



Open Research Online

Citation

Millie, Andrew (2011). Value judgments and criminalization. *British Journal of Criminology*, 51(2) pp. 278–295.

URL

<https://oro.open.ac.uk/96913/>

License

(CC-BY 4.0) Creative Commons: Attribution 4.0

<https://creativecommons.org/licenses/by/4.0/>

Policy

This document has been downloaded from Open Research Online, The Open University's repository of research publications. This version is being made available in accordance with Open Research Online policies available from [Open Research Online \(ORO\) Policies](#)

Versions

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding

VALUE JUDGMENTS AND CRIMINALIZATION

ANDREW MILLIE*

Fuelled by contemporary concerns of risk and majoritarian calls to adhere to ‘the values the majority hold dear’ there can be said to be a ‘crisis of criminalization’ in liberal democracies. Whilst criminalization is clearly an important theme in criminology there has been little attention on the value judgments behind processes of criminalization. By drawing on elements of moral philosophy and by applying these ideas to everyday criminalization in Toronto, this article takes a first step towards addressing this omission. The article adopts a pluralist and social constructivist perspective where differential interpretations lead to the same behaviour being celebrated, tolerated or censured, depending on context and power. A model of value judgment and criminalization is offered that includes consideration of moral, prudential, economic and aesthetic judgments. Value consensus is questioned and the political capital required to dictate values is considered.

Keywords: Value judgment, criminalization, moral philosophy, aesthetics, Toronto

Introduction

Criminalization can be regarded as the processes by which actions or omissions become defined as crimes, or certain people or uses become defined as criminal or potentially criminal. Fuelled by contemporary concerns of risk (e.g. Beck 1992) and majoritarian calls to adhere to ‘the values the majority hold dear’ (Millie 2009b), there can be said to be a ‘crisis of criminalization’ in liberal democracies (Duff 2010) where behaviours or uses that are outside the normative values of the majority—or maybe regarded as too ‘risky’—are too readily seen as unacceptable and criminalized, what Husak (2008) has called ‘overcriminalization’. Criminalization is clearly an important theme in criminology and was picked up by labelling theory and the sociology of deviance (e.g. Becker 1963; Erikson 1964) and more recently by cultural criminology (e.g. Hayward and Young 2007). While much of this focus is on the negative consequences for the person or sub-cultural group given the ‘criminal’ or ‘deviant’ label, there has been less attention in criminology on the value judgments behind the labelling, on the values the criminalization processes are supposed to be supporting. This may in part be due to this being largely the territory of moral philosophy. It is also an area difficult to pin down; as Becker (1963) has noted, ‘Specific rules find their beginnings in those vague and generalized statements of preference social scientists often call values. Scholars have proposed many varying definitions of value, but we need not enter that controversy here’ (Becker 1963: 129–30). In this article, values and value judgments are regarded as fundamental to the criminalization process.

* School of Social and Political Sciences, University of Glasgow, 25 Bute Gardens, Glasgow, G12 8RS, UK; Andrew.millie@glasgow.ac.uk.

The importance of values—or, more specifically, of conflict in values—was something recognized by Chicago School sociologists who posited that different social groups develop differing and conflicting cultures and normative values. For instance, according to Wirth (1931):

‘Whatever may be the physical, the psychological and the temperamental differences between various races and societies, one thing is certain, namely that their cultures are different. Their traditions, their modes of living and making a living, the values that they place upon various types of conduct are often so strikingly different that what is punished as a crime in one group is celebrated as heroic conduct in another. (Wirth 1931: 484–5)’

This article adopts a similarly pluralist and social constructivist perspective in which the same behaviour¹ may be celebrated, tolerated or censured, depending on perspective and context. To give an example that is often used in criminology textbooks, killing someone is not always criminal, as, under conditions of war, it has quite a different meaning from under conditions of peace. It is the same behaviour but may be judged by the majority as justifiable in specific circumstances and therefore not *absolutely* wrong. Rules are formed for breaking rules (Edgerton 1985; Hinde 2007), in this case, the moral rule that values the life of another. At the other end of the spectrum, much has been written about the appropriateness (or otherwise) of forms of manners, etiquette and civility in different settings (e.g. Goffman 1963; Sennett 1974). For instance, eating with your fingers may be judged as acceptable in a fast-food outlet but less so in a Michelin-starred restaurant. Behaviour that is acceptable in one context is usually not acceptable in the other. In effect, behaviour is interpreted differently not just by different social or cultural groups, but also by the same people in different contexts.

These are familiar arguments; however, the aim of this article is to take these further by exploring the values behind such differential interpretations. For this, the article borrows from elements of moral philosophy. Value consensus and majoritarian assumptions of acceptability are questioned as well as consequences for what—or who—are judged to be valueless. I have argued elsewhere (Millie 2008) that behavioural acceptability can be differentially interpreted depending on place and time, on behavioural and aesthetic expectations for that place and time, and on perceived and actual harm or offence caused by the behaviour. I shall explore this process in more detail as a prelude to constructing a model of value judgment and criminalization. In the second part of the article, I consider value judgments and criminalization in a real-world setting. For this, I draw on a qualitative study of everyday criminalization in Toronto, Canada. The study, conducted during 2009, involved the triangulation of three related methodologies. First, documentation relating to relevant legislation, local policy and by-laws was examined. Second, semi-structured interviews were conducted with relevant personnel from the City of Toronto, Toronto Police, and a range of related activist and campaign groups (n = 15). All interviews were recorded, transcribed and then analysed for key and emerging themes. The interviews were drawn from an opportunistic sample gained through standard ‘snowballing’ techniques. The aim was to identify a range of interests and perspectives on behavioural acceptability in Toronto’s public spaces, rather than to be representative of a particular population. That said, the interviewees included some key

¹I use ‘behaviour’ as shorthand for actions or omissions, or ‘persons’ and ‘uses’ (cf. Valverde 2005) that could become criminalized.

decision makers (all were anonymized). The third method involved collating a photographic record of key locations and activities as identified during the interviews. But, before going any further, it is worth first examining people's differential interpretation of behaviour.

