1 CRIMINAL RESPONSIBILITY

INTRODUCTION

The criminal law identifies certain wrongful behaviour that society regards as deserving of punishment. People breaching the criminal law are labelled as criminals and are penalised by the state. Given these severe consequences, the criminal law is normally reserved for limited kinds of wrongdoing.

This chapter will analyse the major considerations affecting the decision whether certain wrongful behaviour should be regarded as a crime.[1] One of these is the principle of *individual autonomy* whereby people may conduct their lives as they choose with as few restrictions as possible. This principle promotes minimal criminalisation. There is also the related notion of 'individualism', which regards people as capable of choosing their own courses of action. According to this notion, people who lack the capacity to choose should not be made criminally responsible for their actions. A competing consideration is the *community welfare* principle according to which the collective interests of society must be protected. This principle views individuals as belonging to a wider community that can only be sustained if certain duties are imposed on its members. The criminal law is relied on as one mechanism to ensure that these duties are adequately discharged. These duties serve to protect the rights of other members of the community and, more broadly, the values and interests of the community that are seen as essential to its successful functioning. Hence, the community welfare principle asserts that individual autonomy may have to be overridden by the collective interests of the community. The criminal law is very much the product of the interplay between these two competing principles of individual autonomy and community welfare.

The first part of this chapter spells out the aims and functions of the criminal law. In the second part, certain specific policies and principles influencing the perimeters of the criminal law are explored. Also included is a brief consideration of the sources of the criminal law and how the law is or should be laid down. The third part covers the essential ingredients of a crime, namely, harm-inducing conduct, a mental or fault element, and the absence of any lawful justification or excuse, or a legally recognised mental incapacity (that is, defences). The fourth part considers certain concepts that the criminal law has devised to extend the scope of criminal responsibility. The discussion will often engage with the struggle between individual autonomy and community welfare. It will be observed how justice or fairness is achieved for both individuals and the community to which they belong through a carefully reasoned balancing of these competing considerations. This need to balance individual autonomy with community welfare is so vital that it appears as an Article in the *Universal Declaration of Human Rights*:

> (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

1 Much of this chapter is inspired by A. Ashworth and J. Horder, *Principles of Criminal Law*, 7th edn, Oxford University Press, Oxford, 2013.

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(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[2]

In the final part, we discuss two recent developments pertaining to criminal responsibility that go beyond the discussion covered by that stage. The first concerns efforts by lawmakers to render corporations criminally liable by modifying the conventional principles of criminal responsibility that are geared towards natural persons. The second is the creation of the International Criminal Court to try certain crimes, and the enactment, at the international level, of a set of general principles of criminal responsibility.

AIMS AND FUNCTIONS OF THE CRIMINAL LAW

The overall aim of the criminal law is the prevention of certain kinds of behaviour that society regards as either harmful or potentially harmful. The criminal law is applied by society as a defence against harms that injure the interests and values that are considered fundamental to its proper functioning. These interests and values cover a wide area. They include the bodily integrity of people, the security of property, protection of the environment and moral values.

It may be easy enough to state this general justifying aim of the criminal law. But the problem comes when we have to locate the key to deciding whether an interest or value is so fundamental as to warrant the protection of the criminal law. This problem is compounded by several factors. First, there are other fundamental interests or values, also crucial to the proper functioning of society, that are incompatible with the threat of criminal sanction. Second, there are methods of social control or prevention besides the criminal law. Third, the primary aim is blurred by its increased use of the criminal law to regulate conduct for reasons of economy and expediency. There is a growing sphere of legislative activity that uses the criminal sanction to endorse policies that stand apart from harm prevention. We shall elaborate upon these factors in the course of our discussion.

MORAL WRONGNESS APPROACH

One suggested key to deciding whether behaviour should be criminalised is 'moral wrongness'. Lord Devlin, an English judge, was a keen proponent of this stance.[3] He regarded morality as underpinning the social fabric of society, and immoral behaviour as eroding that fabric and consequently destabilising society. He therefore had no hesitation in advocating the use of the criminal law to deter 'immoral' behaviour. Lord Devlin applied the strength of feelings of ordinary people to define moral wrongness. If conduct arouses feelings of indignation or revulsion in these people, it is a good indication that the conduct strikes at the common morality and is a proper object of the criminal law. But herein lies a major weakness of Lord Devlin's approach. His definition of moral wrongness is far too imprecise as it leaves the matter to be decided by mere feelings of disgust. Such feelings may well stem from irrational prejudices rather than reasoned moral indignation.

2 Article 29. The Declaration was adopted by the United Nations General Assembly in 1948.

3 See P. Devlin, *The Enforcement of Morals*, Oxford University Press, London, 1965.

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INDIVIDUAL AUTONOMY APPROACH

Another suggested key to deciding whether the criminal law should be used is the 'harms to others' approach. This may be described as individualistic liberalism.[4] This approach places individual autonomy at a premium and contends that this and its attendant individual freedoms are vital to the proper functioning of society. The approach calls for individuals to be accorded as much freedom as possible, subject only to the minimum restrictions required to provide other individuals sharing the community with those same freedoms. The criminal law should therefore be used only against behaviour that injures the rights and interests of these other people, in other words, behaviour that harms others. Thus, under this approach, homosexual behaviour between consenting adults should not be criminalised since they have mutually agreed to engage in this behaviour. Accordingly, these people should not be subject to the criminal law however reprehensible or immoral their behaviour might appear in the eyes of some.[5]

It should be noted that this 'harms to others' approach relates to individuals who have reached a sufficient degree of mental maturity to competently decide what is best for themselves. Proponents would permit the use of the criminal law to protect individuals who lack such maturity, for example, children and intellectually disabled people. This may be described as legal paternalism as it conveys an image of the law acting as a protective parent or guardian to especially vulnerable or dependent individuals. Thus, the criminal law may be applied to prohibit children below a certain age from engaging in activities such as homosexual or heterosexual intercourse, drinking alcohol in pubs, or driving a motor vehicle on a public road. These activities are criminally proscribed not because they are harmful in themselves, but because they have potentially harmful consequences that immature people may not sufficiently appreciate.

A criticism against this approach is that it fails to explain adequately the use of the criminal law in certain areas. For instance, few would today disagree that the deterrent effect of the criminal law should be applied to ensure that safety belts are worn by drivers, or that motorcyclists should wear helmets. Paternalism is an inappropriate explanation here since we are concerned with individuals who should possess a sufficient degree of maturity to make their own decisions about the risks of such activities. It could be contended that these activities might cause harm because the participants may injure themselves and become a financial burden or source of hardship to their families or the state that has to care for them. However, these harms are, at best, indirect and their recognition will considerably reduce the limiting principle that makes the approach so attractive.

COMMUNITY WELFARE APPROACH

Perhaps a better explanation for the criminal proscription of such behaviour lies in what we have termed the community welfare principle.[6] This principle justifies the use of the criminal law to protect the continued physical well-being of members of a community. The principle would also take into

4 Its proponents include Professor Hart, who engaged in a celebrated debate with Lord Devlin over the role of morality in the criminal law. See H. L. A. Hart, *Law, Liberty and Morality*, Oxford University Press, London, 1963.

5 This was the view of Lord Mustill (dissenting) in the House of Lords decision in *R v Brown* [1993] 2 WLR 556 at 599–600, a case involving a group of sado-masochists who willingly and enthusiastically participated in inflicting violence against one another for sexual pleasure.

