

CONSORTING, THEN AND NOW: CHANGING RELATIONS OF RESPONSIBILITY

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Consorting – broadly, the offence of association with criminals – is typically understood as an issue of police powers. But consorting is of interest to criminal law scholars, and particularly, to scholars of criminal responsibility because it is a distinctive configuration of criminal responsibility principles and practices. This article tells the legal story of consorting, with a focus on the sets of relations that are at the heart of criminal responsibility. Based on an examination of consorting offences enacted in Australian jurisdictions since their introduction in the early 20th century, I argue that the laws fall into two generations, each of which encodes different relations of responsibility. The first generation of consorting offences proscribed ‘companionship with thieves’, with relations of responsibility reinforcing existing, highly stratified social relations, and the laws operating to keep different categories of ‘undesirables’ apart from each other. By contrast, the second generation of laws inculcate ‘friendship with the state’, with relations of responsibility assuming a standardised structure, according to which the state is brought into the relationship between individuals in a distinct way – as a ‘friend’.

I INTRODUCTION

Consorting is the offence of association with criminals. In broad terms, the offence functions to criminalise an individual who associates (for any reason, not for a criminal purpose) with another individual who is a criminal, and the degree of association is sufficient to be ‘habitual’. Because the offence has been used by police as part of the surveillance and policing of public spaces, consorting is typically understood as an issue of police powers around crime prevention, and, from this perspective, consorting has been marked by broad continuities over time.¹ But this story focuses more on the use of the laws than the laws themselves. Focusing on the laws themselves reveals that consorting

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¹ See, eg, Alex Steel, ‘Consorting in New South Wales: Substantive Offence or Police Power?’ (2003) 26(3) *UNSW Law Journal* 567.

represents a distinctive configuration of criminal responsibility principles and practices. Criminal responsibility constitutes the bedrock of the criminal law. Viewed from this perspective, consorting is interesting because it is a ‘pre-inchoate offence’ – liability is imposed before any acts of preparation or perpetration resulting in harmful consequences have occurred.² The criminal responsibility story of consorting has not been told.

Criminal responsibility – all the criminal legal principles and practices governing blame, attribution and evaluation³ – is the subject of a wealth of scholarly studies, reflecting the importance of criminal responsibility to the modern criminal law. While criminal responsibility is often examined by scholars working in the legal-philosophical scholarly tradition of criminal law theory – where criminal responsibility is approached as an abstract matter, with analysis framed in terms of rules about accountability that are indexed to moral norms – there is now a vibrant tradition of ‘critical’ criminal responsibility studies.⁴ This ‘critical’ scholarship subjects criminal responsibility to analysis in light of the substantive social, political and institutional conditions under which the principles and practices take form and develop. In existing studies in this vein, a more contextualised account of responsibility for crime has emerged, with the historical, institutional and other conditions of possibility for the elaboration of criminal responsibility coming to the fore.⁵

When responsibility for crime is approached in this critical light, it becomes apparent that particular sets of relations – between self and others, and the state – underpin responsibility principles and practices.⁶ Reflecting the dominant mode of criminal law – in which an individual is called to account for his or her alleged offence through a criminal trial – these relations might revolve around a conflict between wrongdoer and wronged, offender and

² By analogy with offences of membership of an unlawful association: see Manuel Cancio Meliá, ‘The wrongfulness of crimes of unlawful association’ (2008) 11(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 563.

³ See Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, Institutions* (Oxford University Press, 2016) 1 (referring to the broadly synonymous term, ‘the general part’ of criminal law).

⁴ The term ‘critical’ criminal responsibility studies was coined by Nicola Lacey (ibid 176).

⁵ See, eg, Lacey, above n 3; Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge University Press, 1997); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, 2000).

⁶ See Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2019) (forthcoming).

victim, with the state as the prosecutor of the former on behalf of the latter and the community.⁷ But various aspects of criminal responsibility posit different kinds of relations between self, others and the state. As I explore in this article, the offence of consorting involves the criminalisation of relations between individuals. With the standard offence of consorting made out without the association between individuals being for a criminal purpose, consorting is a particularly salient way in which the criminal law regulates otherwise ordinary interpersonal relations, implicating others in the evaluation of the particular individual charged with the offence. Via consorting offences, the individual becomes criminal in his or her relations with others, as that individual's conduct with, and knowledge of, others is the basis for the offence.

This article analyses the relations of responsibility encoded in the law of consorting. Consorting has been claimed as an 'Australasian contribution to the criminal law',⁸ having been pioneered in New Zealand and Australia around the turn of the 20th century. Consorting has returned to prominence on the Australian political and legal landscape in recent decades. I argue that consorting laws encode changing responsibility relations between self, others and the state. In my analysis, the laws fall into two generations, and relations of responsibility fall into two corresponding archetypal patterns. The first generation of laws, which appeared in the first decades of the 20th century, proscribes 'companionship with thieves', with relations of responsibility reinforcing existing, highly stratified social relations, and the laws operating to keep different categories of 'undesirables' apart from each other. By contrast, the second generation of laws, which appeared on the legal landscape at the end of the 20th century and turn of the 21st century, inculcates 'friendship with the state', with relations of responsibility assuming a standardised structure, according to which the state is brought into the relationship between individuals in a distinct way – as a 'friend'.

In order to make this argument, this article presents a thematic rather than chronological analysis of consorting laws. The article is structured around the three main points of comparison between the first and second generations of

⁷ For critical discussion, see Claes Lernestedt, 'Victim and Society: Sharing Wrongs, but in Which Roles?' (2014) 8 *Criminal Law and Philosophy* 187–203.

⁸ *Johanson v Dixon* (1979) 143 CLR 376, 382–3 (Mason J). While this is a widely held view, the use of vagrancy laws to prohibit association between 'undesirables' has a long history, dating to the 16th century: see Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37(1) *Melbourne University Law Review* 103, 112–113 (referring to statutory provisions making association with 'Egyptians' a felony).

consorting laws: the orientation of the laws (broadly, around public protection or security of the state); their mode of responsibility (social or legal responsibility); and the form or structure of the laws (either older or newer, modern structures of accountability). This comparison draws on both statute and case law from across Australian jurisdictions.⁹ While my analysis reveals some points of continuity around police use of the laws in each generation, it is clear that, overall, the two generations' laws have different orientations, modes of responsibility and structures, which, taken together, reveal changed relations of responsibility for crime.

II ORIENTATION: FROM PROTECTION OF THE PUBLIC TO SECURITY OF THE STATE

The first and second generations of consorting laws have different orientations. The first generation of laws – low-level offences constituting a subset of the wider category of vagrancy laws – was oriented to protecting the public and maintaining order, while the second generation of laws – serious stand-alone offences that are part of a wider group of laws addressing organised crime – is oriented to the security of the state.

A *Australasian Innovations in Vagrancy Laws*

The first generation of consorting laws appeared around the turn of the 20th century but had deep roots in vagrancy laws, a body of statutory laws focused more on poverty than crime that can be traced to the 14th century. In the early modern era, with the disintegration of the feudal system, vagrancy laws were introduced to govern the new phenomenon of the 'masterless man', regulating individuals' free labour and geographical mobility that came with development of mercantile and then capitalist economic practices, and industrialisation and urbanisation.¹⁰ As historians have argued, from the 16th century, vagrancy laws were constructed and reconstructed as, gradually and unevenly, the state came

⁹ A number of consorting charges are dealt with in the summary courts and, as such, are not reported. In this article, I draw on reported judgments, including appeals of unreported first instance decisions.

¹⁰ There is an enormous scholarly literature on vagrancy laws: see, eg, William J Chambliss, 'A Sociological Analysis of the Law of Vagrancy' (1964) 12(1) *Social Problems* 67; A L Beier, *Masterless Men: The Vagrancy Problem in England 1560-1640* (Methuen, 1985); McLeod, above n 8, 106-113; Nicholas Rogers, 'Policing the Poor in Eighteenth Century London: The Vagrancy Laws and Their Administration' (1991) XXIV *Histoire sociale/Social History* 127.

to replace the parish in the provision of relief of poverty.¹¹ In the 19th century vagrancy laws acted as a useful vehicle for the more interventionist administrative state, operating as part of a raft of regulations that were designed to inculcate self-reliance on the part of the poor, and prevent dependency on welfare.¹² In the now infamous language of vagrancy laws, members of the ‘less desirable classes of the population’¹³ were classified either as ‘idle and disorderly persons’, ‘vagabonds and rogues’ or ‘incorrigible rogues’¹⁴ – a moralised taxonomy that provided the scaffolding for the first generation of consorting laws.