Differential Interpretation of Behaviour

According to Feinburg (1984; 1985), there are two principles that characterize criminalized activity, these being the harm principle and offence principle (see also Hillyard *et al.* 2004; von Hirsch and Simester 2006). In simple terms, behaviour becomes unacceptable and liable to censure if it is seen to cause sufficient harm or offence to the victim (individual, group, society at large, or environment). The harm principle is at first fairly uncontroversial, as many behaviours deemed to be criminal or civil offences clearly cause harm—be it physical, psychological, economic or environmental—from persistent nuisances or anti-social behaviours through to serious criminality. Yet, as noted, harmful behaviours are not *always* criminal. Drawing on critical scholarship (e.g. Marx 1887/2009; Box 1983; Hulsman 1986; Foucault 1996), social harm² scholars (e.g. Hillyard *et al.* 2004; Hillyard and Tombs 2007; Pemberton 2007) have taken this further in taking a view that 'crime' as socially constructed is too limiting a category of harm, that it tends to focus on 'many petty things' at the exclusion of 'many serious harms' (Hillyard and Tombs 2004: 12–13), such as as perpetrated by the state or by large corporations. For behaviour to be deemed as harmful *and* unlawful, not only is context important, but also power to define behavioural unacceptability.

Some behaviours are criminalized because they cause offence, a particularly problematic and subjective sub-set of harm. Determining offensiveness is a tricky business tied to issues of disgust, obscenity and moral (in)tolerance. In a liberal democracy, what is deemed morally offensive by society and by law is not static; for example, as Lord Devlin noted back in 1959 at a time when homosexuality between males was illegal in Britain, the law can also be inconsistent on such issues:

... it is difficult to ascertain any logical relationship between it [the law] and the moral ideas which most of us uphold. Adultery, fornication, and prostitution are not ... criminal offences: homosexuality between males is a criminal offence, but between females it is not. Incest was not an offence until it was declared so by statute only fifty years ago. (Lord Devlin 1959/1971: 24)

Assessments of offensiveness change not only over time, but between people and, as such, are subjective—despite the law's attempts at objectification. Put simply, what offends me may be different from what offends someone else; and what offends me now may not do so in the future. Being offended may even be good for me, as it challenges preconceptions; as Roberts (2006: 19) has noted, 'one should seriously entertain the possibility that to be offended from time to time, even wrongfully offended, might be socially beneficial and healthy for personal growth and well-being' (Roberts 2006: 19). Yet, some behaviours deemed offensive are generally regarded as not 'socially beneficial', including various forms of racially motivated or hate crime—although, again, this is something that has changed over time. According to Tasioulas (2006), offensive

²The study of social harm is sometimes called *zemiology* after the Greek for harm, *zemia*, although this term seems to have lost favour.

crimes have in common their moral wrongfulness (however defined), they are experienced (actually or threatened) and they occur in public rather than private space. Like broader assessments of harm, offence is context-specific and power-dependent.

Alongside perceived and actual harm and offence, behavioural expectations are also influenced by aesthetic expectations, namely people’s individual tastes and subjective and emotive values attached to sensory encounters (Millie 2008). I shall return to the example of aesthetics, but, to bring together what has been discussed thus far, shows the context specificity of behavioural acceptability (of people and of uses) and thereby of criminalization. It shows a differential interpretation perspective that behaviours occur within a place/time context and that there are behavioural and aesthetic expectations for that place, at that time. Assessments on whether the behaviour is celebrated, tolerated or censured result from whether the behaviour, in that situation, results in perceived or actual offence or harm to the individual or group in question.

As I go on to discuss, this is not the full picture; however, the schematic does point Figure 1 towards a particular problem. If each of us has a different assessment of behavioural acceptability, and this may change in different contexts, then who decides? The answer is tied in with notions of power and powerlessness and associated structural inequalities. Behavioural acceptability and normative compliance can depend on tradition, custom and reputation of place and time; however, they are also dependent on having power to decide and some people’s assessments are given greater weight than others. That said, it is not always clear who the powerful are or how mechanisms of power operate. According to Becker (1963), those with strong influence are the ‘moral entrepreneurs’, including various ‘crusading reformers’, campaign and lobby groups, industrialists, ‘experts’, media campaigners and politicians. Each will influence what is ultimately criminalized and in which context. There may be plural perspectives on behavioural acceptability, but only those with sufficient political capital or loudest voice will be listened to. In terms of resultant criminalization, it is important to consider the judgments behind such assessments on behavioural acceptability and what values are being promoted. It is to value judgment that I now turn.

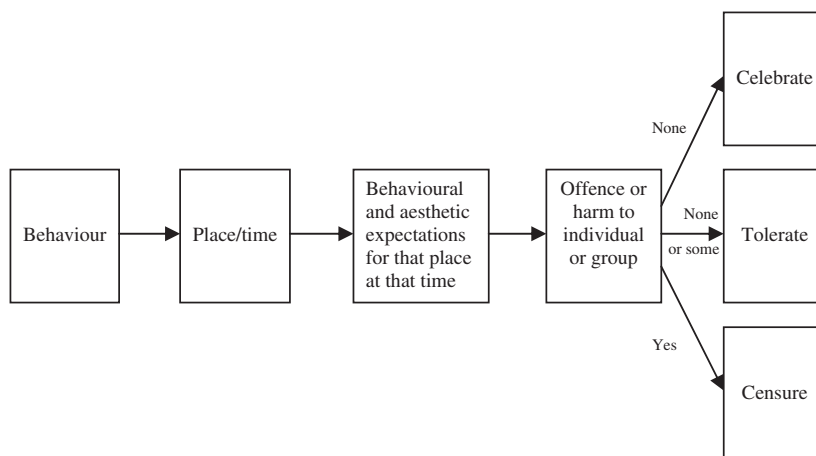


FIG. 1 A differential interpretation perspective (orig. Millie 2008: 389).

Value Judgments

Most decision-making processes are governed by some sort of judgment of value, from the prosaic to the life-changing. For instance, the question ‘should I buy an expensive new shirt?’ involves economic considerations (can I afford it?) as well as aesthetic and prudential judgments (will the shirt make me look good, and will it make my life better?). There may be even moral considerations (is it morally right to spend so much on a shirt, or is the shirt made using child labour?). What appears to be a simple decision can consist of a range of considerations. Judgments may be prejudiced or informed, magnanimous or selfish, the result of calculated rational decision making, or perhaps on-the-spot hedonistic. Whichever is the case, judgments of value are reliant on perception as much as on objective knowledge. The same is true for value judgments on behavioural acceptability, and thereby of criminalization. In order to understand better the notions of ‘value’ and ‘value judgment’ in this context, it is useful to consider briefly philosophical writings on the subject.

