

**Law Commission of Canada.****What Is a Crime? Defining Criminal Conduct in Contemporary Society.**

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On the face of things, the central question confronting, and raised by, this book is whether ‘What is a Crime’ is a question really worth asking any more, at least in relation to ‘defining criminal conduct’. As the Introduction makes clear, the question has been approached by a variety of distinct criminological approaches over the past seventy years or more. For Edwin Sutherland and his followers the key issue related to whether harmful corporate activities should be considered as crimes — or if already crimes, whether they should be subject to more stringent enforcement. Thirty years later, symbolic interactionists of the ‘labelling school’ took the point further. They emphasised not only the arbitrariness of criminal law and its status as an index of power, but also the over-reach of law — particularly with respect to punitive responses to ‘crimes without victims’. In the following years Marxists, Feminists and Critical Race scholars have explored these themes in similar ways. While the theoretical frameworks adopted and specific targets of their critiques have varied, the shape of the answers to the question ‘What is Crime’ has remained basically the same. Crime, criminology and criminal justice are generally characterised as invasive, inconsistent and often arbitrary social constructions that reflect and reinforce social inequalities, and that fail to deliver such protection as they are formally mandated to do. Conversely, criminal law ignores much that ought to be criminal, at least in terms of the criteria that seem to characterise criminal law proscriptions across the board. Given how much ink has been spilled over this question in well over half a century, it might reasonably be asked whether there is very much that a collection such as this could add, no matter how good the papers that compose it.

Take for example, the paper by Ericson and Doyle, dealing with insurance fraud. They analyse the ways in which insurers effectively operate as an independent legal system, with their own regulations, definitions (for example, of ‘fraud’), enforcers, sanctions, ideologies and practices of justice. In practice most cases identified as fraudulent are handled internally by a form of summary justice in which claims are refused. But even those cases defined as more serious and passed onto the investigative units, are normally dealt with in much the same terms. Very few cases giving rise to ‘fraud reports’ are in fact sent on for criminal prosecution, and only about one percent result in convictions. In this alternative ‘legal’ order, much that is familiar to criminologists is reproduced: the poor are targeted and disproportionately punished; those who are defined as ‘good’ risks are dealt with leniently (in practice, being paid compensation even where there are grave doubts about fraud); enforcers engage in dubious forms of coercion and rule-bending; moral panics about fraud are beaten up in order to serve the interests of the insurance organisation and so on. The paper is excellent and the information new. But perhaps it would have been given a more innovative edge if organised under some rubric other than ‘what is a crime’ — perhaps with respect to questions about the effectiveness, impact or implications of alternative regulatory orders. That is, why should it be assumed that ‘crime’ is so important that we should still be concerned with ‘what’ it is?

This sort of question is rather assumed by the organising theme of the collection, and this has stamped its mark on several of the papers. Laureen Snyder's chapter, dealing with the Walkerton tap water contamination incident that killed seven and injured several thousand others, provides a detailed analysis of how testimony and evidence were structured by the fundamental assumptions of criminalisation. She concludes that because criminality 'resides at the individual level', the result is that 'powerful organizations; will not be disciplined or challenged'. While Snyder makes a strong and morally charged case against the outcome of the Walkerton investigations, the product of the paper is little different to that of the exercises carried out by Sutherland many years ago. Of course, the paper has its own moral impact, and it may be that the point about the lack of fit between criminality and organisations needs to be driven home periodically. But by focusing on the old question of what does (or should) constitute a crime, certain key issues are passed over. Given their resources, 'powerful organizations' are frequently able to frustrate prosecution, for criminal law is characterised by an array of defences put in place (at least according to legal ideologies) precisely in order to redress the power balance between the state and individuals. These include proof 'beyond reasonable doubt', and strict evidentiary and procedural rules that are routinely exploited by the corporate sector to escape conviction. It was to get around these problems that other regulatory forms have been invented. The 'civil offence', for example, requires proof only 'on the balance of probabilities' and has much relaxed rules of evidence (for example relating to how evidence is gathered and what constitutes admissible evidence). As well, precisely because they are designed to deal with organisations rather than individuals, civil offence procedures are linked to penalties such as divestiture of assets and bans on trading, that may have much more impact than criminal law's sanctions. Of course, it has been argued that criminal sanctions have a far greater moral impact (and the moral dimension clearly is of concern to Snyder), and that this makes criminal justice procedures more significant as an avenue of public shaming. Indeed, the relative merits of a low probability of moral condemnation in criminal justice versus a high probability of more rigorous material sanctions in other regulatory forms, is an issue that may be worth revisiting in this new entrepreneurial age. But it is not one encouraged by the organising theme of 'defining criminal conduct'.

Other papers in the collection raise important issues in contemporary politics of criminality and security. Wendy Chan writes on the xenophobic agenda of Bill C-11 directed at the regulation of 'illegal, criminal' immigrants, and Stephen Penney contributes a paper on the criminalization of copyright infringement in the digital age. Pierre Rainville poses the question of whether it is appropriate to label practical jokers as criminals, even where their jokes may include making false bomb threats at airports, throwing pies at prominent citizens and politicians, or making sexual contact as a form of humour. Rainville argues that humour is a powerful social force that frequently targets the values criminal law protects. By implication, its strong critical function can be read as setting up a tension between security and order on the one hand, and a fundamental element of freedom on the other hand. As well, (and Rainville interestingly makes this 'definitely the most important' consideration), humour may be regarded as a way of escaping the seriousness of the world, and thus reflects 'a healthy quest for freedom'. He concludes that 'if criminal law unduly enters into the arena of humour, humanity loses one of its few sanctuaries'.

These papers, indeed the collection as a whole, cast doubt on the appropriateness, effectiveness and moral agendas associated with much contemporary deployment of criminal law. They explore issues that are of contemporary relevance, and deal with some important current dilemmas in

criminalization. Of course, this reflects the Law Commission of Canada's brief to attend to specific questions raised by contemporary legal and political struggles and dilemmas, and to be concerned with their implications for law reform. Nevertheless, I suggest, the collection does not bring anything conceptually or theoretically new to the question of 'what is a crime', and that may be because the question is, in theoretical respects at least, exhausted.

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