Like other parts of the Commonwealth, including New Zealand, Australian colonies enacted their own vagrancy provisions based on the English *Vagrancy Act 1824*.¹⁵ The vagrancy regime proved flexible and useful in colonial contexts. Sitting alongside *Masters and Servants Acts*, which governed labour relations both ‘at home’ and in the colonies, vagrancy laws governed the unemployed and the itinerant.¹⁶ These colonial vagrancy laws aimed to establish order among the free populations in the colonies, to control the movement of ex-convicts, and prevent miscegenation.¹⁷ The vagrancy laws included provisions that made it an offence to be in a house frequented by thieves, prostitutes or persons without lawful means of support, and for non-Aboriginal persons to keep company or live with Aboriginal people.¹⁸ While the first sort of prohibition had antecedents in English and Scots law (although it was used for distinctively colonial ends in Australia),¹⁹ prohibitions on association between

¹¹ See Rogers, above n 10.

¹² See generally Martin J Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914* (Cambridge University Press, 1990).

¹³ *Bryan v White* [1962] Tas SR 113, 116.

¹⁴ This taxonomy first appeared in statutes in the 18th century: see McLeod, above n 8, 108.

¹⁵ The 1824 Act was the first statute that separated poor relief from the criminalisation of vagrancy, dealing only with the latter: McLeod, above n 8, 110.

¹⁶ On the *Masters and Servants Acts* in Australia, see Michael Quinlan, ‘Australia, 1788-1902: A Workingman’s Paradise?’ in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, 2004) 219. Under these laws workers could be sentenced to imprisonment for disobedience, misconduct or misdemeanors. ‘Poor laws’ were not introduced in Australia: see Stephen Garton, *Out of Luck: Poor Australians and Social Welfare 1788-1988* (Allen and Unwin, 1990).

¹⁷ Julie Kimber, ‘Poor Laws: A Historiography of Vagrancy in Australia’ (2013) 11(8) *History Compass* 537, 538.

¹⁸ See, eg, *Vagrancy Act 1935* (NSW) s 2, *Police Offences Act 1890* (Vic) s 40 and *Police Act 1892* (WA) s 65.

¹⁹ These prohibitions were the basis for prosecutions of white women and Chinese men who cohabited: see Jan Ryan, ‘“She Lives with a Chinaman”: Orient-ing ‘White’ Women in the Courts of Law’ (1999) 23(60) *Journal of Australian Studies* 149.

Aboriginal and non-Aboriginal people were ‘novel’.²⁰ As this suggests, vagrancy laws were ‘social policy devices that targeted race as well as ‘vice’.²¹ These colonial era laws set the scene for the further adaptation of vagrancy laws in the post-colonial period, including meeting the imperative of segregating Aboriginal people.

The first consorting laws added a limb to the ‘traditional gradations of rascality’ already enumerated in vagrancy laws.²² The Australasian innovation lay in the inclusion of the act of consorting as one of several bases for a finding that an individual was ‘idle and disorderly’ per vagrancy laws; that is, the statutes created a new subset of vagrancy, proscribing mere association between certain individuals. Following the template of the New Zealand *Police Offences Amendment Act 1901*,²³ Australian legislatures criminalised individuals who ‘habitually consorted’ with ‘reputed thieves’ or prostitutes. For example, in NSW, following a press and public campaign around the growth of crime gangs in Sydney,²⁴ and against a backdrop of longer standing concerns with prostitution and gambling, in 1929, the NSW government introduced the offence of ‘habitually consorting’ with ‘reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support’.²⁵ A few years later, in Victoria, with Melbourne facing the same sort of problems with street gangs and vice crimes, the legislature amended the *Police Offences Act 1928* (Vic) along the same lines.²⁶ As the then new Australian High Court had made clear in its first consideration of vagrancy, in 1907, the laws created only one offence – that of ‘being an idle and disorderly person’ – with consorting one of the factual bases on which a conviction for vagrancy could be founded.²⁷

What is it that brings together prostitutes, those without lawful means of support, and thieves, and what accounts for their prominence in the law of consorting? Each of these groups of individuals was regarded as a threat to the social order, with the precise nature of the threat varying from group to group.

²⁰ McLeod, above n 8, 124.

²¹ Kimber, above n 17, 538.

²² *Jolly v Salvitti* [1974] VR 484, 486.

²³ See *Police Offences Amendment Act 1901* (NZ), amending the *Police Offences Act 1884* (NZ).

²⁴ See Steel, above n 1, 582-587.

²⁵ *Vagrancy (Amendment) Act 1929* (NSW) s 2(b), amending *Vagrancy Act 1902* (NSW) s 4.

²⁶ *Guider v Walker* [1933] VLR 413, 415 citing *Police Offences (Consorting) Act 1931* (Vic); see also *Muller v Murphy; Ex Parte Murphy* (1935) 29 QJPR 17, 25, referring to *The Vagrants, Gaming and other Offences Act 1931* (Qld) (a defendant convicted of consorting is deemed to be a vagrant).

²⁷ See *Lee Fan v Dempsey* (1907) 5 CLR 310, 312 (Griffith CJ) (in relation to the *Police Act 1892* (WA)).

Prostitution generated particular concerns about sin and vice, and, in the early 20th century Australian context, fears about the moral health of white populations on the continent.²⁸ Amid concerns about the spread of venereal disease, and the quality of life in city slums, vagrancy laws provided an additional tool for policing street prostitution.²⁹ Individuals without lawful means of support were a mainstay of vagrancy laws, on the basis that ‘the person apparently without lawful means of support is in law considered dangerous’.³⁰ As John Pratt argues in the English context, itinerancy as a way of life threatened the social order because it meant an individual was ‘unknowable’,³¹ raising the spectre of assumed identities, fraud and other suspect activities. The prominence of thieves in the laws reflects the status of theft as a particularly serious threat. In the first decades of the 20th century, property crime was associated with recidivism and ‘dangerousness’,³² and a thief – ‘a person who steals and is prepared to steal, to commit the crime of larceny, should the opportunity offer’³³ – was a socio-legal term with wide currency.³⁴ Indeed, the prominence of theft and thieves in consorting laws subsisted for a long time, surviving until the recasting of the offences in the 1970s.

The miscellaneous collection of people who posed a threat to the social order shared the same socially stigmatic status – as ‘undesirable’.³⁵ In operation, the laws allowed the police to target a diverse range of low level offenders, including ‘stand over men’ who intimidated ‘bettors, sly grog sellers and other individuals’, and friends and thieves.³⁶ As the High Court commented in *Lee Fan v Dempsey* in 1907, each group falling under vagrancy provisions was ‘a

²⁸ See also Susanne Davies, ‘Captives of their bodies: Women, law and punishment, 1880s-1980s’ in Diane Elizabeth Kirkby (ed.), *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press, 1995) 99, 101–05; Judith A. Allen, *Sex and Secrets: Crimes Involving Australian Women since 1880* (Oxford University Press, 1990).

²⁹ See Hilary Golder and Judith Allen, ‘Prostitution in New South Wales 1870-1932: Restructuring an Industry’ (1979-80) 18/19 *Refractory Girl* 17, 18–19.

³⁰ *Lee Fan v Dempsey* (1907) 5 CLR 310, 321 (Isaacs J).

³¹ John Pratt, ‘Governing the Dangerous: An Historical Overview of Dangerous Offender Legislation’ (1996) 5(1) *Social & Legal Studies* 21, 24.

³² *Ibid* 29.

³³ *Dias v O’Sullivan* [1949] SASR 195, 204.

³⁴ See Alana Jayne Piper, ‘To Judge a Thief: How the Background of Thieves Became Central to Dispensing Justice, Western Australia, 1921-1951’ (2017) 4(1) *Law & History* 113.

³⁵ *Byrne v Shearer* [1959] VR 606, 609 (where the court refers to a ‘legislative policy’ to keep individuals without means of support from associating with ‘undesirable companions’).