6 See N. Lacey, 'The Traditional Justifications' in *State Punishment: Political Principles and Community Values*, Routledge, London, 1988c, p 16; N. Lacey, 'Punishment and the Liberal World' in Lacey, 1988a, p. 143.

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account the financial cost to the community of permitting activities such as not wearing seatbelts and helmets to continue unrestricted.

It is worthwhile observing here the material difference between the 'harms to others' approach and the community welfare principle. We have already noted that the former emphasises individual autonomy and confines the role of the criminal law to proscribing activities that impinge on the freedoms of other individuals within the same community. In contrast, the community welfare principle places a premium on community interests and would be prepared to override individual autonomy for the greater good of the community. Thus, the principle may impose criminal liability on drug users or on people driving without securing their seatbelts out of concern for the welfare of the community. This would be done at the cost of infringing upon their individual freedom to choose their own course of action. It should be added that the community welfare principle is not confined to explaining those activities that cannot be adequately explained by the 'harms to others' approach. The community welfare principle can and does serve as a key to deciding which behaviour should or should not be criminalised in respect of a full range of 'antisocial' behaviour.

To summarise our discussion thus far, the overall aim of the criminal law may be stated as the prevention of harm. But the criminal law would be drastically over-used if it were to proscribe each and every activity that causes harm or has the potential to do so. The problem for lawmakers is to determine which kinds of harmful activity should fall within the ambit of the criminal law and which should fall outside it. Two competing influences have been located that have a significant bearing on this determination—the principles of individual autonomy and community welfare. Neither can claim to have taken predominance over the other so that, in achieving the overall aim of preventing harm, the criminal law has been moulded in ways that account for both of these principles.

In your view, what is the key to deciding whether an interest or value is so fundamental as to warrant the protection of the criminal law?

MAJOR FUNCTIONS

We now turn to examine certain major functions of the criminal law. These involve the processes, operations or activities that the criminal law normally discharges. One of these functions is to distinguish civil wrongs from criminal wrongs. A person who is harmed by a tort[7] or by a breach of contract may sue for damages or obtain some other remedy in a civil court. He or she has been 'wronged' but the harmful conduct may not be regarded as sufficiently serious to constitute a crime. Not all social mischiefs will have aggrieved victims wanting remedies from a civil court. There are some mischiefs that harm the public rather than individual victims. In these cases, the criminal law may be justified in stepping in to ensure that such harmful activities are controlled, even though the mischief may constitute only minor incursions on basic social functioning. These have been described as 'victimless' crimes and include activities such as drug use, prostitution, distribution of obscene literature, and some forms of gambling. Whether the criminal law is the best measure to control this behaviour is open to debate.

Distinguishing civil from criminal cases is only a preliminary function of the criminal law. Its primary task is to stipulate the *degree of seriousness* of criminal conduct. We need to determine not simply

7 Torts are civil wrongs that attract compensation by way of damages. Some common torts are negligence, trespass, nuisance and defamation.

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whether a social mischief is sufficiently serious to be made a crime but, if a crime, how serious it is when compared with other crimes. Knowing the degree of seriousness of criminal conduct is vital to selecting the proper label of offence and the appropriate penalty. It has also wider practical consequences for matters such as the legality of arrest without a warrant and of searches, the decision to caution or to prosecute, to grant bail, whether to have the case tried before a magistrate or a judge, to try a case with or without a jury, the sentencing options available, and the decision whether to release on parole.

What considerations are material in assessing the relative seriousness of criminal conduct? One factor is the impact of the conduct on victims of the particular kind of crime. Not only the physical injuries, but also the psychological trauma of victims of violent crimes may be taken into account. The monetary value of property crimes also affects the degree of offence seriousness. Another factor is the extent of culpability of the offender. This may be gauged according to the offender's mental state in relation to the offence. Thus, intentional wrongdoing would normally be assessed as more culpable than recklessness, which in turn would be more blameworthy than negligent behaviour.[8] A third factor is the degree of likelihood of harm. A case involving conduct that was virtually certain to cause harm would obviously be more serious than one where the risk of harm was remote. Similarly, a case where the harm actually occurred would normally be regarded as more serious than one where the harm did not materialise.

This very brief consideration of how offence seriousness is assessed should be sufficient to indicate its complexity. Numerous value judgments are involved as well as a multiplicity of variables relevant to the assessment exercise. Difficult as the task is in ranking offences, justice to both offenders and their victims requires every effort to be made. To reduce arbitrariness and inconsistency in ranking offence seriousness, it may be necessary to adopt a framework upon which lawmakers can pin their deliberations.[9]

So far, we have only discussed crimes that harm the fundamental values and interests necessary for proper social functioning. However, there is an ever-growing proliferation of offences that do not fit this description. These are minor offences that use the threat of punishment to achieve the smooth running of day-to-day social intercourse and activities such as road traffic flow, business regulation, urban planning, licensing procedures and so forth. Accordingly, they have been described as 'regulatory offences'. These offences are often made strictly liable by the legislature so that mere proof of the commission of the proscribed conduct is sufficient to establish the charge against the accused without additionally having to prove that the accused intended, knew of or was reckless of the wrongdoing.[10] But is the use of the criminal law justified in these areas? While the smooth running of these activities may be necessary to realise social and individual goals, it is certainly not as central to social functioning as the protection of physical integrity or the security of property. These regulatory offences seem to have emerged on the basis of economy and expediency. The criminal law and criminal justice system lend themselves to providing cheap, effective and politically convenient means of controlling such comparatively minor infringements. Whether the criminal law should function in these spheres is highly debatable. Such an extension of its operation does not sit well with the overall aim of the criminal law of protecting values and interests considered fundamental to proper social

8 The concepts of intention, recklessness, knowledge and negligence are dealt with later in this chapter.

9 For some examples of suggested frameworks, see J. Feinberg, *Harm to Others*, Oxford University Press, New York, 1984; A. Von Hirsch and N. Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis', *Oxford Journal of Legal Studies*, 11, 1991, p. 1.

10 See further below, p. 25.

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functioning. Furthermore, the stigma and consequences of criminal conviction may be too drastic for these kinds of infringements. It is our view that the better course would be for these infringements to be regulated by some other form of enforcement—for example, insurance, taxation and licensing.[11]

Do you agree with the authors' view that so-called 'regulatory offences' have no place in the criminal law?

SOURCES, PRESCRIPTIONS AND INFLUENCES ON THE CRIMINAL LAW

In this part, we shall deal first with the sources of Australian criminal law—where it is to be found. Next, the form in which the law is presented will be examined. There then follows a brief description of the major categories of crimes. The final section will consider certain policies and principles that narrow or expand the contours of criminal responsibility.

SOURCES OF CRIMINAL LAW

There is no single body of criminal law governing the whole of Australia. Each State and Territory has its own set of criminal laws. Added to these is Commonwealth (or Federal) criminal law regulating matters within the domain of the constitutional powers of the Commonwealth, such as international and interstate trade, Federal taxation, and environmental control.

The criminal laws of these various Australian jurisdictions may be divided into two forms: statutory law, which is enacted by the legislature; and 'common law', which is formulated by judges. The Commonwealth, Queensland, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory have criminal codes. These are statutes that comprehensively lay down the criminal law. New South Wales, South Australia, and Victoria have much of their criminal law formulated and developed by judges. However, in recent years, these common law jurisdictions have witnessed a noticeable increase in criminal legislation. The effect of this is to have the common law gradually replaced by statute.

