

## SOC 3290 Deviance

### Lecture 2: Deviance, Crime, and Criminal Law

The link between deviance and crime is complex. At first glance, it may seem fairly straightforward to argue that deviance is a wider concept than crime: i.e. all crimes are deviant, but not all deviance is crime. Compared with crime, this view would hold that deviance is generally less serious, more frequent, and more pervasive. Indeed, technically, there can be no crime without a law prohibiting an act.

While this view may make some sense from a practical standpoint, there are difficulties. For example, even where laws prohibit certain actions, not all breaches of the law, even dangerous or potentially harmful ones, result in a negative response from the public (e.g. speeding, downloading music from the internet, pirating software). While technically illegal, vast numbers of people engage in these activities without being penalized formally or informally. Crime is not always deviant.

As well, there is no perfect connection between an act's harmful consequences and its designation as criminal or deviant. Many actions that result in the serious injury or death of large numbers of people are not prohibited by law. Corporate executives routinely decide to market unsafe products to consumers, to place workers in unsafe working conditions, and to contaminate the environment with carcinogens. Many countries have no laws whatsoever that prohibit such actions.

Because the relationship of deviance to crime isn't entirely straightforward, sociologists work with a variety of definitions of criminal conduct. Some restrict their definitions to violations of the Criminal Code; others to include the violation of other statutes intended to protect the public. Finally, others go to the other extreme and broaden the definition to include virtually any socially harmful activity (e.g. poverty, underfunding of health care). Of course, the problem with this latter definition is that it transforms virtually all social problems into crime. Hence, it is best to go with the middle definition where crime means a technical violation of law, although not necessarily of criminal law. Again, however, remember that just because a law exists doesn't mean that it will be enforced.

### **Criminal Law in Canada:**

Criminal law involves a set of rules legislated by the state in the name of society and enforced by the state through the threat or application of punishment. It has four important characteristics: *politicality*, *specificity*, *uniformity* and *penal sanctions*.

*Politicality* involves the fact that, as it is legislated by the state, the creation of criminal law is fundamentally a political process. Canada has a system whereby all criminal law is made by the federal government, but administered and enforced provincially (e.g. judges often modify

criminal law through case law and setting precedents). Of course, some criminal laws enjoy high levels of consensus among the public (e.g. laws against murder, robbery, etc.). These offenses are said to be *mala in se* ("bad in themselves"). Other criminal laws, however, elicit far less consensus from the public. These controversial, generally less serious offences, are referred to as *mala prohibita* (e.g. morality offences such as drug use, pornography, prostitution, and public drunkenness). These controversial offences raise the issue of overcriminalization - and criminalizing activities that significant numbers of people (overtly or quietly) view as minor runs the risk of undermining respect for the law (e.g. look what happened during prohibition; pot use today). Not only that, attempting to legislate public morals is hard to enforce, breeds corruption and discriminatory enforcement, and takes resources away from fighting more serious crime. Moreover, there is the issue of whether the criminal law effectively represents the interests of the majority of the population, or whether it disproportionately represents the interests of the powerful. Such issues frequently come to a head politically when morality offences are discussed.

The second important characteristic of criminal law is *specificity*. Two major objectives of Canadian criminal law come into play here: crime control and the preservation of due process. The former involves ensuring the safety of citizens' lives and the security of their property. In the pursuit of these goals, substantive law specifies both what constitutes a crime and its punishment. Procedural law, on the other hand, sets out rules of due process to protect the rights of the accused (e.g. it specifies the kinds of proof required for conviction, the legality of searches and seizures, and the rights of accused to counsel and bail). Specificity itself means that the exact nature of prohibited acts must be clearly specified, and the nature of the punishment that may be imposed (e.g. maximum penalties that courts cannot exceed; occasionally there are minimum penalties). Needless to say, there is great tension between the objectives of crime control and due process. Going too far in the first direction may make it easier to control crime, but the chances of mistakenly punishing the innocent increase. On the other hand, extreme attention to defendants' rights makes it much harder to control crime. Striking an acceptable balance isn't easy.