³⁶ See *Muller v Murphy; Ex parte Murphy* (1935) 29 QJPR 17; *MacDonald v King* (1935) CLR 739, 740; *Canino v Samuels* [1968] SASR 303 (Canino argued unsuccessfully that he was not a thief but a false pretender), respectively.

menace to society'.³⁷ In *Lee Fan*, the defendant, who was alleged to frequent 'gambling houses in the Chinese quarter in Perth' and live on his pay as a 'fighting man', was convicted of being 'idle and disorderly' on the basis that he had no lawful means of support.³⁸ Although most cases of consorting involved men, women were also prosecuted under the laws, for prostitution and other offences.³⁹

As low-level offences, consorting convictions attracted either short prison sentences or fines. While some concerns were expressed about policing practices based on this first generation of laws – including what a Queensland court referred to as 'the danger of what is intended as a provision for the protection of the public, being used as an instrument for harrying individuals even though such individuals fall short of the standards of estimable citizens',⁴⁰ – and some prosecutions attracted critical comments from the courts – such as in the Queensland case in which a returned soldier's conviction for consorting was upheld, but the judge noted that the defendant may find it difficult to avoid the company of 'some doubtful characters' because he lived in a boarding house, and warned the police to be careful to avoid 'any suggestion that they are administering this Act in an oppressive way'⁴¹ – overall, consorting was regarded as an 'effective weapon for breaking up associations of criminals'.⁴²

As this discussion suggests, the first generation of consorting laws was oriented toward the protection of the public and the maintenance of public order, including through the prevention of low-level crime. Significantly, it was the in-person associations between individuals from such stigmatic groups that were regarded as threatening – the associations did not need to be for a criminal purpose to be caught by the laws. In criminalising 'habitual consorting', the laws were intended 'to prevent the regular meeting of congeries of individuals (persons generally regarded by those, who ought to know, as having vicious propensities)'.⁴³ In the words of a South Australian judge, legislation on consorting is 'a legislative attempt to give legal sanction to St Paul's advice to the Corinthians': "[e]vil communications corrupt good

³⁷ *Lee Fan v Dempsey* (1907) 5 CLR 310, 321 (Isaacs J) (referring specifically to persons without lawful means of support).

³⁸ *Lee Fan v Dempsey* (1907) 5 CLR 310. The defendant argued no offence was disclosed but his conviction was upheld.

³⁹ See, eg. *Auld v Purdy* (1933) 50 WN (NSW) 218; *Birrell v Astor* [1940] VLR 180.

⁴⁰ See *Muller v Murphy; Ex parte Murphy* (1935) 29 QJPR 17, 30-31.

⁴¹ *Codd v Lewis* (1944) 38 QJPR 135, 139.

⁴² *Bryan v White* [1962] Tas SR 113, 116 (discussing the *Tasmanian Police Offences Act 1935*).

⁴³ *Dias v O'Sullivan* [1949] SASR 195, 199.

manners”⁴⁴ With the social threat posited by consorting arising from mere association, it did not make sense to limit the reach of the laws to association for a criminal purpose. As the South Australian Supreme Court put it in 1930, consorting governed ‘not companionship in thieving, but with thieves’.⁴⁵

B *The Rise of Serious and Organised Crime*

By contrast with the first generation of laws, the second generation of consorting laws was oriented not to low-level crime but to serious and organised crime. Australia introduced laws against organised crime in the 1980s, in response to ‘the dangers presented to the Australian community by organised crime and crimes involving sophisticated techniques and methods’,⁴⁶ and organised crime has become a notable dimension of serious crime in Australia.⁴⁷ The immediate catalyst for the introduction of a second generation of consorting laws in the early 21st century was concern with serious violent offences committed by ‘outlaw motorcycle gangs’.⁴⁸ Following a series of high profile crimes by members of ‘bikie gangs’, several states and territories enacted extensive legislative regimes to criminalise association between members of ‘criminal organisations’.⁴⁹ At around the same time, Australian Attorneys-General agreed that ‘organised crime is a national issue requiring a nationally coordinated response by all jurisdictions’, and recommended that all states and territories consider introducing legislation, including ‘consorting or similar provisions that prevent a person from associating with another person who is involved in organised criminal activity as an individual or through an

⁴⁴ *Reardon v O’Sullivan* [1950] SASR 77, 82 (Abbott J).

⁴⁵ *Gabriel v Lenthall* [1930] SASR 318, 327; see also *Clarke v Nelson* [1936] Queensland Law Reporter 17.

⁴⁶ See Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1982, 2394-5 (Neil Anthony Brown) (introducing the Act creating the National Crimes Commission).

⁴⁷ Organised crime organisations have come to be implicated in a wide range of criminal activities, including drug trafficking and manufacture: see Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the Future Impact of Serious and Organised Crime on Australian Society* (2007).

⁴⁸ The term ‘outlaw motorcycle gangs’ has attained quasi-legal status, being used in government policy documents. See, eg, Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organized crime groups* (2009); Justice and Community Safety Directorate, ACT Government, *Discussion Paper: Consorting Laws for the ACT*, Discussion Paper (2016) 5.

⁴⁹ See *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Criminal Organisations Act 2009* (Qld); *Serious Crime Control Act 2009* (NT).

organisation'.⁵⁰ Within a few years, almost all Australian jurisdictions had enacted new consorting offences.⁵¹

Under this second generation of consorting laws, consorting is not a subset of vagrancy but a stand-alone offence which attracts significant penalties. For example, in 2005, Victoria amended its *Summary Offences Act 1966* to make it an offence to habitually consort with a person who has been convicted, or reasonably suspected of having committed, an organised crime offence.⁵² Similarly, in 2006, the Northern Territory added a new section to the *Summary Offences Act (NT)*, making it an offence to consort with another person where each person has been convicted of a 'prescribed' offence.⁵³ In 2012, NSW enacted a new consorting law, making it an offence to associate by any means with at least two convicted offenders on at least two occasions.⁵⁴ In the words of the then NSW Parliamentary Secretary on the introduction of the new laws, the legislation 'modernises the offence of consorting as well as extending and clarifying its application'.⁵⁵ The NSW offence formed the model for the recent reforms in Queensland, which saw a new offence of 'habitual consorting' introduced on the basis that it was more 'constitutionally robust', fairer, and 'more effective and efficient' than the more extensive anti-association laws that it was to replace.⁵⁶ The new Queensland offence attracts a maximum penalty of three years imprisonment.⁵⁷

The rationale of these stand-alone consorting offences now relates to serious crime (although, as I discuss below, the laws are still used by police to target low level offenders). This rationale is evident in the structural connection these laws have to criminal organisations laws. For example, dovetailing its

⁵⁰ Standing Committee of Attorneys-General, *Communiqué*, 16-17 April 2009, 8.

⁵¹ Recently the ACT Government conducted a review into the need for a consorting offence in that jurisdiction: see Justice and Community Safety Directorate, ACT Government, *Discussion Paper: Consorting Laws for the ACT* (Canberra, June 2016). This review recommended that consorting laws be introduced into the ACT, but, at the time of writing, no such laws have been introduced.

⁵² See *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic), amending *Summary Offences Act 1966* (Vic). The maximum penalty for the offence under s 49F is 2 years imprisonment.

⁵³ *Summary Offences Act (NT)* s 55A (a prescribed offence is defined as one punishable by 10 years imprisonment). The maximum penalty is 2 years imprisonment.

⁵⁴ *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW). This provision survived constitutional challenge: see *Tajjour v New South Wales* (2014) 254 CLR 508.

⁵⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 7 March 2012, 9091 (The Hon David Clarke).

⁵⁶ See Report, *Taskforce on Organised Crime Legislation* (2016) 194-5. The Taskforce recommended the repeal of the *Vicious Lawless Association Disestablishment Act 2013* (Qld), which included a range of provisions to target organised crime and 'bikie' gangs in particular.

⁵⁷ See s 77B(1) *Criminal Code 1899* (QLD).

consorting law with criminal organisation laws, in 2008, South Australia enacted laws to criminalise consorting six or more times within twelve months with a person who is a member of a 'declared organisation', or subject to a control order or between persons with prescribed criminal convictions.⁵⁸ Here, consorting rests on another legal process, in which an organisation is classified as a 'declared organisation'.⁵⁹ Once an organisation has been made a declared organisation, judges are empowered to issue, on the application of the police commissioner, orders limiting or prohibiting association between members. These criminal organisations laws have been subject to several constitutional challenges,⁶⁰ prompting legislatures to make changes to the laws, and producing what is effectively a pro forma law that seems to have furnished a constitutional challenge-proof model for consorting offences. Thus, as the High Court noted in relation to creation of the new NSW consorting offence, Section 93X, it 'adopts language which has been the subject of authoritative judicial exposition'.⁶¹

The connection between consorting offences and criminal organisations laws exposes the changed overall orientation of consorting: the second generation of laws is oriented to the security of the state, with the protection of the public and maintenance of public order serving this new goal. The goal of security, which has both a national and international aspect, and extends beyond criminal justice, addresses the capacity of the state to provide social goods for its citizens, and, thus, threats to security go to the sovereignty of the

⁵⁸ *Serious and Organised Crime Act (SA)* s 35. The penalty for conviction of this offence is 5 years imprisonment. Some parts of this law were declared invalid by the High Court in *South Australia v Totani* (2010) 242 CLR 1.

