized immigrants, particularly “illegal” immigrants, in a manner that is far-reaching and deeply punitive”.¹⁶

Chan argues the language employed in Bill C-11, such as “foreign national”,¹⁷ and other substantial changes proposed construct negative images of new immigrants. This negative image has contributed to “immigrant backlash”¹⁸ which, in turn, perpetuates stereotypes of these individuals. As an end result, she concludes Bill C-11 redefines immigration as a matter of national security and ends up criminalizing all immigrants, the very individuals who are vulnerable and in need of protection. She suggests these repressive state responses to immigration have been normalized in Canadian society.

Chan goes on to consider the overreaching effects of Bill C-11 that place a further burden on already vulnerable individuals to challenge and counter negative images and stereotypes of their respective communities. For example, the Canadian Council for Refugees has argued that an unintended consequence of legislation aimed at preventing the crime of human smuggling and trafficking could be the criminalization of all family members who help refugees escape. In other words, Chan argues, the provisions of Bill C-11 do not distinguish between those individuals who engage in illegal human smuggling and those who are motivated by humanitarian concerns. She notes another example—provisions imposing harsher sentences for document offences fail to take into account the very reasons why migrants may have to resort to using false documents to escape their country.

Overall, Chan alludes to the notion of governance beyond government vis-à-vis immigration and refugee legislation. She argues that the government’s willingness to enact legislation promotes a racist and xenophobic agenda that will transcend all levels in Canadian society. This, in turn, will fuel existing stereotypes that the public, immigration officers and government officials have. The end result will bolster the image of “illegal criminal” immigrants as outsiders in Canada. In conclusion, she questions whether Bill C-11 will have the unintended consequence of criminalizing all immigrants and further marginalize already vulnerable individuals and groups.

In “Crime, Copyright, and the Digital Age”,¹⁹ Steven Penney highlights the social forces, politics and challenges behind regulating intellectual property, specifically the efforts to criminalize copyright law in the digital era. He points out that traditionally, copyright infringement was considered a private wrong that affected commercial interests. In this sense, there have

16. *Ibid.* at 35.

17. *Ibid.* at 45.

18. *Ibid.* at 38.

19. Steven Penney, “Crime, Copyright, and the Digital Age” in *What is a Crime?*, *supra* note 1 at 61.

been many civil remedies available, but few criminal prosecutions have taken place. He notes the advent of the "computer revolution"²⁰ and the "emergence and rapid proliferation of the Internet"²¹ have increased the digitization of copyrighted works. These new technologies facilitate the efficiency and access of unauthorized copying.

Penney conducts a historical survey of criminal copyright legislation and enforcement in Canada and the United States that illustrates the traditional reluctance to impose criminal sanctions on copyright infringers. Yet, he notes that in response to new technologies and the danger they pose, there has been a shift in government's willingness to expand the scope and severity of criminal copyright offences. Nonetheless, Penney suggests further efforts to increase the criminalization of copyright in response to digitization may be unachievable and "doomed to failure"²² given the failure of deterrence and ineffectiveness of enforcement mechanisms. Deterrence is difficult to achieve in this area of the law resulting from "strategic interactions"²³ such as "low visibility, widespread disobedience, risk aversion, substitution effects, and most important, disjunction between criminal punishment and social norms".²⁴

Penney questions whether we should respond to the challenges posed by the digitization of copyrighted material with increased criminalization. He raises concern over the moral and economic justifications for criminalization of copyright and believes these efforts may fail as the public would see these justifications as "indefensible".²⁵ In his opinion, a moral approach is ineffective as the harm principle does not support criminalizing copyright. For example, copyright infringement in the form of downloading or sharing music files online is a widespread practice and individuals who engage in this behaviour do not consider it intrinsically wrong. An economic approach is equally likely to fail since this type of activity is difficult to detect and widespread disobedience would overwhelm law enforcement officials. In summary, Penney concludes the expanding use of criminal law to regulate a complex social problem such as copyright infringement in the digital era is not an effective tool and may be "doomed to failure".²⁶

In "Criminalization in Private: The Case of Insurance Fraud",²⁷ Richard V. Ericson and Aaron Doyle critically examine the subjective nature of insurance fraud to illustrate how a crime is defined and regulated through

20. *Ibid.*

21. *Ibid.*

22. *Ibid.* at 80.