Value is an important element of moral philosophy, with the search for intrinsic ‘goodness’ being something that has been studied for centuries. In fact, whether something is deemed to be of intrinsic value (good in itself) or extrinsic value (good in relation to other things of value) has been a central concern—despite G. E. Moore’s famous intuitionism that ‘Good is good, and that is the end of the matter’ (Moore 1903/2005: 7).³ But what is the quality of ‘goodness’, and good for whom? For the hedonist, intrinsic value is assigned to pleasure, and anything else of value is extrinsically valuable because it leads to pleasure or makes pleasure more likely. For some, it is virtues such as justice or truth; for others, it is love or perhaps knowledge, with extrinsic value or ‘goodness’ assigned to things/behaviours/people/ideas because they further knowledge and understanding. For the capitalist, it is wealth; for the aesthete, it is beauty. There are clearly a number of competing perspectives (see, e.g. Lemos 1995; Griffin 1996; Rønnow-Rasmussen and Zimmerman 2005). William David Ross (1930/2002) adopted an axiological pluralist⁴ view that there is not just one intrinsic value, but rather several ‘irreducible’ things. Continuing the earlier argument that people interpret behaviours differently, it follows that people have also plural conceptions of value. What values dominate will depend not only on context and power, but also on philosophy—what actions or omissions are seen as intrinsically or extrinsically ‘good’ by individuals, groups, governments, corporations or society at large.

For Perry (1926/2007), value is attributed to any object of any interest. In effect, it is because we are interested in something that it has value. Conversely, certain behaviours or uses are deemed to lack value and, in the current context, this can have criminalizing consequences. That something is valuable *because it is desired* is what Griffin (1996) terms the *taste* model. Griffin also proposes a *perception* model that turns this around, that something is desired *because it is valuable*. Whichever way round (and both processes probably work in tandem), it seems that perception, taste and desire are integral to the attribution of value. Value becomes a qualitative concept with plural interpretations—with different people conferring different forms and degrees of value (cf. Lamont 1955) to different things in different contexts. Conversely, people have

³G. E. Moore’s ‘naturalistic fallacy’, in *Principia Ethica* (1903/2005).

⁴‘Axiology’ being the philosophical study of value (e.g. Ross 1930/2002; Wellman 1975).

different conceptions of what or who are valueless. It seems that value judgments can be categorized under four headings, these being: moral, prudential, economic and aesthetic judgments—although these are not mutually exclusive or discrete. In the next section, each of these forms of judgment is looked at in turn.

Moral judgment

Criminology has long been interested in moral judgments and with ‘moral panics’ in particular (e.g. Cohen 1972). On this subject, Goode and Ben-Yehuda (2009: 110–11) have taken a relativist perspective in stating that ‘Morality is relative geographically and culturally, historically and temporally, situationally and subculturally’ (Goode and Ben-Yehuda 2009: 111). An example they use is of adultery leading to stoning in Iran, but in Sikhism being ‘tolerated, often encouraged and even, upon occasion, rewarded’ (Goode and Ben-Yehuda 2009: 111). Moral judgments can clearly lead to quite different outcomes. Such a relativist and constructivist view of morality is open to criticism, especially from critical realist philosophers (e.g. Bhaskar 1975; Archer *et al.* 1998), who argue that such a view denies the possibility of an objective reality. Furthermore, if everything is relative, then there is no possibility of being proved wrong. Yet, in this article, I argue that context and power are vital in determining behavioural acceptability and in determining how morality is acted out. In an idealized world, there may be absolute moral wrongs, such as that rape or slavery are not acceptable under *any* circumstances. However, if those with sufficient political capital think otherwise, then even these become negotiable. Thus, what I argue is not a version of ‘relative truth’ or metaethical relativism, in which simply ‘what is true for one person (or society) might not be true for another person (or society)’ (Carson and Moser 2001: 2). Rather, I take a contextually constructivist view, that what is constructed to be of value by those with power will vary by context. This is different from saying that such values are always intrinsically ‘good’ (and, similarly, actions or omissions that challenge these values are in all situations intrinsically ‘bad’). Goode and Ben-Yehuda’s (2009) example of adultery shows differential interpretation of the same behaviour based on the political capital of religion. For Western liberal democracies, there may be religious influence, but also majoritarian or utilitarian assumptions of what is morally right or wrong. Yet, problems occur if the majority hold prejudicial views, or if assumptions on what the majority want or need are discriminatory. Moral ‘rightness’ can also be decided on humanitarian grounds, or based on issues of rights; but, again, it is a question of who decides and whose rights take precedence.

Prudential judgment

According to Griffin, a second form of value judgment is prudential judgment, although he also claims that ‘it is impossible to make a sharp cut between prudence and morals’ (Griffin 1996: 19). For Griffin, prudential judgments concern ‘everything that makes a life good simply for the person living it’ (Griffin 1996: 19). In simple terms, prudential judgments relate to issues of personal quality of life. In the context of the current article, someone is less likely to tolerate behaviour and more likely to recommend censure if it interferes with this personal quality of life. For Griffin, prudential judgments relate to issues of accomplishment and what he calls ‘the components of human existence’ or

'[c]hoosing one's own course through life' (Griffin 1996: 29). Furthermore, prudential judgments may concern personal understanding, enjoyment or 'deep personal relations' of friendship and love (Griffin 1996: 30). Disapproval of certain behaviours is due to their assumed detrimental impact on such quality-of-life concerns. Assessments of prudential value may also impact on criminalization. In fact, minor incivilities are frequently also labelled as 'quality of life crimes' due to their perceived impact on what 'makes life good' (cf. Griffin 1996: 19). This is especially so in the United States, where, according to Bill Bratton (1995), local-level concerns are not focused on serious criminality, but rather 'problems of a different kind, namely street prostitution, low-level drug dealing, underage drinking, blaring car radios and a host of other quality-of-life crimes that contribute to a sense of disorder and danger on the street' (Bratton 1995: 447–8). For Ellickson (1996), similar concerns are 'chronic street nuisances' such as overnight sleeping in public parks or 'aggressive' panhandling. In the United Kingdom, these have been re-cast as anti-social behaviours (Burney 2005; Millie 2009*a*; 2009*b*) with assessments of what is anti-social leading to exclusion and possible imprisonment. Judgments on what contributes or takes away from quality of life can have severe consequences.

Economic judgment

The third type of judgment is economic judgment. In the earlier example of buying an expensive shirt, the economic judgment was only whether I could afford it. While economic judgments are important for such everyday decisions, in a capitalist society, they can dominate all other considerations and lead to the censure and criminalization of a range of disparate activities. Decisions can be based on whether someone or something makes an acceptable economic contribution to society. An example is migration policy, which is largely dictated by the potential economic contribution of anyone wanting to come into a country.⁵ An economic judgment is made with criminalizing consequences for those who do not make the list of accepted migrants. At the other end of the spectrum, corporate criminality by large multinationals may be 'overlooked' by the state if prosecution is not seen to be in the economic interests of the nation (e.g. Whyte 2007). In such cases, economic judgment leads to the decriminalization of otherwise seriously criminal activity.