⁵⁹ In general, under criminal organisation laws, a police commissioner or a minister may apply for an organisation to be made a 'declared organisation', an administrative judgment determined on the basis that the members of that organisation associate for the purposes of planning or engaging in serious criminal activity. These applications have been subject to strong criticism: see generally Nicholas Cowdery, 'A Threat to the Rule of Law: The New South Wales Crimes (Criminal Organisations Control) Act 2009' (2009) 21(2) *Current Issues in Criminal Justice* 321; Arlie Loughnan 'The Legislation We Had to Have? The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20(3) *Current Issues in Criminal Justice* 457-465. See also Julie Ayling, 'Pre-emptive strike: How Australia is tackling outlaw motorcycle gangs' (2011) 36(3) *American Journal of Criminal Justice* 250.

⁶⁰ Re the SA legislation, see *South Australia v Totani* (2010) 242 CLR 1; re NSW, see *Wainohu v New South Wales* (2011) 243 CLR 181; re QLD, see *Kuczborski v QLD* (2014) 254 CLR 51.

⁶¹ *Tajjour v NSW* (2014) 254 CLR 508, 576 [135] (Gageler J). This provision was found not to breach any constitutional protections.

state.⁶² In this respect, criminal organisations pose a profound threat, including to the state's monopoly on violence, arrogating to themselves rights that belong to the sovereign state.⁶³ The security orientation of consorting laws now links them with preventive orders (control orders and preventive detention provisions), and non-association orders (a sentencing power), as well as criminal organisations laws, that are utilised in relation to the most serious criminal offences, including terrorism.⁶⁴ This points to broader developments in security practices in the current era.⁶⁵ As part of this elaborate arsenal, consorting laws are now securing the state.

III MODE: FROM SOCIAL RESPONSIBILITY TO LEGAL RESPONSIBILITY

The first and second generations of consorting laws reflect different modes of responsibility. The first generation of laws reflects a social mode of responsibility: under these laws, the legal status of an individual – as criminal – takes meaning from the social status of the individual – as ‘undesirable’. By contrast, the second generation of laws reflects a legal mode of responsibility: these laws rest not on external social statuses or meanings, but on *other* legal practices and technologies.

A *Enforcement of the Social Status Quo*

The first generation of consorting laws applied to a range of ‘undesirable’ persons, and, as discussed above, individuals in each group of persons potentially liable for charges of ‘habitual consorting’ shared socially marginalised status. The marginalised social status of the individuals – as thieves or prostitutes or other – gave meaning to the legal status of those individuals – as criminal. Put another way, the laws targeted ‘members of the criminal class’,⁶⁶ with membership of this legal class having primarily social determinants. In the early 20th century context of highly stratified social

⁶² There is a large body of work on criminal justice and security; see, eg, Victor Tadros, ‘Crimes and Security’ (2008) 71(6) *Modern Law Review* 940; Lucia Zedner, ‘Too much security?’ (2003) 31(3) *International Journal of the Sociology of Law* 155.

⁶³ See Cancio Meliá, above n 2, 585.

⁶⁴ For critical discussion of preventive measures in criminal law, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014).

⁶⁵ See Sabine Selchow ‘Security Policy and (Global) Risk(s)’ in Mary Kaldor and Iavor Rangelov (eds.), *The Handbook of Global Security Policy* (Palgrave Macmillan, 2014), 68–84.

⁶⁶ *Wilson v Giles* [1966] SASR 361, 362.

relations characterised by sharp divisions of class, gender and race, each of the groups of ‘undesirable’ persons was ‘undesirable’ in its own way. In keeping members of different groups of ‘undesirables’ apart from each other, the first generation of consorting laws served not just public order but the enforcement of the social status quo. In this respect, the consorting laws dovetailed with other legal and social practices that produced and reproduced existing social relations, aiming to isolate and marginalise individuals who threatened those relations. The consorting laws were designed to ‘ensure that “birds of a feather do not flock together”’,⁶⁷ meaning that, as Julie Kimber has written in relation to vagrancy laws more generally, consorting operated to make the convicted person ‘friendless’.⁶⁸

A clear illustration of the social mode of responsibility of the first generation of consorting laws is provided by those provisions that criminalised association between Aboriginal Australians and non-Aboriginal Australians. For instance, a Northern Territory ordinance, *An Ordinance Relating to Aborigines* 1918, made it an offence for any non-Aboriginal person to ‘habitually consort with a female aboriginal or half-caste’.⁶⁹ Here, consorting likely referred to intimate relations rather than association more generally.⁷⁰ Similarly, under the Victorian law it was an offence for a non-Aboriginal person to be ‘found lodging or wandering in company with any of the aboriginal natives of Victoria’.⁷¹ These consorting laws were animated by the fear of miscegenation that was a distinctive feature of the broader racist laws and practices directed towards Indigenous people in Australia. As historians have argued, fear of miscegenation loomed large over the development of the Australian population in the nineteenth and early 20th century. At this time, government policy held that Indigenous people were a ‘dying race’, and that mixing of Aboriginal and white people would have a degrading influence on the advance of Australian civilisation. What was called ‘the half-caste problem’ – the idea that ‘mixed-bloods’ would ‘inherit the ‘vices’ of both races and few of

⁶⁷ *Wilson v Giles* [1966] SASR 361, 362.

⁶⁸ Kimber, above n 17, 537.

⁶⁹ See, eg, *Aborigines Ordinance 1918* (NT) s 53(1)(a); see also *Welfare Ordinance 1953* (NT) s 64(b) (providing that it was an offence for a male person to ‘habitually consort, keep company or associate, with a female ward to whom he is not married’: the penalty for a first offence was a fine of 100 pounds or 6 months imprisonment or both). As this latter provision suggests, Aboriginal people were made wards of the state under the protection system.

⁷⁰ See McLeod, above n 8, 128.

⁷¹ *Police Offences Act 1957* (Vic) s 69(1)(a).

their virtues⁷² – was understood as a ‘problem of hybridity and degeneration’ that threatened the ‘racial purity’ of white Australia.⁷³ These fears led to the construction of the ‘protection’ system, a dense regulatory matrix governing all aspects of the lives of Indigenous peoples, including movement, work, and family and relationships, that was only dismantled in the 1960s and 1970s.⁷⁴

The social mode of responsibility of the first generation of consorting laws is also evident in the place of reputation in the offences. Reputation – ‘the popular belief of the nature of a man’s character’⁷⁵ – was the lynchpin of the laws falling into first generation of consorting laws. Reputation, which was distinct from other concepts in use in criminal law, such as bad character or criminal history,⁷⁶ revolves around beliefs held about a person, and necessarily has a social dimension, as it depends on what others believe about an individual. In consorting, reputation was regarded as a matter of fact, and generally treated by courts as an unproblematic notion. Indeed, for a South Australian court, it was possible to divide the community into ‘(i) persons who have the reputation of being thieves, and (ii) those who do not’.⁷⁷ While it was acknowledged that someone with an ‘unsavoury reputation’ may be ‘virtuous and law abiding’, what mattered was reputation, not character, and, if, ‘rightly or wrongly’, a person gains a reputation as reputed thief, ‘that person becomes a reputed thief’.⁷⁸ Similarly, for a Tasmanian court, while companionship with one reputed thief was ‘equivocal as an indication of a man’s character’, the ‘inference’ that could be drawn from ‘persistent companionship’ with more than one was ‘ordinarily inescapable’.⁷⁹ As this indicates, reputation was not a high bar to conviction. Reputation might amount only to propensity; as the NSW Supreme Court stated in 1938, “‘reputed thief’ means a person of whom people who know him believe that he steals when he gets the chance’.⁸⁰

⁷² See Robert van Krieken, ‘The ‘Stolen Generations’ and Cultural Genocide: The Forced Removal of Australian Indigenous Children from their Families and its Implications for the Sociology of Childhood’ (1999) 6(3) *Childhood* 297, 301.

⁷³ *Ibid* 303.

⁷⁴ See Heather Douglas and Mark Finnane, *Indigenous crime and settler law: white sovereignty after Empire* (Springer, 2012), ch 4.

⁷⁵ *Dias v O’Sullivan* [1949] SASR 195, 203.

⁷⁶ See *Berry v Ritchie* [1932] NZLR 1315 (holding that a conviction for a consorting offence did not require proof of either bad character or ‘adoption of a criminal mode of life’).

⁷⁷ *Dias v O’Sullivan* [1949] SASR 195, 202. For this judge, if there were conflicting viewpoints on a person’s status as a known criminal, he did not have the reputation of a reputed thief because ‘there can only be one reputation’ (203).

⁷⁸ *Dias v O’Sullivan* [1949] SASR 195, 203–204.

⁷⁹ *Porter v Bryan* [1963] Tas SR 41, 43.

⁸⁰ *Ex parte King; In re Blackley* (1938) 38 SR (NSW) 483, 491.