The third important characteristic of criminal law is *uniformity*. This means that the police, courts, and correctional institutions should apply the law equally to all citizens. Extralegal characteristics such as gender, ethnicity, race or social class of an individual are not supposed to influence the application of criminal law. Instead, decisions by criminal justice personnel are supposed to be made solely on the basis of legal factors such as the nature of the crime, its seriousness, and the perpetrator's prior record. Needless to say, the theory is not always the practice, and there has been much debate about the extent to which legal and extralegal factors affect the application of criminal law.

The last characteristic of criminal law that we should mention in this regard involves *penal sanctions*. The application of the penal sanctions ordered by the courts is the responsibility of the corrections system. Embedded in our law is the idea that the severity of the sanctions should reflect the seriousness of the offence. Interestingly, however, despite a growing

movement toward various forms of victim compensation, Canadian criminal law places little emphasis on restitution - this is largely seen as a matter for the civil courts.

### **The Elements of Criminal Law:**

Our criminal law is based on 7 principles traditionally determined and followed by legislators and the courts, and these must exist in every criminal act. This *corpus delicti* involves the duty of the state to prove beyond a reasonable doubt the elements of *legality*, *mens rea*, *actus reus*, concurrence of *mens rea* and *actus reus*, *harm*, *causation*, and *punishment*. Basically, the harm forbidden in penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment. Let us look at each of these 7 elements in turn.

*Legality* means that, in order for an act to be considered criminal, it must be forbidden by penal law. There can be no crime unless there is a law that forbids the act in question (*nullum crimen sine lege*).

*Mens rea* is the mental element of a crime. This involves the assumption that becoming involved in a criminal act results from a guilty mind (often referred to as intent, though this is but a subcategory of *mens rea*). This rests on the idea that a person has the capacity to control his behavior and the ability to choose between different courses of action. Fantasizing about committing a crime without doing so isn't illegal, but such thoughts accompanied by prohibited acts or omissions are. Nor is doing something without the requisite mental element a crime. Both must be present. *Mens rea* is also distinct from motive (i.e. the reason for committing a crime), though this may provide evidence of intent and may be counted as an aggravating factor in sentencing. When *mens rea* is discussed in terms of intent, this may take one of 2 forms. Some offences require only general intent (inferred from the action or inaction of the accused, such as pointing a gun and firing it at the victim in culpable homicide). Specific intent requires something more, that the prosecution prove, beyond a reasonable doubt, that this was done "with intent" or for the purposes of." Sticking with our homicide example, the person must be shown to have the actual intention of producing some further consequence beyond the *actus reus* (e.g. the death of the victim). In addition to offences of general and specific intent, there are three distinct levels or degrees of *mens rea* ranging from the most to the least culpable states of mind - intent, knowledge and recklessness. The highest degree of culpability is found in the former, with offences containing words like "intentional" and "wilful." Knowledge is used to indicate that an accused possessed an awareness of a particular circumstance (e.g. "Knowingly" uttering a threat). Recklessness refers to situations where the accused violates a law simply by lacking the appropriate care and attention about something he is doing. Many defenses in court can be made on the basis that the appropriate *mens rea* elements don't apply (e.g. acting in self defense or under duress).

*Actus reus* is essentially the act or omission prohibited by the law. This is the physical or action element of a crime, generally referred to as the guilty act or the evil act (e.g. a punch,

shove, etc. directed at another). Usually this has to be traced to the accused him or herself. Some have recently attempted to modify this to make parents responsible for the actions of their children. Omissions as well as acts can constitute an actus reus (e.g. negligence). Also, for some offences, a person doesn't have to be physically involved with another (e.g. uttering threats, criminal conspiracies).

*Concurrence* involves the idea that intent both precede and be related to the specific prohibited action or inaction that was or was not taken.

*Harm* is important, since our legal system places much importance on the belief that conduct is criminal only if it is harmful. This ideal is reflected in the notion of due process, which holds that a criminal statute is unconstitutional if it bears no reasonable relationship to the matter of injury to the public. This means that there has to be a victim. As a result, some argue that if the offence is a "victimless crime," (e.g. gambling, prostitution, marijuana), then it's not the law's business. The argument is that making these vices a crime does more harm than good.