Economic judgment is central to a Marxist perspective on criminology where whole classes are seen to be criminalized if they hinder the capitalist machine, with 'problem populations' seen in terms of 'the threat and costs that they present to the social relations of production' (Spitzer 1975: 642). Within an urban setting, revanchist processes of revitalization and gentrification replace such problem (and poor) populations with new consuming—and politically more powerful—middle classes (Smith 1996). And, furthermore, in a world of Business Improvement Districts and Urban Enterprise Zones, those who populate the street but do not significantly contribute economically find their presence criminalized (e.g. Coleman 2004). However, you do not need to be Marxist to recognize the exclusionary nature of economic enterprise. For instance, in shopping malls, certain forms of loitering have always been discouraged (by street people, young people and various other unwanted populations). If you are not there to spend, then

⁵Asylum policy may, of course, be different.

your presence is questioned and security guards may ask you to move on. The presence of those not there to shop may also disturb the neo-liberal aesthetic of shopping (Millie 2008) and it is to aesthetic judgments that I now turn.

Aesthetic judgment

The fourth type of value judgment is aesthetic judgment (see, e.g. Young 2005; Ferrell 2006; Millie 2008). Much philosophical writing on aesthetics is concerned with arts appreciation and, according to Bourdieu (1979/1984), clear social snobbery tracks a progression of aesthetic taste from ‘popular’, through ‘middle-brow’ to ‘legitimate’. I have argued elsewhere (Millie 2008) that there can be criminalizing consequences for what is regarded as illegitimate—for instance, with only some forms of graffiti being sub-popular and criminalized (and other more aesthetically acceptable forms, such as the use of stencils by Banksy and others, gaining legitimacy and celebrated). But aesthetics is not restricted to arts appreciation. For instance, aesthetic judgment has also been an important element in understanding landscape. In eighteenth-century Britain, William Gilpin (1786) famously developed ideas on what makes a landscape picturesque or sublime. At the same time, Lancelot ‘Capability’ Brown was busy re-engineering entire landscapes into ‘beautiful’ backdrops for the wealthy. If farms or villages spoil the view, they were moved or destroyed. Today, there are still aesthetic controls on uses or persons in the country, ranging from land-use planning through to limits on people deemed ‘inappropriate’. In Britain, despite ‘right to roam’ legislation,⁶ there are still formal and informal controls on where people can go and what they can do in the countryside. Furthermore, more severe controls can be experienced by Gypsies, Roma and Travellers perceived as ‘inappropriate’ for a picture of a rural idyll (Halfacree 1996; James 2007).

Of course, landscapes are not only rural, but also urban, where planning policies based, among other things, upon aesthetic principles can govern the acceptability or otherwise of development. Again, there may be criminalizing consequences for anything deemed unacceptable or not fitting a prescribed aesthetic. For instance, in *The Last Landscape* (1968), William H. Whyte highlighted the importance of saving open spaces in American cities. Alongside health and other socio-psychological benefits assumed of such spaces, there are also aesthetic gains. For Whyte (1968), the question was ‘To what degree can we use the police power to order better land use—and to what degree do we have to use eminent domain, that is, pay for it?’ (Whyte 1968: 35). At that time, possible answers came in the form of zoning ordinances and taxes.

Aesthetic judgment is also important to everyday decisions and everyday criminalization. Influenced by Lefebvre’s (1985) concept of ‘everyday life’, a branch of aesthetics has emerged labelled ‘everyday aesthetics’ (Light and Smith 2005; Saito 2007) and takes the philosophical study of aesthetics away from conventional art to everyday objects, events and encounters. For instance, in terms of everyday criminalization, a degree of public drunkenness may be tolerated by the majority out in a city centre during the evening, as it fits in with an aesthetic of the night-time economy; however, similar behaviour may not be acceptable at the same location at midday, especially if those doing the consuming are untidy-looking street drinkers. Despite displaying similar behaviour, their presence does

⁶Countryside and Rights of Way Act 2000 and the Land Reform (Scotland) Act 2003.

not fit in with a neat and ‘civilized’ shopping aesthetic and they are therefore moved on or worse (e.g. Beckett and Herbert 2010). Similarly, certain forms of visible street protest are discouraged (Staehele and Mitchell 2008), and young people congregating in groups are seen as a visible threat to urban civility (Millie 2008). In effect, there are specific aesthetic expectations for particular places and for particular times, leading to censure for uses or persons that do not fit in, be it the wrong type of graffiti, ‘un-aesthetic’ development in rural and urban landscapes, traveller camps in the ‘wrong’ place or street drinkers in a shopping mall. As with moral, prudential and economic judgments of value, context and power are everything.

Modelling Value Judgment and Criminalization

As noted, the different types of value judgment are not necessarily mutually exclusive or discrete and, like the earlier example of buying an expensive shirt, judgments can involve a combination of values. For instance, a judgment on the unacceptability and criminalization of street people in a shopping mall may involve aesthetic, economic, moral and prudential considerations. I may not agree with the argument, but considerations could include whether street people fit in with the look and feel of the mall (aesthetic); whether street people distract the consuming majority from shopping (economic); whether they have a negative impact on the quality of life of the majority (prudential); and is it right for people to live on the street anyway (moral).

What I hope to have demonstrated in the discussion thus far is the importance of considering the value judgments behind the criminalization process. Figure 2 brings these different types of judgment together in a model of value judgment and criminalization. The model is a development of the differential interpretation perspective shown in Figure 1.

Like the earlier differential interpretation perspective, the model focuses on behavioural expectations (including expectations of people and uses) that each behaviour

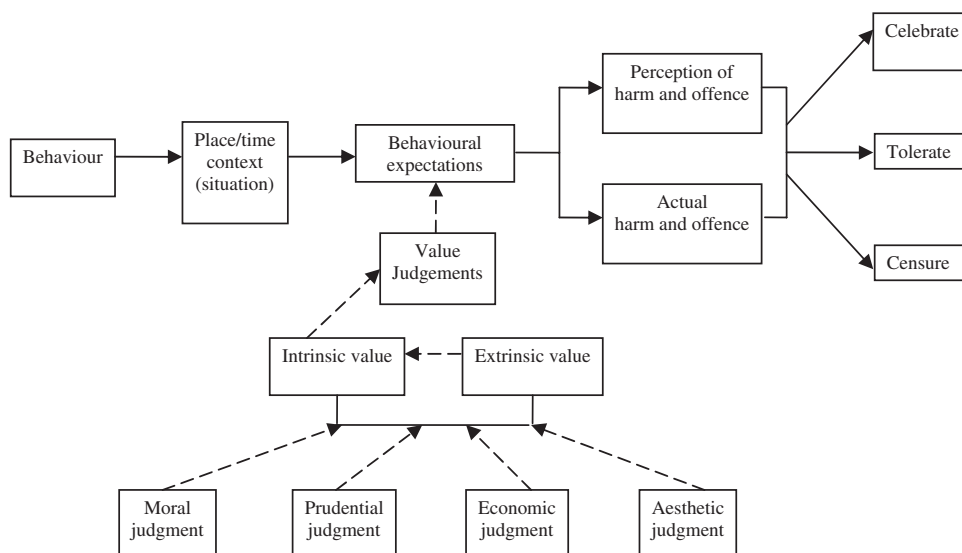


FIG. 2 A model of value judgment and criminalization.