For the purposes of a charge of habitual consorting, reputation was treated as self-evident, and a criminal reputation could be proved by police evidence. The evidence of the police detectives and senior officers – ‘persons whose business it is to know’ – was considered sufficient to establish this aspect of the offence.⁸¹ This meant that a criminal conviction was not required for an individual to have the reputation of a thief or a prostitute and to make anyone who associated with him or her liable for the offence of consorting. Reputation operated not only as sufficient grounds for conviction but, in addition, as a basis for policing practices, surveilling particular individuals and seeking to separate them from others.⁸² As this suggests, reliance on reputation facilitated a slippage between issues of law and evidence and policing, or elements of the offence and proof of it. With reputation a requirement of the consorting offence, and evidence of reputation furnished by police statements about the individual and his or her conduct with others, these consorting offences were ‘effectively proved on charge’, which, as Alex Steel argues, made them particularly useful to police.⁸³

The place of reputation in this generation of consorting laws reveals the laws’ dependency on a relatively stable community for their coherence and operation. The laws rested on the idea that the reputation of certain individuals – as thieves, or prostitutes – was a meaningful notion that revealed the identity of such individuals – as thieves or prostitutes, where those identities were themselves a shorthand for a wider and more diffused social category of ‘undesirable’ people. Thus, as a Queensland court stated in 1936, ‘the [prohibited] association is with persons of a reputation which would ordinarily cause them to be avoided by honest men’.⁸⁴ Like reputation, ‘undesirability’ was regarded as manifest or evident. This reflects the genesis of vagrancy laws in the era of ‘manifest criminality’, when crimes were those acts that constituted a clear threat to society, and were recognised by all as such.⁸⁵ Thus, what was

⁸¹ *Gabriel v Lenthall* [1930] SASR 318, 323; see also *Auld v Purdy* (1933) 50 WN (NSW) 218; *O’Connor v Johnston* (1903) 23 NZLR 183, 184 (‘The evidence of a police officer as to whether a man is reputed to be a member of the criminal class, and, if so, of what branch of that class, seems to me to be the best evidence of the man’s reputation’).

⁸² See, eg, *Guider v Walker* [1933] VLR 413 (Walker was alleged to ‘habitually consort’ with reputed thieves, and also to be a reputed thief himself).

⁸³ Steel, above n 1, 575.

⁸⁴ *Ex parte Finney; Re Miller & Anor* (1936) 50 WN (NSW) 190, 191.

⁸⁵ See George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000).

being criminalised via the laws was criminal ‘disposition’,⁸⁶ or the danger or threat some individuals posed to the stable social system, rather than conduct as such. This aspect of consorting would become more controversial in the second half of the century, as I discuss below.

As this discussion suggests, in its social mode of responsibility, the first generation of consorting laws enlisted social meanings – around the racial, classed and gendered identity and status of individuals subject to the laws – for technical, legal and law enforcement ends. Thus, notions such as ‘reputation’ were technical terms in use in the criminal law but their meaning was social. The emphasis of consorting was on the threat or danger posed by ‘undesirable’ individuals, with the laws adding legal proscription to social stigma and marginalisation. Under the first generation of laws, individuals charged with consorting were responsible for causing harm or disorder, or, more accurately, for raising the possibility of the threat of harm or disorder, in certain (public) contexts, and were responsible to the community for such harm. In this way, with its social mode of responsibility, criminal responsibility was state-defined but not a responsibility to the state (at least not in the same way as would be the case for the second generation of laws, discussed below).

B *From Reputation to Record*

The first evidence of a changed mode of responsibility in consorting – from social to legal – appeared with a recasting of some of the then existing laws, which occurred in the 1970s. In this recasting, the focus of the laws shifted to association with ‘criminals’ in general as opposed to association with particular socially ‘undesirable’ individuals. At this time, the openly morally-evaluative terms and nebulous provisions, like ‘reputation’, were replaced with reference to criminal records or convictions. Thus, in NSW, in 1970, the language used in the consorting offence was changed from ‘reputed criminals’, ‘known prostitutes’ and ‘convicted vagrants’, to ‘reputed prostitutes’, ‘reputed drug offenders’, ‘other reputed criminals’, and those who had been convicted of vagrancy, and then, in 1979, each of these categories was replaced with ‘persons convicted of indictable offences’.⁸⁷ As this indicates, this change represented

⁸⁶ *Wilson v Giles* [1966] SASR 361, 363 (stating that consorting laws applied to individuals who ‘manifest[ed] a disposition to associate with the criminal class’).

⁸⁷ See *Summary Offences Act 1970* (NSW) s 25; *Crimes (Summary Offences) Amendment Act 1979* (NSW) s 4, inserting *Crimes Act 1900* (NSW) s 546A.

greater reliance on criminal records. In addition, also as a result of the 1979 amendment, NSW law came to require that a person convicted of consorting had knowledge that the person he or she was associating with had been convicted of a serious offence.⁸⁸ Knowledge was quite hard to prove and these changes rendered the laws less useful to police than they had been,⁸⁹ setting the scene for the appearance of the second generation of consorting laws in the first decades of the 21st century.

The recasting of some of the laws of consorting reflected increased concern with social welfare, and public and political awareness of human rights that arose in Australia, as elsewhere, in the 1960s and 1970s. At this time, consorting laws themselves, as opposed to police practices based on them, became more of a focus for concern, with criticisms levied at the laws on the basis of infringements of rights of individuals to free association and to freedom from state interference. For example, in his dissent in the 1979 High Court decision of *Johanson v Dixon*, which concerned the scope of the consorting offence in the *Vagrancy Act 1966* (Vic), Justice Murphy expressed concern that a person could be imprisoned for associating with others even if the association was ‘innocent of “sinister, illicit or illegal” purpose’.⁹⁰ His Honour noted that the consorting legislation contravened human rights standards, giving this as a ‘special reason’ for construing the laws strictly in favour of the defendant.⁹¹ Similarly, in a South Australian Supreme Court decision in 1983, Chief Justice King sounded a note of concern that a defendant convicted of consorting ‘is to be punished not for any harm which he has done to others, but merely for the company which he has been keeping, however difficult and even disloyal it might be to avoid it.’⁹² These sorts of concerns prompted the abolition of the then existing offence of consorting in the ACT,⁹³ and later, in Western Australia.⁹⁴ As the Law Reform Commission of Western

⁸⁸ See *Crimes (Summary Offences) Amendment Act 1979* (NSW) s 4, inserting *Crimes Act 1900* (NSW) s 546A.

⁸⁹ There is some evidence that the offences continued to be used as a means of gathering intelligence: see Steel, above n 1, 592–93.

⁹⁰ *Johanson v Dixon* (1979) 143 CLR 376, 393 (Murphy J).

⁹¹ *Johanson v Dixon* (1979) 143 CLR 376, 392 (Murphy J).

⁹² *Jan v Fingleton* (1983) 32 SASR 379, 380.

⁹³ *Police Offences (Amendment) Ordinance 1983* (ACT) s 6(2).

⁹⁴ The Law Reform Commission of Western Australia recommended the abolition of the relevant offences in 1992 and these offences were repealed in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA): see Law Reform Commission of Western Australia, *Report on the Police Offences Act*, Project 85, (Perth, 1992) (in relation to ss 65(7) and (9) of *Police Offences Act 1892* (WA)).

Australia stated in its 1992 review of the relevant Western Australian laws, criminalising individuals on the basis that they are ‘known to be in a particular category’ or ‘reputed’ to be in such a category was ‘inconsistent with the principles of the criminal law’.⁹⁵

The recasting of consorting laws around the category of ‘criminals’, and the centrality of the device of criminal records, or convictions for particular crimes, did not signify a triumph of human rights concerns, however. Rather, the changes that shifted consorting into a different, legal mode reflected the rise of modern governance practices and ‘ways of knowing’⁹⁶ that had developed over the period since the creation of the first generation of consorting laws in the early 21st century. As a number of scholars argue, the development of new technologies and forms of expertise in the development of the welfare state generated new possibilities for government of individuals and groups, including future-oriented risk-based analyses.⁹⁷ Reliance on criminal records, and ostensibly neutral categories like ‘persons convicted of serious indictable offences’ in consorting laws shows the greatly extended administrative capacity of Australian states in the last decades of the 20th century. By this point in time, policing and criminal justice practices had undergone a process of professionalization, and official records, such as criminal records, were more complete and more reliable.⁹⁸ In addition, and crucially, bureaucratic technologies such as ‘convictions’ and ‘criminal records’ presented the more acceptable, morally neutral face of criminal justice that was by then necessary for the legitimation of criminal law and justice.