Also in this regard, harm isn't merely physical injury, it may also include psychological harm, harm to public institutions, and concern about one's well being (e.g. stalking, perjury, and hate crimes).

*Causation* refers to crimes that require that the conduct of the accused produce a specific result. So long as the act or omission of the accused started a series of events that led to harm, causation has occurred. This comes into play most often in cases where the mens rea and the actus reus are widely separated in time.

Finally, *punishment* requires the criminal law to state the sanctions for every crime in order that everyone be aware of the possible consequences for specific actions. The Criminal Code does this.

### **Mens Rea and Actus Reus: Case Illustrations**

Now that we have elaborated some of the specific qualifications of *mens rea* and *actus reus*, we must reiterate that concurrence between these two elements is generally required for a conviction. Concurrence requires, for example, that "intent both precede and be related to the specific prohibited action or inaction that was or was not taken." Concurrence is usually not considered a controversial issue since in most instances the connection between act and intent is obvious.

So how would a court go about finding a concurrence of *mens rea* and *actus reus* in murder cases? Consider the case of R. v. Cooper. In this case the accused and his former girlfriend had been out with friends at a bar, drank a considerable amount, and left to go parking. At one point, they began to argue and she struck him. He became angry, hit her, and grabbed her by the throat with both hands. He then blacked out, and, the next thing he remembers is waking

up in the back seat finding her strangled body beside him. The defense argued that, since he blacked out before killing her, he did not have the required intent to commit murder. Alternatively, he did not foresee that holding someone by the throat was likely to cause her death.

At issue in this appeal case was not only whether *mens rea* was present, but whether it must exist *concurrently* with the guilty act. The majority, led by Justice Cory, argued that this must coincide at some point, but need not overlap entirely. “It could be reasonably inferred by the jury that when the accused grabbed the victim by the neck and shook her that there was, at that moment, the necessary coincidence of the wrongful act of strangulation and the requisite attempt to do bodily harm that the accused knew was likely to cause her death. Cooper was aware of these acts before he blacked out...It was sufficient that the intent and the act of strangulation coincided at some point. It was not necessary that the requisite intent continue throughout the entire two minutes required to cause the death of the victim.” However, one judge, Justice Lamer, disagreed with this. He argued that “there may be a point at the outset when there is no intention to cause death and no knowledge that the action is likely to cause death. But there comes a point in time when the wrongful conduct becomes likely to cause death. It is, in my view, at that moment or thereafter that the accused must have a conscious awareness of the likelihood of death. This awareness need not, however, continue until death ensues.” In the end, the majority of the court sided with Mr. Justice Cory, and Cooper’s conviction was restored.

The difference between the positions of these two judges hinges on the inferences that one is willing to draw with respect to intention. Justice Lamer asserts that any conviction for murder requires proof of subjective knowledge of the likelihood of death. Justice Cory thinks it is sufficient to base a criminal conviction upon an inference of reasonable knowledge of the likelihood of death given the nature of the acknowledged actions in question. This question of whether criminal conviction for murder should be premised upon objective or subjective intention is one that will continue to be debated in criminal law. In essence, the distinction is between what a reasonable person would be expected to intend, and what the accused actually did intend.

The situation is even more complicated in the case of other crimes. There are many criminal offences for which the required *mens rea* is a subjective intention to commit the given act, but is founded on “recklessness” or “advertent negligence” rather than a direct intent. For example, in the offence of dangerous driving causing death, we can look at the case of R. v. Hundal. There the judge looked at the text of s.233 (1), the provision against dangerous driving, and argued: “Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of *mens rea* may be satisfied in different ways. The offence can require proof of a positive state of mind such as intent, recklessness or wilful blindness. Alternatively, the *mens rea* or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused. In the appropriate context, negligence can be an acceptable basis of liability which meets the fault requirement...The wording of the section itself which refers to the operation of a motor vehicle ‘in a manner that is dangerous to the public, having regard to all the circumstances’ suggests that an objective

standard is required. The ‘manner of driving’ can only be compared to a standard of reasonable conduct. That standard can be readily judged and assessed by all who would be members of juries. Thus, it is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended, but rather whether, viewed objectively, the accused exercised the appropriate standard of care.”