occurs in a place/time context and there are specific expectations for that place at that time. What is new is that a person's or group's behavioural expectations are seen to be informed by a combination of intrinsic and extrinsic value judgments, including moral, prudential, economic and aesthetic judgments that are particular to that behaviour in that context. These judgments inform the assessment of whether the behaviour has caused or is likely to cause perceived or actual harm or offence. The result of this judgment is whether the behaviour is celebrated, tolerated or censured.

It is clearly not a simple process; yet, when examining criminalization, it is important to include consideration of the value judgments behind the criminalization. It is only through considering such judgments that we can begin to understand why some people or uses are criminalized and others not, or why some are criminalized only in specific circumstances. In the second part of this article, I apply this model to a real-world setting. The example used is drawn from a study of everyday criminalization processes in Toronto, Canada.

Value Judgments and Everyday Criminalization in Toronto

The initial focus for the Toronto study was the impact of aesthetics on everyday criminalization. While aesthetic judgments were certainly important, it was found that they were interwoven with other forms of judgment. To give an example, a prominent City of Toronto policy was its 'Clean and Beautiful City' initiatives (since renamed 'Beautiful Streets Programs'), which aimed to make Toronto a better and more beautiful place to live by, 'working together on community gardens, murals, community clean-ups and graffiti removal' (City of Toronto 2009). According to the campaign website, 'Beauty is essential in building a prosperous, safe and liveable Toronto' (City of Toronto 2009). This one statement contains a combination of aesthetic ('beauty'), economic ('prosperous') and prudential ('liveable') value judgments; and by linking these to issues of safety, there are possible criminalizing consequences for people or uses not deemed to be a 'beautiful' contribution to the city. Of the activities listed, I focus on the example of graffiti removal and mural creation. I also use the examples of controls on panhandling and the legality (or otherwise) of billboards and street posters. These are clearly not the only concerns in Toronto, but are used to illustrate how differing value judgments can come together in everyday criminalizing processes.

Toronto graffiti and murals

The official view, according to the City of Toronto Clean and Beautiful City Program, was that graffiti should be removed. Campaign posters appeared across the city with the slogan 'Give graffiti the brush off' and this was backed by a City of Toronto Police 'Graffiti Eradication Program'. The message was simple, that there was no place for graffiti in the city. Yet, the value judgments behind this view were not only aesthetic, but also economic and prudential (and maybe even moral). For instance, according to a police officer working on the Eradication Program:

If there is a palpable trend in Toronto that it is crime ridden and dirty and full of refuse and graffiti vandalism, and that manifests itself through tourists coming here and relating it to other friends and relatives, media stories, articles by tourist agencies, 'oh don't go to Toronto, it's crime ridden', we don't have that infrastructure coming in. We want the tourism money, that's the one way we want it to be a clean, beautiful city. (Toronto Police Officer 1)

For this officer, economic judgment was part of the justification for tackling graffiti, in that ‘we want the tourism money’. Elsewhere in the City of Toronto Police, other officers were working on a ‘Legal Graffiti’ initiative centred on involving young people in the creation of graffiti-style murals. The view of an officer working on this ‘Legal Graffiti’ initiative was different:

... let’s get the kids that are getting in trouble for skipping school, and smoking drugs in the laneways at lunch or doing a little vandalism graffiti, it’s no secret who these guys are. Instead of putting them in handcuffs and sending them to jail, let’s bring them into these projects that we’re going to do, where we’re going to go banging on everybody’s door, and get permission to remove their vandalism graffiti ... And at the same time, if you’re an artist or you’ve got friends that’s an artist, let’s give the artist an opportunity. So let’s ask some property owners if they’ll go for a mural, in whatever style you want to do, with some creative license. (Toronto Police Officer 2)

The distinction between graffiti vandalism that is criminalized and graffiti-style murals that are approved becomes a grey area. First, does the graffiti/mural have the permission of the property owner? Second, have there been any complaints? Municipal law is frequently complaint-driven and so this is clearly important. Complaints can be informed by the range of aesthetic, economic, prudential or moral value judgments and, as noted, it is often those with sufficient political capital who are heard the most, be they individuals or corporations with greater access and knowledge of ‘the system’. According to a 2005 City of Toronto by-law on graffiti,⁷ an art mural is defined as ‘A mural for a designated surface and location that has been deliberately implemented for the purpose of beautifying the specific location’. Thus, aesthetic judgment is central to the legal designation, although whose aesthetic judgment is not clear. Some graffiti have been designated as murals retrospectively, whereas other pieces have been declared as graffiti—and as illegal—and the property owners asked to paint them over.⁸ There is also a spatial aspect to decisions of acceptability. For instance, if graffiti are seen in the main shopping or business districts or in more exclusive neighbourhoods, then there are likely to be complaints from corporations and individuals with power. Yet, if the graffiti occur in more ‘alternative’ districts (in Toronto including Queen Street West and Kensington Market), then complaints are less likely; in fact, the graffiti and murals are seen to contribute to ‘alternative’ districts attracting tourists—in effect, those with power *want* the graffiti. The result is that there are contextual differences in the application of the law principally derived from aesthetic and economic value judgments.

Toronto panhandling

The second example is the control of panhandling in Toronto. The 1999 Ontario Safe Streets Act introduced restrictions specifically targeted at the activities of panhandlers and ‘squeegee kids’ that come up to your car and offer to clean your windscreen for a small fee (see O’Grady and Bright 2002).⁹ The relevant sections of this legislation focused on soliciting ‘in an aggressive manner’ or ‘a captive audience’. More specifically,

⁷No. 123–2005.

⁸Under City of Toronto by-law 123-2005, the onus is on the property owner to remove the graffiti or to pay for the removal.