The most important factor in the changed mode of responsibility of the second generation was the major social changes that took place in Australia in the last decades of the 20th century. As a result of these changes, the stable, stratified social system on which the first generation of consorting laws depended fell away. Liberal social values, social diversity and moral pluralism radically undercut concepts such as criminal reputation. In this context, and as the South Australian Police commented in a recent parliamentary review of the

⁹⁵ See LRC (WA), *Report on the Police Offences Act*, above n 94; see also Neil Morgan ‘Criminal Law Reform 1983-1995: An Era of Unprecedented Legislative Activism’ (1995) 25 *Western Australian Law Review* 283-300.

⁹⁶ See generally Michel Foucault, *Discipline and Punish* (Pantheon, 1977).

⁹⁷ See, eg, David Garland, *Punishment and Welfare: A History of Penal Strategies* (Gower, 1985); Nikolas Rose, *Governing the soul: the shaping of the private self* (Routledge, 1990) and ‘Government, authority and expertise in advanced liberalism’ (2006) 22(3) *Economy and Society* 283-299.

⁹⁸ On the development of policing in Australia, see Mark Finnane, *Police and government: Histories of policing in Australia* (Oxford University Press, 1994).

laws relating to organised crime, ‘the classification of persons’ as ‘reputed thieves’, ‘prostitutes and the like’ became ‘petty’:⁹⁹ such a ‘classification of persons’ was clearly no longer regarded as stigmatic or effective in enforcing the law. As the social system underpinning the first generation of consorting laws had changed so thoroughly, consorting laws were no longer functioning in the way intended. Indeed, in a wholesale reversal of fortune, in relation to serious and organised crime, a criminal reputation had ceased to be an incriminating device, as under the first generation of consorting laws, and had become a business asset, ‘no different to goodwill for a legitimate business’.¹⁰⁰

IV LEGAL FORM: FROM OLD TO MODERN STRUCTURES OF ACCOUNTABILITY

The first and second generations of consorting laws have different legal forms or structures. Consorting laws falling under the first generation of laws are characterised by an older and looser form and a flexible operation, revolving around the manifestly criminal nature of the prohibited conduct, while the second generation of laws have a (somewhat) tighter and more modern form, achieved as much via formalised procedures as substantive change in the elements of offence.

A ‘Manifest Criminality’

Consorting offences in the first generation of laws had a loose, open-textured quality, reflecting the way in which they depended on and reinforced the social status of the individuals whose associations with others they proscribed. Flowing from the status of consorting as a species of vagrancy, laws in the first generation revolved around a manifestly criminal act – associating with ‘undesirable’ individuals – with the significance of the conduct or behaviour element of the offence far greater than any mental or fault element. The laws did not require that the prosecution prove *mens rea* because ‘habitually

⁹⁹ Government of South Australia, Submission to Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the legislative arrangements to outlaw serious and organized crime groups* (June 2008), 29 (referring to *Summary Offences Act 1953* (SA) s 13).

¹⁰⁰ Evidence to Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, Canberra, 3 July 2008, 18-19 (Damian Kenneth Powell) quoted in Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organized crime groups* (2009), 57.

consorting with reputed thieves is such conduct as *prima facie* to shew [sic] a guilty mind'.¹⁰¹ While there were some references in the case law to 'the necessary blameworthy condition of mind' required by the offence, this amounted only to knowledge of the reputation of the persons with whom the defendant had been in company – and because of the role of reputation, discussed above, it was possible to infer such knowledge from the absence of proof to the contrary.¹⁰² With police evidence about the reputation of an individual operating to construct a *prima facie* case, knowledge was a thin fault requirement that did not operate as a genuine bar to conviction. As evident in what appears to be the low success rate of appeals against conviction, it was difficult to argue that the evidence was not sufficient to make out the charge.¹⁰³

This open-textured offence structure supported flexible practices of policing and prosecution. Like the vagrancy laws of which they were a part, consorting laws were characterised by the high degree of discretion they afforded police and magistrates. The laws enabled police officers to arrest without a warrant an individual suspected of consorting if he or she was alleged to be consorting at the time of the arrest. At least in some cases, accidental meetings between such individuals could be the subject of 'bookings' by the police and taken into account for the purpose of supporting a charge of habitual consorting.¹⁰⁴ Arrest for consorting also operated as a backup charge, when it was not possible to make out a charge for another, more serious offence: indeed, it was possible that consorting provided the means by which to make an arrest once the police had concluded a person was a criminal.¹⁰⁵

Once charged, consorting was tried in the summary jurisdiction, and magistrates also had significant discretion in deciding between convictions and penalties. Consorting cases often turned on their facts – in particular, the degree of association required to satisfy the 'habitual' aspect of the consorting offence¹⁰⁶ – and, reflecting widespread judicial support for policing practices,

¹⁰¹ *Gabriel v Lenthall* [1930] SASR 318, 324; see also *Ex parte Finney; Re Miller & Anor* [1936] WN (NSW) 190, 191; *Dias v O'Sullivan* [1949] SASR 195, 200.

¹⁰² *Gabriel v Lenthall* [1930] SASR 318; *Dias v O'Sullivan* [1949] SASR 195, 204.

¹⁰³ See, eg, *Canino v Samuels* [1968] SASR 303, 304.

¹⁰⁴ *Beer v Toms, Ex parte Toms* (1952) 46 QJPR 102, 111. The only limitation on police powers that emerged sometime in the mid-century was the time period within which the instances of consorting had to occur. In NSW, this was 6 months, based on the requirement that summary proceedings must be commenced not later than 6 months following the alleged offence: see *Justices Act 1902* (NSW) s 56 and *Criminal Procedure Act 1986* (NSW) s 179(1). As a continuing offence, all instances of consorting had to occur within this timeframe: see Steel, above n 1, 573.

¹⁰⁵ Steel, above n 1, 589.

¹⁰⁶ See, eg, *Brealy v Buckley* [1934] Argus LR 371, 372; *MacDonald v The King* (1935) 52 CLR 739.

and public support for the laws themselves, rates of conviction seem to have been high. Few defendants had the resources required to appeal,¹⁰⁷ and, even where they may have reached a different conclusion on the facts of a particular case, appellate courts were reluctant to overturn convictions.¹⁰⁸

Reflecting a debt to the laws of vagrancy, and the manifest nature of the crime, there was no such thing as ‘innocent’ consorting,¹⁰⁹ and individuals charged with consorting did not have many means by which to defend the charge. In addition to arguing that the number of associations did not amount to ‘habitual’ consorting, some individuals relied on the statutory defence to a charge of consorting. This defence required the person charged with the offence to give ‘to the satisfaction of the court a good account of his lawful means of support and also of his so consorting’.¹¹⁰ As this indicates, the defendant bore the burden of proving this defence. Just as what constituted consorting was interpreted broadly, the scope of this defence was interpreted narrowly. The logic of this part of the law was explained by Justice Smith of the Supreme Court of Victoria, in a statement worth extracting in full:

...the view of the Legislature would seem to have been this: a person who habitually consorts with criminals and undesirable persons is likely to be supporting himself by preying on the community in some way, or to be under strong temptation to do so. Any such person may therefore be imprisoned for the protection of the community unless he shows he is not in fact a danger. ... But such proof of present means cannot be accepted as sufficient, in itself, to show that he is not a danger. Even though he has means he must still be regarded as a danger because of his habitual consorting unless he gives, in addition, a good account of that consorting.¹¹¹

As Justice Smith’s comment indicates, providing evidence of lawful means of support undercut the manifest meaning of the act of consorting: that the

¹⁰⁷ If a person convicted of consorting appealed, he or she did so via a civil suit against the senior police officer or detective in charge of the prosecution. This meant that an individual appealing his or her conviction had to obtain an order *nisi* to review the decision, and the appeal court either discharged that order and upheld the conviction (see eg *Brealy v Buckley* [1934] Argus LR 371) or made the order absolute and quashed the conviction (see eg *Guider v Walker* [1933] VLR 413). It also meant that a number of appeals against conviction featured the same police officer: see, eg, *Codd v Lewis* (1944) 38 QJPR 135; *Codd v Wall* (1944) 38 QJPR 141.

¹⁰⁸ See, eg, *Patterson v Harrison* [1957] Argus LR 1195.

¹⁰⁹ See *Johanson v Dixon* (1979) 143 CLR 376, 384 (Mason J) (but in his dissent, Justice Murphy argued that this interpretation of the law gives consorting an overly broad scope: at 392-3).

¹¹⁰ See, eg, *Police Offences Act 1957* (Vic) s 69(d)(i).