This variety of criminal laws in Australia is unsatisfactory. While there are some core criminal legal principles commonly shared by all the States and Territories, there remain material differences in much of the substantive criminal law of these jurisdictions. These differences concern such fundamental matters as the definitions of offences, their range of seriousness, the definitions of defences, and the prescribed punishment. The result is inconsistency and incoherence in outcomes when dealing with like cases in different jurisdictions. Thus, a person performing some criminal conduct in, say, Queensland, may be convicted of a different offence and receive a different punishment from a person who had performed the same conduct in Victoria. Justice dictates that persons engaged in criminal behaviour should be treated in the same way throughout this country.[12] Such a sentiment led the Attorneys-General of all the Australian States and Territories to initiate a model criminal code for Australia.[13] Regrettably, after more than two decades, there is little evidence that the State and

11 See generally, J. Rowan-Robinson, P. Watchman and C. Barker, *Crime and Regulation: A Study of the Enforcement of Regulatory Codes*, T. & T. Clark, Edinburgh, 1990.

12 See M. Goode, 'Codification of the Australian Criminal Law', *Criminal Law Journal*, 16, 1992, p. 5.

13 This occurred in 1991 with the establishment of the Model Criminal Code Officers Committee. For the background to this Australian initiative, see G. Scott, 'A Model Criminal Code', *Criminal Law Journal*, 16, 1992, p. 350.

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Territorial Governments are prepared to replace their existing criminal laws with the one proposed by the Model Criminal Code Officers Committee.[14] Hopefully, the lead taken by the legislatures of the Commonwealth and the Australian Capital Territory in adopting most of the model criminal code will eventually persuade the other governments to follow suit.[15]

PRESCRIPTION OF CRIMINAL LAW

A national criminal code would bring consistency to the criminal law of Australia. This development would have another welcome effect on those jurisdictions whose criminal law is presently founded on a common law base. It would mean that the criminal law would be prescribed and developed primarily by the legislature rather than by judges. This is more in accord with constitutional precepts—since the criminal law is society's most powerful measure in regulating social mischiefs, it should be the legislature who decides what that law should be as opposed to a small number of unelected judges. The legislature, comprising elected representatives of the community, is best equipped to express the views of society on such questions as: Is a particular interest or value fundamental to proper social functioning? If so, are there other competing interests or values that should prevail? Is the criminal law the best medium to protect these interests and values?

Another reason for preferring the criminal law to be cast in statutory form is the greater certainty this achieves when compared with the common law. With the law laid down in statute, members of society are given fair warning of their social responsibilities under the criminal law and can readily find these out. This adheres to the principle of individual autonomy with its notion of sufficient choice. Choices are real if the law clearly spells out in advance the consequences of taking certain proscribed actions.

In contrast, the history of the common law has been to create new offences whenever judges regarded conduct, not previously the object of the criminal law, to be deserving of punishment.[16] The common law has also tended to be much vaguer in its pronouncements of the criminal law. This might have been consciously done by the judges to provide room for further creativity should some future occasion so require. The stance of the common law can be supported on the ground of social defence. The judicial power to create new offences and the vagueness of existing criminal law are needed to deal with new variations of social mischief without having to await the lumbering response of legislature. The main criticism against this approach is that it denies individual autonomy (and consequently fairness to individuals) by retroactively penalising previously non-criminal conduct. Indeed, such retroactivity breaches an Article in the *Universal Declaration of Human Rights*, which says that:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.[17]

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14 Over the years, the Model Criminal Code Officers Committee has produced several chapters of the Code, commencing with 'General Principles of Criminal Responsibility' in 1992.

15 See M. Goode, 'Codification of the Criminal Law', *Criminal Law Journal*, 26, 2004, p. 226. For a study indicating that the Criminal Code provisions are working well in practice, see M. Goode, 'An Evaluation of Judicial Interpretations of the Australian Model Criminal Code' in W.C. Chan, B. Wright and S. Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform*, Ashgate, Farnham, 2011, p. 313.

16 There has been no new common law offence created over the past few decades; the modern tendency of the courts is to express the need for a new offence and leave its creation to Parliament.

17 Article 11(2).

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As for the point about the lumbering response of legislature, the pace of legislative enactment has been noticeably much quicker in recent years.[18]

With the move towards greater statutory prescription of the criminal law, what role is left for the courts? This brings us into the realm of statutory interpretation. Judges, with their legal training and expertise, are still the best people to attend to this task. Where the statutory formulation is clear, the court cannot deviate from it. Where the formulation is open to debate, which is often the case, the judges can select from a range of interpretative principles. The judges exercise considerable discretion in both the selection and appreciation of these principles.

The statutory prescription of the criminal law makes it readily accessible to the public. It also provides the impetus to pronouncing the law in simple language so as to be easily comprehensible to ordinary people. Furthermore, the process of encasing the criminal law within the structure and terms of a statute in turn encourages the exercise of ranking offences according to their seriousness.[19] As we have noted earlier, justice requires that a determined effort should be made to perform this task.

CATEGORIES OF CRIME

It is not possible here to mention all the multifarious forms of harms that the criminal law proscribes. The main categories of crimes (not necessarily in order of offence seriousness) may be summarised as follows:

- *Crimes involving death*. Homicide, which is causing death to a human being, is arguably the most serious harm. The crime of murder with its special label and the severity of punishment it attracts places this offence above all other offences involving homicide. A little lower down the scale is attempted murder. This is followed by manslaughter and offences such as infanticide and causing death by reckless driving.
- *Crimes involving bodily injury.* Besides offences causing death, there is a whole range of other offences designed to protect bodily integrity. Psychic assault (threats to apply unlawful force) sits at the least serious end of the range. At the other end are physical assaults resulting in very serious bodily injury that brings the victim close to death. In between are numerous varieties of assault, depending on such factors as the degree of force applied, the injury suffered, and the mental state of the offender. Sometimes, the status of the victim is also significant—for example, the relatively serious offence of assaulting a police officer while in the execution of her or his duty. Sexual offences also vary widely and range from minor sexual contact to sexual assault involving serious physical violence.
- *Road traffic offences*. Many of these offences are minor in nature and perform a regulatory function promoting the smooth flow of traffic. However, included in this category are much more serious offences that pose a danger to the lives and safety of other road users. For instance, there is reckless driving and its less culpable counterparts, negligent driving and drunk driving. Besides seeking to prevent bodily injury, road traffic offences legislation seeks to provide protection against damage to property.

18 For example, the proliferation of sexual assault legislation in New South Wales, South Australia and Victoria, with many of the new offences enacted soon after a few months of public debate. The rapid enactment of antiterrorism offences is another example, although this can be explained by the imminent global threat posed by terrorists: see further Chapter 10, pp. 359–60.