⁹‘Squeegee kids’ were much more common when the Safe Streets Act was enacted. However, at the time of the author’s fieldwork in 2009, the practice still occurred, witnessed at the heart of one of Toronto’s main ‘alternative’ districts at the corner of Queen Street West and Spadina Avenue.

according to ss. 2 and 3 of the Act, to solicit is to ‘request, in person, the immediate provision of money or anything of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, or gesture or other means’. This definition is so all-encompassing that, according to Hermer and Mosher (2002), it ‘leaves open the question of whether a visibly indigent person—a homeless person who looks to be in a desperate, destitute state that evokes need and want—would be considered to be soliciting *simply by being present* in the wide array of spaces’ (Hermer and Mosher 2002: 13, original emphasis). Perhaps, then, the panhandler is aggressively present? The effect is that interpretation of behaviour or presence is down to the discretion of the police officer; and like controls on graffiti, this may be influenced by complaints from the powerful. The Act was later challenged in *Rv. Banks* [2007 ONCA 19] as being unconstitutional and discriminatory—although the challenge was unsuccessful.

The City of Toronto attempted less punitive approaches, including the building of homeless shelters. According to a senior officer interviewed from the City’s Transportation Services/Right of Way Management, the City’s responsibility is not enforcement; rather, it is to ‘make sure that they’re safe and make sure that somebody works with them’ (City of Toronto Officer 1). According to Ranasinghe and Valverde (2009: 2), the legal options open to the City of Toronto in providing shelters are limited, that Canadian municipalities ‘rely heavily on zoning, one of the few legal tools they have at their disposal’. Ranasinghe and Valverde (2009) observe that:

Land use law (of which zoning is the most important component) has never been about substantive democracy, equality or social justice Rather, land use law, since its inception, has worked primarily to protect property values, segregate certain ‘undesirable’ uses of land, and generally, to constitute an urban space that is highly differentiated. (Ranasinghe and Valverde 2009: 2)

The dominant value judgment is an economic one of protecting property prices. However, it is also prudential, aesthetic and moral in that uses deemed to be incompatible are segregated. Furthermore, public participation is part of any zoning decision; however, ‘given that rights in land-uses are tied to property, it is usually the case that those groups who end up influencing particular land uses are those who have legal occupancy’ (Ranasinghe and Valverde 2009: 3). Again, it is a question of political capital and the homeless themselves are not included and homeless advocates have less of a voice than residents’ groups. Influencing value judgments can therefore become somewhat lopsided and may include elements of ‘nimbyism’ and moral intolerance of street people.

In terms of service provision to homeless people on the street, the City of Toronto officer cited above also noted that those in the Downtown area might receive attention first:

It may be that one that is in the Downtown will probably be the first one to be dealt with than the one that is, sort of, a little bit outside the Downtown. But you know, eventually they will get to that individual as well. . . . Because of the heavy volume of traffic, I would say, and pedestrian traffic. (City of Toronto Officer 1)

It is claimed that priority is given to the Downtown because of the volume of traffic. While there may be concerns for the street person’s safety, I would suggest it may also be due to aesthetic and economic concerns. Further to this is the added pressure on street people from the proliferation of private security guards managing semi-public and private spaces in the major Downtown retail and business districts, resulting in the displacement of visible street people to less ‘public’ districts.

Toronto billboards and posters

The third issue concerns the legality and acceptability of commercial billboards and informal postering in Toronto, examples of which are shown in Figure 3. The informal postering tends to occur specifically on street sign and utility poles (rather than fly-posting in general, which is on any surface) and is most common around the universities and ‘alternative’ districts. Under Toronto Municipal Code (City of Toronto 2008), there were existing by-law controls on the location, size and content of advertising billboards and temporary signs. The controls on temporary signs included limitations on the number and location of signs erected by community organizations (including charities, religious institutions and schools). Thus, billboard and poster advertising—whether by large multinationals or by community groups—that was in an unauthorized location, was the wrong size or contained unauthorized content was criminalized under municipal law.

As noted, municipal law is frequently complaint-driven and so, in ‘alternative’ districts, the informal postering was not a major issue. However, illegal billboard advertising was picked up as an issue by local activist groups¹⁰ who highlighted instances in which the law had been breached. Members of such groups were motivated by anti-capitalist economic judgment; however, aesthetics were also clearly important. For instance, the view of one activist who focused attention on illegal billboards was as follows:

... the important thing is we're not law enforcement activists. We're not asking the city to enforce every one of its laws. ... We think that would result in a lot of injustices. For example there is a lot of street art that's quite frankly illegal that we think contributes to a beautiful city. There's lots of graffiti that we think contributes to a beautiful city. There is err, there's posters that advertise non-profit community



FIG. 3 Poster advertising and billboards, Toronto.

¹⁰See www.beautifulcity.ca.

groups that we think are important, and technically they would violate a city by-law. We're not out there as law enforcement activists, we're out there to specifically target corporate speech. (Local Activist 1)

For this activist, value judgment on the unacceptability of illegal commercial billboards was both economic and aesthetic. Informal posters (as well as a lot of graffiti and street art) were fine, as they contributed to a 'beautiful city'. However, not all informal posterage was by community groups and included, for instance, adverts for nightclubs and bars, as well as for essay-writing services—especially near the universities. As noted for graffiti, informal posterage would be less acceptable in the main shopping and business districts or in more exclusive neighbourhoods.

While the example of billboards and posters may not be the most pressing issue in most cities, it again highlights the value judgments involved in criminalization processes, and the political capital needed to influence criminalization. Following pressure from activists, in December 2009, the Toronto City Council approved a new 'Sign By-law' and 'Third Party Sign Tax' (City of Toronto 2010). The tax would be used 'to raise revenue for funding enhanced enforcement, arts and culture, and other city beautification initiatives'. Also, in an attempt to tidy the streets, the City has considered the use of officially designated walls or kiosks for community messaging/posters.

Conclusions

As noted in the introduction, it has been argued that there is a 'crisis of criminalization' in liberal democracies (Duff 2010), what has been termed a state of 'overcriminalization' (Husak 2008). Whilst criminalization is clearly an important theme in criminology, there has been little attention on the value judgments behind processes of criminalization. It is through trying to understand *why* some behaviours and uses are criminalized and in what contexts that we can begin to address overcriminalization. Identifying these processes, as well as who has sufficient political capital to dictate values, is a useful place to start. By drawing on elements of moral philosophy and by applying these ideas to everyday criminalization processes in Toronto, I have taken a small step towards addressing this omission.

The article has adopted a pluralist and social constructivist perspective where the same behaviour may be celebrated, tolerated or censured, depending on context and power. In constructing a model of value judgment and criminalization, it is suggested that each behaviour occurs in a place/time context and that there are behavioural expectations specific to that context. These behavioural expectations are informed by a combination of intrinsic and extrinsic value judgments, including moral, prudential, economic and aesthetic judgments. The resulting judgment will determine whether the behaviour causes or is likely to cause perceived or actual harm of offence; and the result of this assessment determines whether the behaviour is celebrated, tolerated or censured (and criminalized).