¹¹¹ See *Byrne v Shearer* [1959] VR 606, 613 (citing *Police Offences Act 1957* (Vic) s 69(d)(i)).

accused was ‘preying on the community in some way’. Thus, for an account of consorting to be a ‘good account’, it had to operate to excuse the conduct in some way, and not merely show that ‘there was habitual consorting but nothing more’.¹¹²

B Procedural Solutions to Substantive Challenges

Under the second generation of consorting laws, the offence structure has been carried over – associating with proscribed individuals with knowledge of their status – but the conduct and fault elements have been made more robust. In relation to conduct, in light of the potential of the laws for abuse, the requirement of ‘habitual consorting’ is now strictly interpreted, meaning that the laws are intended to target ‘companionship, not mere conversation’, and ‘casual conversation on the street with an acquaintance’ cannot amount to consorting.¹¹³ Reliance on ‘numerous instances of reiteration’,¹¹⁴ as required to support convictions for ‘habitual consorting’ under the first generation of laws, has been replaced with a requirement that the defendant associate with a specified number of individuals on a specified number of occasions. For example, in NSW, the offence provides that a person does not ‘habitually consort’ with convicted offenders unless he or she consorts with at least two such people and with each convicted offender on at least two occasions.¹¹⁵ For the purposes of consorting, association now extends beyond in-person communications, to include any type of communication, including electronic communication, between individuals,¹¹⁶ which has offset the narrowing effect of the stricter conduct requirements of the new laws.

In addition, in attempts to avoid the victimisation of vulnerable people, there have been some attempts to limit the class of people who may be convicted of the offence of consorting. In some jurisdictions, consorting is limited to those who are associating with individuals who have been convicted of serious offences. Thus, in Victoria, the scope of consorting is limited to

¹¹² *Johanson v Dixon* (1979) 143 CLR 376, 384 (Mason J). A ‘good account’ could be furnished by evidence that the defendant was associating with ‘close relatives, for filial or family reasons, or because his occupation required him so to do’ (384).

¹¹³ *Forster v DPP (NSW)* [2017] NSWSC 458 [59].

¹¹⁴ *Dias v O’Sullivan* [1940] SASR 195, 201.

¹¹⁵ See, eg, *Crimes Act 1900* (NSW) s 93X(2). See also *Summary Offences Act 1953* (SA) s 13; Justice and Community Safety Directorate, ACT Government, *Discussion Paper: Consorting Laws for the ACT*, Discussion Paper (2016), 13.

¹¹⁶ See, eg, *Crimes Act 1900* (NSW) s 93X.

associations with those who have committed, or are reasonably suspected of committing, ‘organised crime offences’.¹¹⁷ In South Australia, consorting can only be charged in relation to individuals convicted of certain ‘prescribed offences’, including serious drug offences, firearms offences, and violence offences.¹¹⁸ In Western Australia, it is an offence for an individual who has been convicted of certain declared drug offences to associate with another individual convicted of those offences.¹¹⁹ These limitations on the scope of consorting laws – to serious and organised crime – reinforce the orientation of the second generation of laws – toward security of the state – as discussed above.

The fault element for the offence of consorting – knowledge of the criminal status of the other person – has been made a (more) genuine element of the offence. While, in general, the laws continue to criminalise association in itself, rather than require an intention to associate for a criminal purpose,¹²⁰ there have been two developments in relation to the fault element of the offence. The first development entails clarifying the fault requirement. For example, under the South Australian laws, it is necessary for the person to know or be reckless as to the status of the person with whom they consort.¹²¹ The second development entails a change in the procedural scaffolding around the laws, which functions to buttress the knowledge requirement of the offence. Here, a particular instance of association will only count for the purposes of the offence where an individual has been warned about that association. Thus, under the Queensland and NSW provisions, individuals must be given either one or two ‘official warnings’ by a police officer that he or she is associating with a convicted offender, and that consorting with a convicted offender is an offence, before he or she can be convicted of an offence of consorting.¹²² Change to the procedural scaffolding around consorting is significant for the relations with state posited by the offence, as I discuss below.

Even with the tightening up of the conduct and fault elements of the offences, consorting laws are again a useful tool in the toolbox of police powers.

¹¹⁷ See *Criminal Organisations Control Amendment (Unlawful Associations) Act 2015* (Vic).

¹¹⁸ *Summary Offences Act 1953* (SA) s 14A.

¹¹⁹ *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 32, inserting *Criminal Code 1913* (WA) s 557]. A similar consorting offence applies to convicted child sex offenders (s 557K); see also *Director of Public Prosecutions (WA) v McGarry* [No. 9] WASC 306 (23 September 2016).

¹²⁰ Among the Australian jurisdictions, only the Commonwealth and the Northern Territory require that police officers issue warnings only where they believe on reasonable grounds that such a warning will prevent the commission of an offence: see *Criminal Code Act 1995* (Cth) s 104.2(2) and *Summary Offences Act* (NT) s 55A.

¹²¹ *Serious and Organised Crime (Control) Act 2008* (SA) s 35(2).

¹²² See s77B(1)(b) *Criminal Code 1899* (QLD) and s 93X(3) *Crimes Act 1900* (NSW) respectively.

Revealing a degree of continuity in the operation of the first and second generation of laws, and despite the restriction of consorting to serious or indictable offences (in some but not all jurisdictions), police are using consorting as part of ‘observations of people spending time together in places open to the public’.¹²³ This has meant that certain groups, including Indigenous people and young people, have been disproportionately affected by the new consorting laws. A review by the NSW Ombudsman found that the NSW laws are used in relation to vulnerable individuals such as young people and homeless people.¹²⁴ As the Supreme Court of NSW noted in hearing an appeal from the first person convicted of the new offence of consorting in that state, police evidence had included a ‘disarmingly frank account’ of the use of the consorting laws to deal with recidivist offenders and ‘crime hot spots’ in town.¹²⁵ This level of continuity indicates that, on an operational level, consorting continues to be used in policing low-level offences and protecting public order, itself revealing the main target of the offence – suspect populations, or status not conduct – is common to each generation of the laws.

Consistent with modern structures of criminal responsibility, in which limitations on liability have formalised as either restrictions on the scope of offences or as defences, there are now clearer limits on the consorting offences. These limits are carved out from within the statutory provision. For example, under the Commonwealth offence of ‘associating with terrorist organisations’, communication with a ‘close family member’ about ‘a matter of family or domestic concern’ cannot form the basis of a consorting charge.¹²⁶ In NSW, consorting is not an offence where it is ‘reasonable in the circumstances’, which includes associating with family members, for employment or education, and consorting in the course of receiving legal advice.¹²⁷ In Queensland, particular

¹²³ NSW Ombudsman, *The consorting law: Report of the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016, 4.

¹²⁴ *Ibid* n 123. The Ombudsman found that, in the first three years of its operation, 3300 people were either issued with a consorting warning, or had others warned about consorting with them; only 42 people were charged with 46 offences of habitually consorting (*ibid* 3). This report referred to the ‘lawful but inappropriate’ use of consorting, and recommended the inclusion of an ‘objects’ clause in the legislation to state that the purpose of the law is to prevent serious criminal offending (*ibid* 5, 8 (recommendation 19)).

¹²⁵ *Forster v DPP (NSW)* [2017] NSWSC 458, [26] (referring to evidence before the Magistrate who had convicted the appellant of consorting).

¹²⁶ *Criminal Code Act 1995* (Cth) s 102.8 (4) (the evidential burden is on the accused).

¹²⁷ *Crimes Act 1900* (NSW) s 93Y. The burden is on the defendant to satisfy the court in relation to these defences. The NSW Ombudsman’s review of the operation of the NSW laws recommended adding to these defences, and defining ‘family members’ to ensure recognition of Aboriginal kinship relations: see NSW Ombudsman, above n 123, ch 10.

acts of consorting – with family members and for the purposes of lawful business – are to be ‘disregarded’ under the law.¹²⁸ As this statutory language indicates, these associations are still consorting but cannot form the basis of a conviction for the offence. The burden for establishing these defences or exclusions is on the person charged with consorting. These provisions delineate a limited legal zone for particular types of interpersonal contact, beyond the reach of the criminalisation of association.

As this discussion suggests, the tighter and more modern structure of consorting laws in the second generation has been realised in part via the formalisation of procedures as much as by changes to the substance of the offences. These procedures expose the role of criminal process in addressing modern demands for legitimacy in criminal law, even as the elements of criminal offences such as consorting echo an earlier era. These formalised procedures concern the policing practices – including the use of police discretion and surveillance – that are based on the offences of consorting (and allied criminal organisation offences). These procedures constitute a significant buttressing of the laws themselves. Thus, the system of police warnings that must precede a charge of consorting in some jurisdictions ‘has the practical effect that a person warned would find it difficult to say that he or she did not know the persons with whom he or she was consorting thereafter were convicted offenders’.¹²⁹ As this indicates, these warnings put an individual on notice about the status of her or his associates. In addition to aiding efficacy, and demanding extensive record keeping, these procedural provisions assist consorting laws to adhere to the enhanced rule of law demands of the current era. As explained by the Queensland Taskforce in advocating for a new consorting law in that state, utilising an offence based on the criminal convictions of the person with whom the individual is now associating is the appropriate way to avoid unfairness to individuals.¹³⁰

The role of formalised procedural practices around the offence of consorting reveals the changed position of the state in relations of responsibility. These procedural practices show how the state is brought *into*

¹²⁸ See s 77C *Criminal Code 1899* (QLD).