19 Offence seriousness is normally measured by the type of penalty prescribed for the offence. See Chapter 7.

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- *Occupational health and public safety offences.* These are offences proscribed to prevent physical injury in the workplace, from the consumption of goods, in the use of public transportation, and so on. In the past, these offences tended to be regarded as minor and regulatory in nature when compared with the traditional offences involving bodily injury. However, with greater enlightenment on the extent of injury suffered by victims of these offences, they are beginning to be accorded a much higher rank on the scale of offence seriousness.
- *Offences against public order.* These offences range from such serious offences as rioting and violent disorder to minor ones such as offensive behaviour or the use of offensive language. They are designed to enable members of society to move about freely without fear of violence, and be spared abuse or nuisance. For offences at the lower end of the range, there is a danger of their being misused by the police to serve or protect their own interests.[20]
- *Offences against the state.* Treason, sedition, and providing assistance to the enemy in time of war are examples of this group of offences. Their proscription seeks to protect the foundations of the state and maintain the stability of the government, which is considered vital to maintaining peace and good order. Closely related to these offences are those that have recently been enacted to combat the threat of terrorism.[21] As might be expected, these offences are placed very high on the scale of offence seriousness since their proscription seeks to protect national security.
- *Property offences.* The most serious of these offences is robbery (theft accompanied by the use or threat of physical violence). Lower down the range is theft, which is the deprivation of another's property without consent and with the intention of doing so permanently. Then there are the offences of damaging or destroying another's property that, as with theft, are proscribed to protect property interests. Next, are those offences that have an element of fraud—for example, where property has been obtained by deception or by falsifying accounts. The offence of receiving stolen property is proscribed to punish those who encourage the commission of other property offences by making it economically worthwhile.
- *Environmental offences.* Legislation regarding these offences seeks to prevent the pollution of water, air and the earth and to generally maintain a healthy environment. In recent years, there has been an increased awareness of the long-lasting ill effects of pollution on food, health and the environment. This has resulted in raising many environmental offences up the scale of offence seriousness. Industries that produce hazardous wastes are being more closely monitored and made to implement antipollution procedures under threat of heavy penalties.
- *Paternalistic offences.*[22] Some of these have already been discussed such as failure to wear seatbelts and helmets. Gambling, prostitution, the distribution of obscene literature and drug use may be added to this list. Legislation regarding these offences is sought to be justified on the ground that it protects vulnerable people from harming themselves. These people are usually the very young, but adults are also included on the basis that the general welfare and well-being of the community is promoted by discouraging such potentially harmful activities.
- *Drug offences.* While the criminalisation of drug use may be motivated by paternalism (as used in a wide sense), there are several other offences connected with drugs that are seen to exhibit

20 This is exemplified in Chapter 10, pp. 312–13 when discussing the relationship between the police and Aboriginal people.

21 See further Chapter 10, pp. 359–60.

22 Paternalism is here used in a wider sense than used earlier where capacity and state protection are linked. The offences currently discussed are described as victimless crimes.

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aggravating features. These are drug trafficking, importation, cultivation and manufacture. These offences are placed high on the scale of offence seriousness because they are designed to eradicate the supply of drugs. The whole issue of drug offences, particularly in relation to so-called 'soft drugs', is a matter of continuing public debate.

INFLUENCES ON THE PERIMETERS OF CRIMINAL RESPONSIBILITY

In this section we shall consider certain policies and principles contained in the criminal law that influence the ambit of criminal responsibility. Some of these will have the effect of narrowing the limits of the criminal law while others will have the opposite effect.

The policy of *minimal criminalisation* advocates that the criminal law should be used sparingly due to its coercive and liberty-depriving consequences. Individual autonomy is placed at a premium with the individual given as much freedom of choice as possible. The criminal law should therefore be confined only to censuring those activities that definitely harm the values and interests fundamental to proper social functioning.

Opposed to minimal criminalisation is the policy of *social defence*. This sees individuals as members of a wider community whose social arrangements may need to be protected by the criminal law. The criminal law is permitted to infringe upon individual autonomy should this be required to protect the community from threats to peace and order. We have previously noted this same tension between the two policies when discussing the principles of individual autonomy and community welfare.

The principle of *liability for acts but not omissions* also narrows the ambit of the criminal law. According to this principle, criminal responsibility should be confined to positive conduct. Conversely, the criminal law should not penalise people for failing to take action to protect the bodily integrity or property interests of others. It can be seen that individual autonomy is once again maintained since the principle asserts that people should be free to decide whether or not to act in these circumstances. Proponents of this principle would be prepared to recognise certain exceptions. Positive duties to act may justifiably be imposed by the criminal law where, for example, a parent–child relationship exists, or where the accused had voluntarily assumed the care of the victim.[23] However, these exceptions are still consistent with individual autonomy since the positive duty is imposed only on people who have voluntarily chosen through their previous actions to protect the victim. Accordingly, a failure by these people to protect their charges may deserve punishment.

In contrast, the principle of *social responsibility* asserts that the act–omission distinction should give way to the imposition of duties that help to promote a value or protect an interest beneficial to society. In partial deference to individual autonomy, there is the proviso that the discharge of the duty is easy and involves no risk to the actor.[24]

The principles of justification and excuse also operate to narrow the ambit of criminal responsibility.[25] Under the principle of justification, society approves of the accused's conduct and

23 For a discussion of the various categories of duties under common law, see *R v Taktak* (1988) 34 A Crim R 334; *Burns v The Queen* (2012) 246 CLR 334. The codes expressly impose duties to act: see, for example, ss. 285–90 of the Queensland code; ss. 262–7 of the Western Australian code; and ss. 144–52 of the Tasmanian code.

24 Thus under French criminal law, there is a 'duty of easy rescue': see A. Ashworth and E. Steiner, 'Criminal Omissions and Public Duties: The French Experience', *Legal Studies*, 10(2), 1990, p. 153. No Australian jurisdiction recognises such a duty. The closest to doing so is s. 155 of the *Criminal Code Act 1983* (NT), which criminalises 'any person who, being able to provide rescue … to a person urgently in need of it and whose life may be endangered … callously fails to do so'.

25 See S. Yeo, *Compulsion in the Criminal Law*, Law Book Co., North Ryde, 1990, Ch. 1.

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seeks to encourage its performance. The accused should therefore be acquitted of the crime charged. Examples of justification include acting in self-defence or applying force to apprehend a suspected offender. Under the principle of excuse, society regards the accused's conduct as wrong and to be discouraged. However, the accused is rendered not blameworthy (and therefore acquitted of the offence) due to certain extenuating circumstances operating at the time the wrongful conduct was performed. Examples include committing an offence in order to avoid serious injury or some natural danger. While society maintains that the accused's conduct was wrong, it acknowledges the pressures under which the accused operated. As the accused's choices of action were constrained, there was an absence of the individual autonomy required to render her or him criminally responsible for the resulting harm.

The principles of justification and excuse are subject to the limitations that the accused's conduct was reasonable and necessary. Reasonableness may be measured by the concept of proportionate response—the accused's conduct is reasonable provided the harm it inflicted on the victim was no greater than the harm that that conduct prevented. Necessity looks at whether there were other less harmful ways of avoiding the threat or danger to the accused. The concepts of reasonableness and necessity are deliberately kept vague to provide the flexibility needed for judges to respond properly to a whole variety of situations.

This brief discussion of policies and principles influencing the perimeters of criminal responsibility highlights two important matters. The first is that there are no simple explanations as to why the criminal law has taken one direction and not another over a particular subject. In each case, the explanation will stem from one or more policies or principles that are selected, and this selection process is value laden. As Alan Norrie has observed:

> There are principles of rationality and justice in operation within the law but they must be seen as elements in tension with other contradictory elements. In examining criminal law, we must recognise the limits of rationality and justice: limits which are a central and necessary part of the enterprise and not the result of chance or contingency. Criminal law is relatively unpredictable in its development and this stems from the fundamental ambiguity of its central organising principles.[26]

Second, underlying the whole discussion is the concern that the criminal law should not be significantly out of touch with society's expectations. These expectations range from individual freedom to conduct one's own affairs with minimal restrictions, to ideas about shared responsibilities as a member of a community. Difficult as the task may be, the criminal law should be under continuous scrutiny to ensure that it maintains the respect of society. This is not only an important aspect of democracy, it also has a practical foundation since the law relies on public consensus for its effective functioning.[27]

Who is responsible for scrutinising the criminal law to ensure that it maintains the respect of society? What difficulties might be encountered in discharging this responsibility, and are they surmountable?