Thus, it is fair to conclude that the very nature of *mens rea* changes as one moves from offence to offence.

The final issue we must consider with regard to *mens rea* is that of parties to an offence. Under s.21 of the Criminal Code, parties to an offence may be held just as criminally responsible as the persons who actually commit the crime. If you do or refrain from doing something that aids the offender committing the crime, or form a common intention to carry out an unlawful purpose, you are a party to the crime and may be held responsible. In most cases the operation of this section is pretty straightforward. If you provide a gun, drive the getaway car, or keep a lookout for police, you can be convicted of the offence just as readily as the person who pulls the trigger or robs the bank. However, there are awkward situations that are not quite so simple. What if you walk by a fight where someone you dislike is being badly beaten up by a friend? What if you simply walk by and do nothing? What if you smile or shout encouragement? What if you volunteer to hold the victim down? The answer to these various situations is always somewhat unclear, but a general framework goes something like this. Simple presence is not sufficient to show intent to encourage the fight. However, any evidence of encouragement toward the offender (or, for example, betting at prize fights) would likely render you culpable as a party to the offence.

Now that we have discussed the general elements of an offence, how subjective an objective standards of *mens rea* vary by offence, and the issue of parties to an offence, we must move on to consider defenses and mitigations to criminal offences. In addition to violations of an accused’s constitutional rights under the Charter, there are many circumstances in which people charged with criminal offences are able to escape responsibility - or some degree of responsibility - for their crime. Many of these are related to the requisite *mens rea* for the crime in question. For example, an accused may have inflicted harm in self defense; they may have been enticed by police to commit a crime (usually in drug or prostitution cases); they may have been forced at gunpoint to help rob a bank (duress); they may have been mistaken about a woman’s consent to sexual relations (mistake of fact); or they may have been too intoxicated or mentally disturbed to understand or appreciate the alleged offence (drunkenness/ insanity). Of course, these “excuses” for crime are highly controversial and are often criticized for supporting unjust societal assumptions. Today we will consider cases in relation to two of these defenses: drunkenness and mistake of fact.

We will first consider the defense of drunkenness by looking at the case of Randy Tom. Police officers had been called to a reservation by an ambulance crew after a report of Mr Tom causing a disturbance. He was soon observed by police officers being chased by a man with a baseball bat. When he saw the police the man with the bat backed off and Mr. Tom kept running.

The police caught up with him shortly afterward and noted he was very drunk. The officer advised him he was being arrested for public drunkenness, given his rights, but there was no response. He just stared at the officer glassy eyed and mute. He was helped toward the road to wait for the police cruiser. While waiting, Tom asked the officer (whom he knew) for his gun to “shoot” those who had been pursuing him. When the officer tried to calm him down, Mr. Tom picked up a rock and swung it at the officer’s head. After a short chase, both fell and passed out. He was arrested by the other officer and charged with assault causing bodily harm and assaulting a police officer.

At trial the defense argued the defense of drunkenness, basically that Mr. Tom’s intoxication was so extreme that it involved a lack of awareness akin to a state of insanity or automatism - raising a reasonable doubt as to the existence of the minimal intent required for the offence. The trial judge did not feel that there was such an absence of awareness in this case since the accused appeared oriented to time and place, recognized the officer (whom he knew for some time), and carried on a conversation with him. The fact that Tom does not remember anything later was irrelevant to the trial judge, who convicted Mr. Tom on both charges. However, on appeal to the B.C. Court of Appeal the outcome was reversed. The appeal judges felt that the conversations between the parties only established that they could understand Mr. Tom’s words, not that he was making any sense or was in any way coherent. In their view, many people who are very drunk can speak, but the more important question is whether what is spoken can support a reasonable inference - one way or the other - as to their cognitive awareness. Here, moreover, the evidence indicated that when the officer spoke to Mr. Tom at the scene, he did not respond but simply stared incomprehensively. Not only did he not seem to understand what was being said, but his behavior both before and after arrest was sufficiently bizarre to lead to the conclusion that there was something at least abnormal about his cognitive function. Mr. Tom’s convictions were thus overturned.