23. *Ibid.* at 62.

24. *Ibid.*

25. Des Rosiers and Bittle, *supra* note 2 at xxii.

26. Penney, *supra* note 19 at 80.

27. Richard V. Ericson and Aaron Doyle, "Criminalization in Private: The Case of Insurance Fraud" in *What is a Crime?*, *supra* note 1 at 99.

expanding private justice mechanisms. This chapter explores the social processes by which insurers define and regulate fraud in the case of home, auto and workers' compensation lines of insurance.

Ericson and Doyle's interviews of 224 insurance personnel in Canada and the United States reveal the insurance industry operates in a climate of suspicion, deception and mutual distrust. Their research reveals that exaggeration of claims is a widespread practice in the insurance industry. Analogous to Penney's example of downloading music files over the Internet, exaggeration of insurance claims is so common that the majority of claimants do not view themselves as engaging in inappropriate behaviour. Research indicated that claimants and insurers distrust one another and engage in deliberate deception that has become institutionalized in the claims process and in the insurer-client relationship. Claimants expressed temptation to exaggerate claims they feel will be minimized, whereas adjusters attempt to minimize claims they view as exaggerated.

A significant increase in fraudulent claims in the last few decades has fuelled antifraud publicity campaigns and awareness, as well as paved the way for an expansion of private-policing personnel and technologies in the insurance industry. However, research indicated that fraud is endemic and remains tolerated within the industry. As such, the dramatization of fraud as a crime and the relationship insurance companies have with police are viewed as purely symbolic in deterring fraud. Ericson and Doyle's study illustrates that society is increasingly regulated or governed by private institutions rather than governments. In the end, they suggest the insured bears the ultimate responsibility to maintain honesty and integrity in the claims process. As a deterrent, their research demonstrated the key factors in the antifraud crackdown are economic pressures placed on the insurer and their inability to consequently pass costs down to the client.

This chapter is also a good illustration of the fluidity in defining crime and crime control. Ericson and Doyle examine the boundaries and blurring distinction between fraud and mere exaggeration. Fraud is a fluid concept with a changing definition that reflects how a particular insurance company is organized, rather than the actual act of fraud, analogous to Brodeur's analysis of the classification of offences above. They note that what constitutes fraud in a given situation depends on the client and the respective insurer-client relationship. For example, some insurers may turn a blind eye for their most lucrative policyholders, whereas certain less desirable populations, such as marginalized groups, are monitored more heavily and often have their claims rejected. The end result is that in the insurance industry, the criminal justice system is invoked for primarily symbolic purposes to serve as a deterrent. As they conclude: "In an increasingly privatized socie-

ty, the practical definition of insurance fraud becomes whatever is consistent with the smooth flow of business".²⁸

In "From Practical Joker to Offender: Reflections on the Concept of "Crime"",²⁹ Pierre Rainville explores the distinction and boundaries between inappropriate conduct or derogatory behaviour and truly criminal behaviour. He illustrates the notion that the power to define crime and crime control rests with the enforcer of criminal law. The complexity of this issue is evident when one considers that the foundation of criminal law and the *Criminal Code* are matters of a serious nature. Humour, as Rainville suggests, is a means to escape everyday constraints in society and is an "antidote of choice against anger, outrage, and irreversible acts".³⁰ However, he notes that "humour often targets the very values that criminal law seeks to protect: ...morality, safety, property, human dignity, and the authority of the courts".³¹

For example, is the practical joker who calls in a phony bomb threat to an airport a criminal? Is the person who throws a pie in the face of a public figure a criminal? Rainville reminds us that law is not interpreted in a vacuum and must not be trivialized: "Systematically thrusting practical jokes into the arena of criminal law amounts to detracting from and trivializing the very concept of crime".³² However, when does a practical joke reach the level of seriousness to be considered a crime?

Rainville proposes a two-step analysis of the required threshold of seriousness in criminal matters when considering whether a practical joke should constitute a crime: "(1) determining the danger of the act in question"; and, (2) "determining society's threshold of tolerance".³³ He suggests this raises two questions with regard to the attention to the danger of the act in question: (1) Can a practical joke mitigate the seriousness of the alleged conduct and consequently remove it from the definition of crime? and (2) Conversely, are there certain jokes that are intrinsically dangerous and reprehensible enough in a truly criminal sense?