¹²⁹ *Tajjour v New South Wales* (2014) 254 CLR 508 (in relation to the NSW offence).

¹³⁰ Report, *Taskforce on Organised Crime Legislation* (2016) (by contrast with laws targeting the criminal organisations).

the relationship between individuals in a distinct way. There are two dimensions to this change – one formal and one substantive. First, the laws encode a nebulous, but meaningful, flattening out of relations between individuals and the state. Here, all individuals are brought into the same relation with the state. By contrast with the first generation of laws, consorting operates not to keep groups of socially ‘undesirable’ people apart from each other, but to standardise relations between individuals and the state. The elaborate system of police warnings about association with criminals, and the extensive formal record keeping that now surrounds the offence of consorting, shows that the laws establish a uniform legal relation between individuals falling under the laws and the state. According to this standardised relation, the laws *activate* individuals in their interpersonal associations: via consorting, all interpersonal associations can be made to operate in furtherance of, or in accordance with wider, state-sanctioned goals such as security.

The second dimension to this change is substantive – it concerns the nature of the standardised relations between individuals and the state via the laws of consorting. In these relations, the state is posited as a ‘friend’, albeit a weaker institutional form of a friend. As the archetypal form of this standardised mode of interpersonal association, friendship now characterises relations of criminal responsibility between individuals and the state. With its hallmarks of mutuality and equality, and correlates of loyalty and allegiance, friendship is a mode of relation characterised by choice: it may be contrasted with the unchosen, fixed relations, characterised by status, role or custom, and with unequal relations, characterised by dominance, vulnerability, or dependency.¹³¹ Under consorting, the individual subject to the laws is posited as having to choose between (criminal) ‘friends’ and the state thus not associating with the ‘friends’. In this context, there is an equality of exchange across the social goods of freedom and protection, and the interests of the state – around its own security – are rendered equivalent to those of a friend. As this suggests, private and personal or mental space, and self-policing, is now as important as public space and policing by the police to consorting. Recalling the security orientation of the second generation of laws, their legal rather than social mode of responsibility, and their tighter and more modern structure, it

¹³¹ There is a large sociological literature on friendship: see, eg, Ray Pahl, *On Friendship* (Polity, 2000); Graham Allan, ‘Friendship, Sociology and Social Structure’ (1998) 15(5) *Journal of Social and Personal Relationships* 685.

becomes clear that the laws now work to inculcate ‘friendship with the state’ rather than proscribe ‘companionship with thieves’.

The background to the change in relations of responsibility described here is complex and multifaceted. For my purposes, there are two significant aspects to note. First, large scale changes in sociality into the current era have radically reconstructed interpersonal relations along horizontal lines. As sociologists and others have argued, the move from modernity¹³² to ‘advanced liberal’, ‘late’, ‘new’, or ‘reflexive’ modernity¹³³ has entailed a fundamental change in relations between individuals. Indeed, for scholars such as Anthony Giddens and Ulrich Beck, changing relations between individuals define this social change.¹³⁴ Further, a number of critical theorists have analysed the rise of associational identity – as a basis for political activism and social organisation – as class identity has declined in significance.¹³⁵ In the current era, several forms of inter-personal relations – including intimate relations and familial relations – now cleave towards friendship.¹³⁶ Second, in a wider political context, citizenship has been re-moralised, and the rights of protection by the state now attaches to new sets of duties.¹³⁷ In this context, citizens have a duty not to pose a threat to the state, and those who do so infringe others’ citizenship rights and offend against the whole community.¹³⁸ The large scale changes in sociality and the re-moralisation of citizenship together help to account for this change in relations between individuals and the state.

¹³² Modernity is a contested concept: it is used here to denote a distinctive ‘mode of life’, in which the state, as opposed to local and religious institutions, provides the main framework: see Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1990) 4.

¹³³ See Nikolas Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge University Press, 1996); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2002); Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter trans, Sage Publications, 1992) [trans of: *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (first published 1986)]; Giddens, above n 132; Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991).

¹³⁴ See Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age*, above n 133; Beck, above n 133.

¹³⁵ See generally Nancy Fraser, *Justice Interruptus: Critical Reflections on the ‘Postsocialist’ Condition* (Routledge, 1997); Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995).

¹³⁶ See Sasha Roseneil and Shelley Budgeon, ‘Cultures of Intimacy and Care Beyond ‘the Family’: Personal Life and Social Change in the Early 21st Century’ (2004) 52(2) *Current Sociology* 135.

¹³⁷ See Anthony Giddens *The Third Way: The renewal of social democracy* (Wiley & Sons, 2013); Peter Ramsay, *The Insecurity State: vulnerable autonomy and the right to security in the criminal law* (Oxford University Press, 2012).

¹³⁸ See Peter Ramsay ‘The responsible subject as citizen: Criminal law, democracy and the welfare state’ (2006) 69(1) *Modern Law Review* 29.

The significance of the idea that consorting now encodes ‘friendship with the state’ is that, via consorting, the criminal law is encoding loyalty and allegiance, which is overlaying the older ideas of dangerousness and threat that animated the first generation of consorting laws. Thus, even as consorting continues to be used to police low-level threats and public order, the notion of moral wrongness at the heart of the offence has changed: what is now wrong about consorting is less about social threat and more about disloyalty, or dis-allegiance. In this sense, what is said to be distinctive about organised crime (to which consorting is now allied) – with recognisable leadership, hierarchies, rules, symbolic identification, and codes of silence¹³⁹ – when compared with other crime also reveals what it is that the consorting laws are now condemning: loyalty to a person, people, or a group or organisation other than, and set up in opposition to, the state.

V CONCLUSION

This article offered an analysis of the development of consorting laws in Australian jurisdictions with such laws understood as encoding changing relations of criminal responsibility. I argued that the laws fall into two generations, each of which encodes different relations of responsibility. The first generation of consorting offences proscribed ‘companionship with thieves’ with relations of responsibility reinforcing existing, highly stratified social relations, with the laws operating to keep different categories of ‘undesirables’ apart from each other. By contrast, the second generation of laws inculcate ‘friendship with the state’, with relations of responsibility assuming a standardised structure, according to which the state is brought into the relationship between individuals in a distinct way – as a ‘friend’. By way of conclusion, I briefly discuss some of the implications of this analysis for our understanding of the place of consorting in the criminal law corpus.

Consorting has been the subject of only limited consideration by criminal law scholars. Typically, consorting is identified (and dismissed) as a paradigmatic “status offence”, criminalising individuals on the basis of who

¹³⁹ These features of organised crime are said to render traditional policing tactics redundant: see Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, *Inquiry into the legislative arrangements to outlaw serious and organized crime groups* (2009), 56.

they are rather than what they have done.¹⁴⁰ Thus, in normative accounts of criminal responsibility, consorting is criticised because, in general, fault is based not on intention or recklessness but on knowledge or, arguably more accurately, dangerousness. In addition, because consorting criminalises association between individuals without a requirement that the association to be for any particular criminal purpose (by contrast with conspiracy), it is thought to extend the criminal law beyond justifiable boundaries, infringing on personal autonomy and freedom of association.¹⁴¹ On this basis, scholars typically conclude that consorting has no rightful place in modern liberal legal systems.

But the story told in this article suggests that consorting warrants further attention in studies of criminal responsibility (even if not a radically different conclusion about the concerning aspects of the laws). My study shows the way in which consorting has developed, from first generation to second generation, entails a move from a marginal place – concerned more with low-level offences and social threats – to a central position in the criminal legal order. With its orientation around security of the state, its legal rather than social mode of responsibility, and tighter legal form or structure, consorting now appears to look more like modern criminal offences, and to constitute the core business of the criminal law. In this light, consorting may not be so readily dismissed by scholars of criminal law.

¹⁴⁰ See, eg, Hamed Tofangaz, 'Criminalization of Terrorist Financing: From Theory to Practice' (2018) 21(1) *New Criminal Law Review* 57, 124.

¹⁴¹ For discussion of this concern in the context of 'membership offences', see Liat Levanon, 'Criminal Prohibitions on Membership in Terrorist Organizations' (2012) 15(2) *New Criminal Law Review* 224.