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26 A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, 2nd edn, Butterworths, London, 2001, p. 13.

27 P. Robinson and J. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law*, Westview Press, Boulder, CO, 1995.

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ELEMENTS OF A CRIME

The elements that must exist before a person can be convicted of an offence vary from one crime to another. All crimes comprise some form of prohibited conduct, which may be an act or (in rare cases) an omission. This conduct element denotes the external or physical component of a crime.[28] Another element found in many (but not all) crimes is the mental state of the person at the time when the prohibited conduct was performed.[29] This may take several forms, such as intention, recklessness or knowledge in relation to the prohibited conduct. Most of the traditional crimes developed through the common law require personal awareness of what was being done. However, there are many crimes, known as offences of strict liability and of absolute liability, that do not require any such awareness at all. Even when both the conduct and mental elements are satisfied, a person may still avoid conviction by relying on a defence. These defences constitute justifications or excuses to the prohibited behaviour, or a mental incapacity deserving of exculpation from criminal responsibility.

CONDUCT ELEMENTS

A cardinal requirement for all crimes is that the prohibited conduct must have been performed voluntarily. Voluntariness involves the ability to exercise control over one's bodily movements. Examples of states of involuntariness are sleepwalking, a concussion, an epileptic fit, being attacked by a swarm of bees, and being physically overpowered by another person.

The draft Australian Model Criminal Code describes voluntariness in terms of a 'willed act'[30] in line with the High Court ruling that, for conduct to be voluntary, it must be the product of the will.[31] This requirement stems from the principle of individual autonomy, which declares that people may be made criminally responsible for their actions provided they had sufficient choice or control over them. A person who lacks choice or control cannot fairly be described as having *acted* out the conduct in the strict sense of that term. It would be more appropriate to describe the conduct as the result of something *happening* to the person.[32] With the principle of individual autonomy embedded in the requirement of voluntariness, it is easy to incorporate ideas of blame and desert into the discussion. This is consistent with the way a substantial proportion of society views criminal responsibility—a person should be convicted and punished only if he or she was blameworthy in the sense of having freely chosen to perform the proscribed behaviour.

There is a countervailing view to this. It is that human behaviour is determined by causes, some known but others unknown. In this view about the deterministic nature of human conduct, voluntariness, blame and desert play no part in the consideration of criminal responsibility. It calls for a utilitarian approach to be taken when identifying criminal responsibility.

Whether a person will be held criminally responsible will turn on what approach would be most effective in preventing or reducing harmful conduct. How might this view about determinism affect

28 It has conventionally been described by the Latin term *actus reus*.

29 The Latin term *mens rea*, meaning 'guilty mind', is often used to describe these subjective mental states.

30 Section 202.2.1 of the Model Criminal Code prepared by the Criminal Law Officers Committee of the Standing Committee of Attorneys-General (1992). Hereinafter called the 'draft Model Criminal Code'.

31 See *Ryan v the Queen* (1967) 121 CLR 205; *R v Falconer* (1990) 171 CLR 30.

32 Ashworth and Horder, 2013, p. 87.

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the requirement of voluntariness? It can be safely asserted that there is no real evidence for the truth of determinism in the sense that *all* our behaviour is fully determined. Nevertheless, we should be prepared to accept that there may be instances where a person's behaviour was strongly determined so that he or she should not be held criminally responsible for the proscribed conduct. This proposition has been described as 'compatibilism'.[33] It assumes the notion that individuals are sufficiently free to choose and control their actions so as to be blamed for them, and yet accepts that there may be occasions when circumstances so affect an individual's choice or control as to warrant the negation of blame.

Once conduct has been determined to be voluntary, the enquiry shifts to whether an accused had *caused* the resulting harm. Take the case of D who stabs V in the arm, leading V to seek medical attention. Unfortunately, the medical treatment is grossly inadequate. Should V die, can D still be said to have caused his death? The test of 'substantial cause' has been devised to resolve this problem.[34] Otherwise, it would be possible to impose liability on conduct of the accused that had some causal effect, however remote or indirect it might be. For example, D invites V to dinner. On the way to D's house, V is killed by a bus. It would be unduly harsh to regard D as having caused V's death, even though it may be true that, but for D's invitation, V would not have used the road that night.

There may be cases involving intervening causes, that is, where another human agent's conduct has come in between the accused's conduct and the eventual harm. Take the case of A who stabs V. As V lies dying, B shoots and kills V instantaneously. The law will conclude that B and not A had caused V's death, even though A might be charged with attempted murder. But what if B's conduct lacked autonomy due, for instance, to A having compelled him by death threats to shoot V? In such a case, A may be regarded as having caused V's death using, as it were, B as his instrument to cause the death. This is further buttressed by the fact that A was the creator of the circumstances that led to V's death. The same reasoning may apply to cases when the intervening cause was by V herself or himself as opposed to a third party. In *Royall v The Queen*, a leading Australian case on causation, R had violently attacked V.[35] On one view of the evidence, V jumped to her death from a high building in an effort to escape the attack. R was regarded to have caused V's death because he impaired her autonomy in respect of her conduct and created the emergency she faced.

There is another way of reaching the same result in these cases of intervening causes. It is to ask whether a reasonable person in the accused's position could have foreseen that her or his conduct might lead to the intervening causal occurrence.[36] If so, then the accused remains causally responsible for the eventual harm occasioned by the intervening cause. To return to the case of shooting, A would have reasonably foreseen both B's act of shooting and V's death from the gun wound since it was he who had coerced B into shooting V. Similarly, with regard to the facts in *Royall*, R could have reasonably foreseen that V might seek to escape from his violent attack by jumping from the building.

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33 For a detailed discussion, see M. Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law*, Oxford University Press, Oxford, 1993.

34 For primary Australian cases on causation, see *R v Hallett* [1969] SASR 141; *R v Moffatt* (2000) 112 A Crim R 201; *Royall v The Queen* (1991) 172 CLR 378; *Arulthilakan v The Queen* (2003) 78 ALJR 257.

35 *Royall v The Queen* (1991) 172 CLR 378.

36 See E. Colvin, 'Causation in Criminal Law', *Bond Law Review*, 1(2), 1989, p. 253; K. Arenson, 'Causation in the Criminal Law: A Search for Doctrinal Consistency', *Criminal Law Journal*, 20(4), 1996, p. 189. For a recent judicial discourse on the role of reasonable foreseeability in the causal inquiry, see the Supreme Court of Canada case of *R v Maybin* 2012 SCC 24.

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MENTAL ELEMENTS

We have just noted the significant impact that the principle of individual autonomy has in moulding the conduct elements of crime. This principle also plays a significant role in linking criminal responsibility to personal awareness about the consequences of one's conduct.[37] Individual autonomy requires people to be judged by their free choice of actions. This choice is present only if individuals knew of the consequences of their conduct or knew the actual circumstances under which they were operating. This may be described as the *subjective approach* in that it places emphasis on the personal viewpoint of the particular defendant.

However, the community welfare principle supports an *objective approach*. According to this principle, individuals should be convicted irrespective of whether they possessed free choice of action, if future crime is prevented or reduced.[38] Additionally, the principle focuses on the actual consequences of an accused's conduct or the actual circumstances under which the conduct occurred rather than on the accused's mental state during the performance of the conduct. An objective approach to criminal responsibility is thereby advocated in that it places emphasis on the *actual* state of affairs resulting from or surrounding the commission of the crime.