So how do you feel about this? Should drunkenness continue to be a defense to criminal charges of general intent? Should the circumstances be restricted? Or should drunkenness be irrelevant to determination of guilt and simply be considered when sentence is being imposed (in exacerbation or mitigation)?

While we are not able to discuss all of the defenses noted earlier (e.g. insanity, self-defense, duress, and entrapment being some), we will look at one more controversial example before we close. The defense of mistake of fact traditionally maintained, for example, that if a man has an honest but mistaken belief that a woman has consented to sexual activity, he may avoid conviction for sexual assault as he lacks the requisite *mens rea*. We will consider two cases on this issue.

In the first, the Pappajohn case, a female real estate agent and her male client had a long business lunch, consumed large amounts of alcohol, and returned to his residence around supertime where they engaged in sexual relations. Afterwards their recollections of this encounter varied significantly. He argued that what occurred was consensual with no more than a bit of coy objection on her part, while she related a story of rape completely against her will and

over her protests and struggles. The police were called later that evening and Mr. Pappajohn was charged with sexual assault. He argued the defense of mistake of fact. Here the judge noted circumstantial evidence supportive of his claims, including: (1) the fact that her necklace and car keys were found in the living room; (2) the complainant confirmed his testimony that her blouse was neatly hung in the clothes closet; (3) other items of folded clothing were found at the foot of the bed; (4) none of her clothes were damaged in the slightest way; (5) she was in the house for a number of hours; (6) by her version, when she entered the house Mr. Pappajohn said he was going to 'break her,' but she made no attempt to leave; (7) she did not leave while he undressed; (8) there was no evidence of struggle; and (9) she suffered no physical injuries other than 3 scratches. Nevertheless, despite this circumstantial evidence, Mr. Pappajohn was convicted by the jury. The appeal court simply didn't want to interfere with the trier of fact which was in a better position to observe the accused and assess the evidence in person (rather than secondhand from appeal transcripts). In somewhat tortured reasoning, the supreme court argued that "it does not follow that, by simply disbelieving the appellant on consent, in fact the jury found there was no belief in consent and that the jury could not reasonably be believed in consent." In other words, Mr. Pappajohn may not have been believed by the jury, but the jury may have been mistaken. In short, this precedent holds out the possibility of a defense of mistake of fact in other cases, even though it was not successful here.

A second, and clearer, case on this issue involved a Mr. Sansregret who had lived with a woman for about a year in a turbulent relationship. After what she recounted as recurring physical abuse on his part, she decided to end the relationship and asked Mr. Sansregret to leave - which he did. Not surprisingly in such relationships, Mr. Sansregret did not stay away for long. He broke into her house in the middle of the night, terrorized her with a file like instrument, and, in order to calm him down, she held out some hope of reconciliation and had sexual relations. Later she reported this to police and Mr. Sansregret's probation officer intervened. Then, three weeks later, Mr. Sansregret broke in again. He accused her of having another boyfriend, pulled the phone out of the wall, struck her hard across the mouth, and repeatedly terrorized her with a kitchen knife. Again, to calm him down, she pretended there was some hope for reconciliation and had sexual relations. Later that morning she dropped him off, went to her mother's and called the police. The judge here concluded that there was no consent, but rather submission as a result of a very real and justifiable fear. "No one in his right mind could have believed that the complainant's dramatic about face stemmed from anything other than fear. But the accused did. He saw what he wanted to see, heard what he wanted to hear, believed what he wanted to believe."

As noted, both of these cases, with widely differing fact situations, ended in a conviction. The defense of honest mistake of fact remains as a legal possibility, but it is clear that it cannot be simply a subjective test of the accused's intention. Wholly unreasonable beliefs, however honestly held, are not likely to be viewed by the courts as negating the *mens rea* required for conviction.

### **Conclusion:**



Today we have looked at the awkward distinction between deviance and crime, the various characteristics and elements of criminal law, and illustrated key aspects and criminal defenses through real case examples. Keep these in mind when we are considering various forms of deviance later in this course, as they may help raise important social policy considerations.