It is not a simple process; yet, it is only through considering the context and the value judgments behind the criminalization that we can begin to understand why some people and uses are criminalized and others not, or why some are criminalized only in specific circumstances. As noted, if each of us has a different assessment of behavioural acceptability and this may change in different contexts, then who decides? While behavioural acceptability and normative compliance can depend on tradition, custom and reputation, those with greatest political capital are those that hold the power. Furthermore,

while public consultation is deemed to be desirable, this rarely reaches the ‘hard to reach’ (Jones and Newburn 2001), invariably canvassing the ‘worried well’ or, worse, only those with specific interests or agendas, as found in Toronto, when the City tried to build homeless shelters but only ‘those who have legal occupancy’ having influence (Ranasinghe and Valverde 2009: 3).

By focusing on everyday criminalization in Toronto, I hope to have shown how different forms of value judgment can apply to criminalization processes—even the apparently minor. For instance, judgment on acceptability or criminalization of graffiti and murals was principally determined by economic and aesthetic considerations. For panhandling, the value judgments behind the criminalization seemed to be a combination of moral, prudential, economic and aesthetic judgments. For the billboards and posters, it tended to be aesthetic and economic (including anti-capitalist) judgment. In this particular example, there was a three-way split on who had the biggest influence between the City, the advertising/billboard companies and the anti-billboard campaigners; and with the introduction of a ‘sign tax’, it seems the campaigners may have won.

The article has highlighted the usefulness of philosophical debate to criminology, what Arrigo and Williams (2006) call a *philosophical criminology*. Yet, what I have presented is only a first step in understanding relationships between value judgments and criminalization. Potential future steps could include consideration of how different forms of value judgment are prioritized, or examination of assessments of degrees of goodness (and badness) and their criminalizing consequences. Furthermore, empirical work is needed to consider the extent that people take moral, prudential, economic and aesthetic considerations into account in their assessments of behavioural acceptability and of what is (or should be) criminalized. What this article has highlighted is that value consensus and majoritarian assumptions of acceptability ought to be questioned, and that context and power are central to processes of criminalization.

Funding

Canada–Europe Award granted by the International Council for Canadian Studies.

ACKNOWLEDGEMENTS

I would like to thank the anonymous reviewers for their helpful comments. The Toronto study was conducted in 2009 whilst I was a Visiting Fellow at the Centre of Criminology, University of Toronto. At the Centre of Criminology, I am particularly grateful to Mariana Valverde and Ron Levi. I would also like to thank all those who were interviewed as part of the Toronto study.

REFERENCES

- ARCHER, M., BHASHKAR, R., COLLIER, A., LAWSON, T., and NORRIE, A., eds (1998), *Critical Realism: Essential Readings*. London: Routledge.
- ARRIGO, B. A. and WILLIAMS, C. R., eds (2006), *Philosophy, Crime, and Criminology*. Urbana, IL: University of Illinois Press.
- BECK, U. (1992), *Risk Society: Towards a New Modernity*. London: Sage.
- BECKER, H. S. (1963), *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press.

- BECKETT, K. and HERBERT, S. (2010), *Banished: The New Social Control in Urban America*. Oxford: Oxford University Press.
- BHASKAR, R. (1975), *A Realist Theory of Science*. Leeds: Leeds Books.
- BOURDIEU, P. (1979/1984), *Distinction: A Social Critique of the Judgement of Taste*, (trans. R. Nee) Cambridge, MA: Harvard University Press.
- BOX, S. (1983), *Power, Crime and Mystification*. London: Tavistock.
- BRATTON, W. J. (1995), 'The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes', *Journal of Law and Policy*, 3: 447–64.
- BURNEY, E. (2005), *Making People Behave: Anti-Social Behaviour, Politics and Policy*. Cullompton: Willan.
- CARSON, P. K. and MOSER, T. L., eds (2001), *Moral Relativism: A Reader*. New York: Oxford University Press.
- City of Toronto (2008), *Municipal Code Chapter 693: Signs*, 30 October 2008, available online at www.toronto.ca/legdocs/municode/1184_693.pdf.
- (2009), 'A Clean and Beautiful City ... Ours to Share', City of Toronto Website, available online at www.toronto.ca/cleanandbeautiful/.
- (2010), 'Sign Bylaw Project', City of Toronto Website, available online at www.toronto.ca/signbylawproject/index.htm.
- COHEN, S. (1972), *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*. London: MacGibbon and Kee Ltd.
- COLEMAN, R. (2004), *Reclaiming the Streets: Surveillance, Social Control and the City*. Cullompton: Willan.
- DEVLIN, LORD. PATRICK. (1959/1971), 'Morals and the Criminal Law', in R. A. Wasserstrom, ed., *Morality and the Law*. Belmont, CA: Wadsworth.
- DUFF, R. A. (2010), 'Towards a Theory of Criminal Law?', *Aristotelian Society Supplementary Volume*, 84: 1–28.
- EDGERTON, R. B. (1985), *Rules, Exceptions, and Social Order*. Berkeley, CA: University of California Press.
- ELLICKSON, R. C. (1996), 'Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning', *The Yale Law Journal*, 105: 1165–248.
- ERIKSON, K. T. (1964), 'Notes on the Sociology of Deviance', in H. S. Becker, ed., *The Other Side: Perspectives on Deviance*. New York: The Free Press.
- FEINBURG, J. (1984), *Harm to Others: The Moral Limits of the Criminal Law Vol. 1*. New York: Oxford University Press.
- (1985), *Offense to Others: The Moral Limits of the Criminal Law Vol. 2*. New York: Oxford University Press.
- FERRELL, J. (2006), 'The Aesthetics of Cultural Criminology', in B. A. Arrigo and C. R. Williams, eds, *Philosophy, Crime and Criminology*. Urbana, IL: University of Illinois Press.
- FOUCAULT, M. (1996), 'Strategies of Power', in W. Truett Anderson (ed.), *The Fontana Post-Modernism Reader*. London: Fontana Press.
- GILPIN, W. (1786), *Observations, Relative Chiefly to Picturesque Beauty, Made in the Year 1772: Particularly the Mountains and Lakes of Cumberland and Westmoreland, Vol. 1*. London: R. Blamire.
- GOFFMAN, E. (1963), *Behavior in Public Places: Notes on the Social Organization of Gatherings*. New York: The Free Press.
- GOODE, E. and BEN-YEHUDA, N. (2009), *Moral Panics: The Social Construction of Deviance*. Chichester: Wiley-Blackwell.