Current 'common law' favours the subjective approach to criminal responsibility. The general rule is that the prosecution bears the burden of proving that the accused intended or knowingly risked the consequences of her or his conduct. In contrast, the criminal codes of Queensland, Western Australia and Tasmania lean towards the objective approach.[39] Apart from certain crimes such as murder and many property offences, the prosecution in these jurisdictions does not need to prove a particular mental state of the accused. Instead, the prosecution would only need to disprove that the conduct was done accidentally or under an honest and reasonable mistaken belief, if those issues are raised by the defence. It is worthwhile noting that the committee that developed a model criminal code for Australia has preferred the subjective approach.[40] While acknowledging the good service that the criminal codes had given to Queensland, Western Australia and Tasmania, the committee believed that those codes were out of line with modern thinking about criminal responsibility. The trend is towards presuming a subjective mental state as part of the definition of all offences, accompanied by the prosecution bearing the burden of proving such a mental state.

In the ensuing discussion, the framework incorporating a subjective approach to criminal responsibility will be adopted. First, the salient forms of subjective mental states contained in the criminal law are presented. This will be followed by certain objective principles that have retained a stronghold in the criminal law. It will be observed how the law generally upholds the subjective approach but does occasionally give way to arguments based on community welfare on grounds of 'public interest'.

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37 See H. L. A. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law*, 2nd edn, Oxford University Press, Oxford, 2008, Chs 2 and 5.

38 The community welfare principle is therefore associated with utilitarian theories that promote general deterrence: see K. Greenawalt, 'Punishment' in S. Kadish (ed.), *Encyclopedia of Crime and Justice*, vol. 4, Free Press, New York, 1983, p. 1336.

39 See, for example, ss. 23 and 24 of the Queensland and Western Australian codes, and ss. 13 and 14 of the Tasmanian code. For a further discussion, see R. G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, 7th edn, Butterworths, Sydney, 2008, paras 8.13–8.17.

40 Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Commonwealth Attorney-General's Department, Canberra, 1992, p. 25. See above, p. 12.

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SUBJECTIVE MENTAL STATES

The mental state of a crime may comprise a variety of mental elements usually classified as intention, recklessness and knowledge. This mental state varies from one crime to another, with some crimes focusing on the consequences of the accused's conduct and others concentrating on the circumstances in which the conduct occurred.

Intention

The core meaning of this notion is purpose. A person intends a consequence if it is her or his purpose to achieve that result. Seen in these terms, intention in the criminal law is not concerned with desire (for example, one may act out of feelings of duty rather than desire). Similarly, intention should not be confused with motive. Motive is the emotional force behind a person's conduct and is distinguished from intention, which is a technical concept denoting a mental state in which a person acts with the purpose to bring about a result. Furthermore, this technical meaning given to intention by the criminal law shows that it is only concerned with a particular type of intention, ignoring other intentions that the accused person might have had. For example, in taking a blanket without the owner's consent, D might have intended to permanently deprive the owner of it. She might also have intended to take the blanket to give to a homeless person, or to please a friend who coveted it. For D to be charged with theft, only the first form of intention, which appears in the definition of theft, will need to be proven.

The criminal law has, however, given a wider meaning than purpose to intention. A person may be said to intend a consequence that he or she foresaw was certain to follow the conduct in question.[41] Take the case of D, the owner of a plane, who arranged for it to be blown up while in mid-flight realising that the explosion would certainly kill everyone on board. Let us assume that his purpose was to claim insurance on the plane and not to kill the aircrew and passengers. Since it was not D's purpose to kill, that aspect of the definition of intention is not fulfilled. The issue then is whether D should be classified as a purposeful killer or a merely reckless killer. The criminal law prefers the former as it sees little social or moral difference between the mental state of D (he knew as a matter of virtual certainty that those on board the plane would die, but nonetheless proceeded with the plan) and a person who deliberately set out to kill the people in the plane. Both the core and wider definition of intention have been included in the Commonwealth Criminal Code:[42]

> A person has intention with respect to a result when he or she means to bring it about or is aware that it will occur in the ordinary course of events.[43]

Recklessness

Given that intention includes foresight of the virtual certainty of a consequence occurring, recklessness must involve a less culpable mental state. Recklessness may be defined as foresight of a risk that a consequence might occur, or that a circumstance exists, and proceeding to act in a way that brings about

41 *R v Woollin* [1998] J 4 All ER 103. Also refer to S. Odgers, *Principles of Federal Criminal Law*, 2nd edn, Thomson Reuters, Sydney, 2010, paras 5.2.230–5.2.240; B. Fisse, *Howard's Criminal Law*, 5th edn, Law Book Co., Sydney, 1990a, pp. 479–81.

42 *Criminal Code Act 1995* (Cth). The code contains a comprehensive statement of general principles of criminal responsibility, derived from the model criminal code prepared by the Model Criminal Code Officers Committee for all Australian jurisdictions: see above, p. 12.

43 Section 5.2(3).

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that risk.[44] Any significant degree of risk (other than virtual certainty, which is covered by intention) will normally suffice for recklessness. A proviso to criminal responsibility based on recklessness is that the accused must be unjustified in taking the risk, which he or she believes to be present. This rarely poses a problem as the bulk of reckless criminal incidents involve socially unjustifiable risk-taking.[45] However, this requirement does explain why a surgeon performing a difficult but necessary operation may not be made criminally responsible for a consequent death even though there was a substantial risk of failure. The Commonwealth Criminal Code encapsulates these various aspects of recklessness into the following definition:

> A person is reckless with respect to a circumstance when he or she is aware of a substantial risk that it exists or will exist and it is, having regard to the circumstances as known to him or her, unjustifiable to take the risk. A person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances as known to him or her, unjustifiable to take the risk.[46]

It would be desirable for other Australian jurisdictions to enact legislation that also made it clear that recklessness requires the unjustified taking of the foreseen risk.

Knowledge

Knowledge constitutes awareness that a specified circumstance exists or that a consequence will ensue. It is distinguishable from recklessness, which, as we have seen, concerns foresight of a risk of something that may or may not result or be present. In contrast, a person cannot 'know' something unless he or she believes it exists or will exist. The Commonwealth Criminal Code subscribes to this distinction by defining knowledge in the following terms:

> A person has knowledge of a circumstance or a result when he or she is aware that it exists or will exist in the ordinary course of events.[47]

Occasionally, a defendant might seek to rebut knowledge on the ground of mistaken belief. For example, an element of the crime of rape is knowledge that the victim did not consent to sexual intercourse. D may have believed, but believed mistakenly, that V had so consented.[48] In such a case, the subjective approach of the criminal law will cause D to be acquitted because his honest mistaken belief rendered absent the knowledge requirement of the offence. Acquittal will lie even if there were no reasonable grounds for such a mistaken belief.[49] This position stems from the principle of individual autonomy, which requires criminal responsibility to be based on what defendants believed they were doing, not on the basis of actual facts that were unknown to them at the time. It should be mentioned that a contrary view exists that sees the need for an element of reasonableness to

44 Fisse, 1990a, pp. 62–3. This may be described as 'advertent recklessness' on account of the need for actual foresight by the accused. In the context of sexual assault law, some jurisdictions such as New South Wales have extended the definition of recklessness to recognise 'inadvertent recklessness', which involves a failure to consider whether the complainant was not consenting to sexual intercourse with the accused.