Overall, Rainville raises two competing tensions that must be reconciled by criminal law: tensions between the practical joker and the victim, and tensions between the undue extension of criminal law and a judge's subjectivity. He argues that criminal law must reconcile these tensions by balancing the subjective experience of the victim of a practical joke and the offender. He goes on to suggest two challenges humour presents to conventional criminal law—criminal law cannot leave the victim at the mercy of a

28. *Ibid.* at 122.

29. Pierre Rainville, "From Practical Joker to Offender: Reflections on the Concept of "Crime" in *What is a Crime?*, *supra* note 1 at 125.

30. *Ibid.* at 126.

31. *Ibid.* [footnotes omitted].

32. *Ibid.* at 127–128 [emphasis omitted].

33. *Ibid.* at 128.

joker's poor judgment, but at the same time it must not cause the joker to risk a conviction on account of a victim's unpredictable reaction or lack of sense of humour. After all, as Rainville concludes, "[i]f criminal law unduly enters into the arena of humour, humanity loses one of its few sanctuaries".³⁴

In "Poisoned Water, Environmental Regulation, and Crime: Constituting the Nonculpable Subject in Walkerton, Ontario",³⁵ Laureen Snider discusses how particular acts and actors are subjectively viewed as non-criminal. She examines how events leading up to the public inquiry in Walkerton, Ontario were explained and conceptualized. In other words, she asks, "[h]ow do 'we' as a society decide where blame is warranted and where it is not?"³⁶

In May 2000, 7 people died, 65 were hospitalized, and 2,300 others became ill after a municipal well contaminated with E. coli bacteria spread into the population's drinking water. A public inquiry was established to look into the contamination of the water supply in Walkerton and into the safety of Ontario's drinking water. One hundred and fourteen witnesses, including townspeople, government officials and subject matter experts, testified in public hearings. In January 2002, the O'Connor Report was released and blamed the water contamination on a variety of factors, including government cutbacks, the reluctance to enforce regulations and a voluntary approach to compliance that was common in the workplace. The report criticized and blamed the neoliberal policies and government cutbacks for the disaster. It also criticized the Ontario government's decision to privatize water monitoring and emphasized the obligation to protect health, environment and life of citizens resides within the government.

Snider's case study is a good illustration of the role of discursive framework in framing events as criminal or non-criminal. The public inquiry was viewed as a genuine examination in scrutinizing the Ontario government's actions and, in turn, gave a voice to the people of Walkerton. She suggests "the technical discourse of science" was used to challenge the neoliberal policies of the Ontario government.³⁷ The main focus and challenge of the inquiry was on organizational responsibility rather than individual culpability since, as Snider puts it, "criminality resides at the individual level".³⁸

In conclusion, each of these case studies reminds us that crime is not an objective phenomenon, but is a concept that embodies unacceptable or unwanted behaviours. This collection of scholarly work reflects on the notion of what constitutes a crime and affords us the opportunity to recon-

34. *Ibid.* at 146.

35. Laureen Snider, "Poisoned Water, Environmental Regulation, and Crime: Constituting the Nonculpable Subject in Walkerton, Ontario" in *What is a Crime?*, *supra* note 1 at 155.

36. *Ibid.* at 163.

37. *Ibid.* at 178.

38. *Ibid.* at 180.

sider the role of criminal law in our society and identify society's expectations from other members in society. Overall, contributing authors agree that we need to avoid the reflex of applying criminal law to complex social issues. As Des Rosiers and Bittle point out, they also remind us that crime and criminal law are a product of power relations within society and adversely affect those who are most vulnerable.

What is a Crime? carries on with the longstanding tradition of examining issues related to crime, its control and questioning the role of law in dealing with complex and changing societal norms and values. As Des Rosiers and Bittle reiterate, crime is subjective in nature and does not exist independent of social structures and processes that shape our response strategy to define and control certain categories of behaviour. This collection of essays will be of interest to scholars and students in criminology, law, philosophy, political science, sociology as well as all individuals and policy makers who work in the criminal justice sector.

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