- GRIFFIN, J. (1996), *Value Judgement: Improving our Ethical Beliefs*. Oxford: Clarendon Press.
- HALFACREE, K. H. (1996), 'Out of Place in the Country: Travellers and the "Rural Idyll"', *Antipode*, 28: 42–72.
- HAYWARD, K. and YOUNG, J. (2007), 'Cultural Criminology', in M. Maguire, R. Morgan and R. Reiner, eds, *The Oxford Handbook of Criminology*. 4th edn. Oxford: Oxford University Press.
- HERMER, J. and MOSHER, J., eds (2002), *Disorderly People: Law and the Politics of Exclusion in Ontario*. Halifax, Nova Scotia: Fernwood Publishing.
- HILLYARD, P. and TOMBS, S. (2004), 'Beyond Criminology?', in P. Hillyard, C. Pantazis, S. Tombs and D. Gordon, eds, *Beyond Criminology: Taking Harm Seriously*. London: Pluto Press.
- (2007), 'From "Crime" to Social Harm?', *Crime, Law & Social Change*, 48: 9–25.
- HILLYARD, P., PANTAZIS, C., TOMBS, S. and GORDON, D. (2004), *Beyond Criminology: Taking Harm Seriously*. London: Pluto Press.
- HINDE, R. A. (2007), *Bending the Rules: The Flexibility of Absolutes in Modern Life*. Oxford: Oxford University Press.
- HULSMAN, L. H. C. (1986), 'Critical Criminology and the Concept of Crime', *Contemporary Crises*, 10: 63–80.
- HUSAK, D. (2008), *Overcriminalization: The Limits of the Criminal Law*. Oxford: Oxford University Press.
- JAMES, Z. (2007), 'Policing Marginal Spaces: Controlling Gypsies and Travellers', *Criminology and Criminal Justice*, 7: 367–89.
- JONES, T. and NEWBURN, T. (2001), *Widening Access: Improving Police Relations with Hard to Reach Groups*, Home Office Police Research Series Paper 138. London: Home Office.
- LAMONT, W. D. (1955), *The Value Judgement*. Edinburgh: Edinburgh University Press.
- LEFEBVE, H. (1985), *Everyday Life in the Modern World*, (trans. S. Rabinovitch). New Brunswick: Transaction Publishers.
- LEMONS, R. M. (1995), *The Nature of Value: Axiological Investigations*. Gainesville, FL: University Press of Florida.
- LIGHT, A. and SMITH, J. M. (2005), *The Aesthetics of Everyday Life*. New York: Columbia University Press.
- MARX, K. (1887/2009), 'Capital: A Critical Analysis of Capitalist Production, Vol. 1', reproduced in D. Whyte, ed., *Crimes of the Powerful: A Reader*. Maidenhead: Open University Press.
- MILLIE, A. (2008), 'Anti-Social Behaviour, Behavioural Expectations and an Urban Aesthetic', *British Journal of Criminology*, 48: 379–94.
- (2009a), *Anti-Social Behaviour*. Maidenhead: Open University Press.
- (2009b), *Securing Respect: Behavioural Expectations and Anti-Social Behaviour in the UK*. Bristol: The Policy Press.
- MOORE, G. E. (1903/2005), *Principia Ethica*. New York: Barnes and Noble.
- O'GRADY, B. and BRIGHT, R. (2002), 'Squeezed to the Point of Exclusion: The Case of Toronto Squeegee Cleaners', in J. Hermer and J. Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario*. Halifax, Nova Scotia: Fernwood Publishing.
- PEMBERTON, S. (2007), 'Social Harm Future(s): Exploring the Potential of the Social Harm Approach', *Crime, Law & Social Change*, 48: 27–41.
- PERRY, R. B. (1926/2007), *General Theory of Value*. Oxford: Oxford University Press.
- RANASINGHE, P. and VALVERDE, M. (2009), 'The Toronto Shelter Zoning By-Law: Municipal Limits in Addressing Homelessness', in J. D. Hulchanski, P. Campsie, S. B. Y. Chau, S. W.

- Hwang and E. Paradis, eds, *Finding Home: Policy Options for Addressing Homelessness in Canada*. Toronto, Ontario: Cities Centre, University of Toronto.
- ROBERTS, P. (2006), 'Penal Offence in Question: Some Reference Points for Interdisciplinary Conversation', in A. von Hirsch and A. P. Simester, eds, *Incivilities: Regulating Offensive Behaviour*. Oxford: Hart Publishing.
- RØNNOW-RASMUSSEN, T. and ZIMMERMAN, M. J., eds (2005), *Recent Works on Intrinsic Value*. Dordrecht, Netherlands: Springer.
- ROSS, W. D. (1930/2002), *The Right and the Good*. (ed. P. Stratton-Lake). Oxford: Clarendon Press.
- SAITO, Y. (2007), *Everyday Aesthetics*. Oxford: Oxford University Press.
- SENNETT, R. (1974), *The Fall of Public Man*. Cambridge: Cambridge University Press.
- SMITH, N. (1996), *The New Urban Frontier: Gentrification and the Revanchist City*. London: Routledge.
- SPITZER, S. (1975), 'Toward a Marxian Theory of Deviance', *Social Problems*, 22: 638–51.
- STAEHELI, L. A. and MITCHELL, D. (2008), *The People's Property: Power, Politics and the Public*. New York: Routledge.
- TASIOULAS, J. (2006), 'Crimes of Offence', in A. von Hirsch and A. P. Simester, eds, *Incivilities: Regulating Offensive Behaviour*. Oxford: Hart Publishing.
- VALVERDE, M. (2005), 'Taking "Land Use" Seriously: Toward an Ontology of Municipal Law', *Law, Text, Culture*, 9: 34–59.
- VON HIRSCH, A. and SIMESTER, A. P., eds (2006), *Incivilities: Regulating Offensive Behaviour*. Oxford: Hart Publishing.
- WELLMAN, C. (1975), *Morals and Ethics*. Glenview, IL: Scott, Foresman and Company.
- WHYTE, D. (2007), 'Gordon Brown's Charter for Corporate Criminals', *Criminal Justice Matters*, 70: 31–2.
- WHYTE, W. H. (1968), *The Last Landscape*. New York: Doubleday & Company Ltd.
- WIRTH, L. (1931), 'Culture Conflict and Delinquency, I. Culture Conflict and Misconduct', *Social Forces*, 9: 484–92.
- YOUNG, A. (2005), *Judging the Image: Art, Value, Law*. Abingdon: Routledge.