45 For a recent case illustration, see *Lustig* [2009] NSWCCA 143 at [74].

46 Section 5.4(1).

47 Section 5.3.

48 D would not have been reckless since, as far as he was concerned, he knew for certain that V consented. D would be reckless only if he were unsure whether V consented and proceeded nevertheless to have sexual intercourse with her.

49 *R v McEwan* [1979] 2 NSWLR 926. More generally, the High Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523 has held that an honest belief is sufficient with respect to the effect of a mistake, for crimes requiring proof of a subjective mental state.

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be added to the mistaken belief. This view takes an objective approach to criminal responsibility. It imposes what is considered to be an easily dischargeable duty on the defendant to ask the victim whether she consents before proceeding to engage in sexual intercourse with her. The criminal codes of Queensland, Western Australia and Tasmania support this approach by insisting on the defendant's mistake of fact to be both honest and reasonable.[50]

Select a crime that you are familiar with and obtain its legal definition. Break that definition down into its component elements and attempt to explain why the criminal law has chosen each of these elements for the crime selected.

CONTEMPORANEITY

Thus far, we have covered both conduct elements and mental elements of a crime. But proof of these elements alone is insufficient to establish criminal responsibility. There is a further requirement that the conduct element must coincide with the mental element of the crime. This has been described as the principle of contemporaneity.[51] It asserts that criminal responsibility should be confined in point of time to when the proscribed conduct was performed together with the requisite mental state. Hence, a person who took a bag believing it to be hers would not be guilty of theft, even though she may have decided to keep the bag for herself upon subsequently discovering the mistake.

Occasionally, the criminal law places a premium on the accused's mental state and downplays the principle of contemporaneity. Take the case of D who strikes V's head with the intention of killing him and then, thinking V to be dead, throws his body into a river. V dies by drowning. D will be found guilty of murder in these circumstances even though, strictly speaking, the proscribed conduct of killing V by throwing him into the river did not coincide in point of time with the requisite mental state for murder.[52]

OBJECTIVE PRINCIPLES

The community welfare principle sees individual autonomy as giving way to the greater good of society. In line with this principle, objective criteria such as the seriousness of consequences and the deterrent effect of conviction and punishment should be afforded greater weight than the culpable mental state of individual actors. Some manifestations of this kind of objective approach to criminal responsibility will now be presented.

CONSTRUCTIVE LIABILITY

There are instances in the criminal law where people are convicted of serious crimes when they lacked the mental state normally required for those crimes. An example is the 'constructive-murder' rule found in New South Wales.[53] Under this rule, a person may be guilty of murder if, while in the course of committing an offence punishable by imprisonment for 25 years (such as armed robbery with

50 Queensland and Western Australian codes, s. 24; Tasmanian code, s. 14. Recent New South Wales legislation is to like effect: see Chapter 10, p. 350.

51 See Ashworth and Horder, 2013, p. 81; Fisse, 1990a, pp. 133–4.

52 *Meyers v The Queen* (1997) 71 ALJR 1488; *R v McConnell* [1977] 1 NSWLR 714; *Thabo Meli v The Queen* [1954] 1 WLR 228.

53 See s. 18 of the *Crimes Act 1900* (NSW). See also s. 3A of the *Crimes Act 1958* (Vic).

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wounding), he accidentally killed someone. The constructive-murder rule may be justified on the ground of social defence. Society needs to deter people from engaging in dangerous behaviour that might cause death. To achieve this, the law takes the mental element of a comparatively minor offence, couples it with the harm caused (which is death), and in this way constructs liability for a more serious offence.

A different example of constructive liability is the doctrine of prior fault. Basically, this doctrine denies a person a defence should the circumstances requiring the need for the defence have arisen out of her or his own fault.[54] For instance, the defence of provocation is denied to people who had purposely, through taunts, sought to induce the victim to attack them.[55] In these cases, the previous acts of the accused are relied upon to prevent them from successfully invoking the defence. The law thereby constructs criminal responsibility by withdrawing the defence on account of the accused's fault occurring, not at the time of the proscribed event, but at an earlier time. Once again, the justification for this form of constructive liability is social defence—society needs to be protected from people who engage in potentially harmful behaviour. It may also be supported on grounds of social responsibility—members of society have an obligation to avoid behaviour that has the risk of causing harm to others.

NEGLIGENCE

There are some crimes that base liability on negligence, for example, negligent manslaughter and careless driving. The concept of negligence incorporates an objective approach by assessing an individual's behaviour according to what a reasonable person in the same situation ought to have known or done. The personal or subjective awareness of the individual is therefore irrelevant. This approach runs counter to the principle of individual autonomy since it convicts and punishes individuals who, being unaware of the consequences of their actions or the risks involved, lacked the choice necessary for blame.

However, crimes based on negligence can be supported by the competing community welfare principle. This principle argues that the shared obligations that come with belonging to a community require individuals to exercise care in their actions. The more serious the harm that those actions can cause to other members, the greater the care that individuals will be expected to take to avoid them. With regard to the lack of choice, the reply would be that individuals who negligently caused harm have the capacity to behave otherwise. This is because there were sufficient signals to alert a reasonable person to take care. As for the purpose that is served by punishing negligent behaviour, it exerts a general deterrent effect by warning people of the need to take care in certain situations.

The proposed Model Criminal Code defines criminal negligence as:

> A person is negligent with respect to a physical element when his or her conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and such a risk that the element exists or will exist that the conduct merits criminal punishment for the offence in issue.[56]

54 Yeo, 1990, Ch. 5.

55 For a description of the defence of provocation, see Chapter 10, p. 320. See also below, p. 28 for the operation of the doctrine of prior fault with respect to the defences of duress and necessity.

56 Section 203.4 of the draft Model Criminal Code. This definition is based closely on the one under common law: see *Nydam v The Queen* [1977] VR 430; *Wilson v The Queen* (1992) 174 CLR 313.

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This demanding test of gross negligence is appropriate for very serious crimes like manslaughter. However, the degree of negligence may be diminished for less serious crimes such as negligently entering a protected area of the Great Barrier Reef.[57]

STRICT AND ABSOLUTE LIABILITY

Strict liability offences are those offences for which a person may be convicted without proof of intention, recklessness or knowledge. For example, a statute may enable D to be convicted on evidence that he sold adulterated meat without needing to prove further that he knew of the adulteration. However, defendants may escape criminal responsibility by raising the defence of honest and reasonable mistake of fact, which is essentially a claim that they were not negligent when performing the proscribed conduct. Using the above example, D could claim that he honestly and reasonably believed that the meat sold was fit for human consumption because it had been supplied only a few hours earlier by the local abattoir. In contrast, absolute liability offences are more draconian in that they do not permit a claim of honest and reasonable mistake of fact.

The justifications for offences of strict and absolute liability appear to be based on economics and expediency. There are numerous trivial social mischiefs that hamper the smooth daily running of society. The threat of criminal sanction is a ready tool to deter them. Whether this is a proper function of the criminal law has already been raised. The point about the triviality of the social mischiefs is significant for three reasons. One is the economic argument that these minor offences are not worth the public expense of requiring the prosecution to prove a subjective mental state. A second reason concerns individual fairness—while fairness may arguably be overridden by economic considerations in cases of minor offences, it cannot be so overridden where the offence is grave. Thirdly, since the social mischiefs are trivial, they should attract only non-custodial sentences such as fines.[58]

The severe position created by absolute liability offences and their denial of claims of honest and reasonable mistake of fact is supported by an argument based on social defence. It is that the fundamental values and interests sought to be protected by the criminal law should not be abandoned when their infringements were due to a mistake or accident, however reasonable, on the defendant's part.[59] The criticism against having absolute liability offences stems from the fact that they are (or should be) confined to trivial harms.[60] The criminal law should not be used to control such minor social mischiefs. Other preventative measures such as education and civil regulation should be relied upon to reduce the minor harms that are currently the subject of absolute liability offences. Of course, this same criticism can be directed against strict liability offences. But at least individual fairness is afforded to people charged with these offences in the form of a claim of honest and reasonable mistake of fact.

Is it fair on accused persons to punish them on the basis of objective principles of criminal responsibility such as those described above?

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57 *White v Patterson* [2009] QCA 320 at [50].

58 See *He Kaw Teh v The Queen* (1985) 157 CLR 523. See also Parliament of New South Wales Legislation Review Committee, *Strict and Absolute Liability. Responses to the Discussion Paper*, Report No. 6, Sydney, 2006.

59 Ashworth and Horder, 2013, pp. 161–3.

60 For example, see *CTM v The Queen* [2008] HCA 25 where the High Court ruled that New South Wales child sex offence laws did not attract absolute liability. See also *Hogan v Hinch* [2011] HCA 4.

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CRIMINAL DEFENCES

In practice, accused persons will often seek to avoid criminal liability by challenging the case against them, such as by casting doubt on the evidence tendered by the prosecution. Accused people may also seek to rely on legally recognised defences to criminal charges against them.[61] Some defences, such as mistake of fact,[62] accident and, to some extent, insanity and intoxication, have the effect of negating the mental element of the crime. Other defences, such as automatism and, again to some extent, insanity and intoxication, negate a conduct element of the crime. Still others, such as duress, necessity and self-defence, serve as excuses or justifications for the criminal behaviour. For this last group of defences, both the conduct and mental elements have been established. However, in respect of excusatory defences, the accused is deemed to be blameless because there were certain extenuating circumstances operating at the time of the offence. With regard to justificatory defences, there were circumstances that made the conduct rightful.

Only some of these defences will be presented here. As with the preceding parts of this chapter, the primary focus of the discussion will be on the tension between the principles of individual autonomy and community welfare.

INSANITY

The insanity (or 'mental impairment') defence proceeds in two stages.[63] First, the accused must have been deprived of reasoning power due to a disease of the mind when the offence occurred. Then it must be established that such deprivation of reasoning power caused the accused not to realise what he or she was doing, or at least not to realise that it was wrong. The result of successfully pleading this defence is a special verdict of not guilty by reason of insanity. Under this verdict, the accused is not convicted of the crime charged, but is committed indefinitely to an institution for psychiatric treatment.

The principle of individual autonomy explains the defence in several ways. A person who, by virtue of disease of the mind, did not realise what he or she was doing, may be regarded as having acted involuntarily. For example, a person may be so psychotic that her or his conduct could properly be described as that of an automaton (or robot), devoid of the will to act required for voluntary conduct. The lack of realisation of what he or she was doing would also normally result in rendering absent subjective mental states such as intention, knowledge or recklessness. Even if the conduct had been voluntary and the relevant mental state was present, the disease of the mind might operate to render the accused blameless for the harm caused. This is because the disease of the mind could have caused her or him to fail to appreciate that the conduct was morally wrong (usually meaning that the accused believed, by some distorted reasoning process, that the conduct was justifiable). Given the absence of either the conduct or mental element for the crime, the principle of individual autonomy insists on the complete acquittal of the accused.

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61 For a full discussion of the available defences, see P. Fairall and S. Yeo, *Criminal Defences in Australia*, 4th edn, Butterworths, Sydney, 2005.

62 This is distinguishable from the defence of honest and reasonable mistake of fact noted in our discussion of strict and absolute liability offences. Here, D need only plead that her or his belief was honest and it would not matter (other than going to the question of honesty) that the belief was unreasonable. For example, in some jurisdictions, D could be acquitted of rape if he honestly believed V to have consented to sexual intercourse.

63 What follows is essentially the McNaghten formulation of the defence at common law. For a leading Australian case, see *R v Porter* (1933) 55 CLR 182. There are some variations under the criminal codes: see, for example, s. 27 of the Queensland and Western Australian codes.

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The competing community welfare principle requires that the special verdict be given on grounds of social defence. The reasoning is that, since the accused's involuntary conduct or peculiar mental state arose from insanity, he or she will continue to pose a danger to society. Indefinite medical intervention is therefore warranted. However, of late, the assumption that all criminally insane people are so dangerous as to require indefinite detention has been challenged. There are no clear answers to questions such as what constitutes evidence of future dangerousness, and how accurate are predictions of dangerousness. Accordingly, it would be fairer on criminally insane people for the courts to be given a range of disposition options and to abolish or else lessen the use of the indeterminate commitment. Australian jurisdictions have recently enacted legislation along these lines.[64]

INTOXICATION

The defence of intoxication operates to negate the mental state required for an offence. An individual may have been so intoxicated as to lack free and rational choice in her or his actions. Consequently, such a person should be acquitted, following the principle of individual autonomy with its insistence on sufficient choice or control over one's actions before criminal responsibility could lie.

On the other hand, the community welfare principle sees individuals as having certain social duties as part of their membership of a community. One duty is to keep one's behaviour under control at all times. Proponents of this principle criticise the defence of intoxication for promoting the idea of 'more alcohol, less culpability'. They would prefer to confine the defence to offences where an intention to cause a specific result is an element. Under this approach, the defence is unavailable to crimes such as physical assault, rape and manslaughter, which do not require such specific intention. This is the approach taken in New South Wales, Queensland, South Australia, Western Australia and Tasmania.[65] However, the wider version of the defence, with its emphasis on individual autonomy, has been recognised in Victoria, which appears not to have experienced any untoward social effects caused by recognising such a defence.[66] The explanation for this might be the rarity of the defence succeeding in practice. The draft model criminal code for Australia has also adopted this wider form of defence:

> If a fault element [such as intention, recklessness and knowledge] other than negligence is an element of an offence, evidence of intoxication may be taken into consideration in order to determine whether that fault element existed.[67]

DURESS AND NECESSITY

These two defences involve situations where a person claims to have been compelled by a threat to commit the offence charged.[68] In respect of duress the source of the threat is a human agent,

64 For example, see *Mental Health (Forensic Provisions) Act 1990* (NSW), s. 39; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s. 23; *Criminal Law Consolidation Act 1935* (SA), s. 269; *Criminal Justice (Mental Impairment) Act 1999* (Tas), s. 21.

65 See s. 428A-G of the *Crimes Act 1900* (NSW); s. 26 of the *Criminal Law Consolidation Act* 1935 (SA); s. 28 of the Queensland and Western Australian codes, and s. 17 of the Tasmanian code. See also *R v Kusu* [1981] Qd R 136; *Cameron v The Queen* (2002) 76 ALJR 382.

66 The leading case is *R v O'Connor* (1980) 146 CLR 64.

67 Section 303. Where crimes based on negligence are concerned, s. 304 of the draft code specifies that, in determining whether negligence existed, regard must be had to the standard of a reasonable sober person.

68 The defences are recognised by the common law and the criminal codes, although there are certain differences: see R. O'Regan, *Essays on the Australian Criminal Code*, Law Book Co., Sydney, 1979, Ch. 7; S. Yeo, 'Necessity under the Griffith Code and the Common Law', *Criminal Law Journal*, 15, 1991, p. 17.

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while for necessity it may be a human agent or a natural event such as a fire, flood, earthquake or a storm. The defences of duress and necessity do not negate the mental element of the crime since the defendants would have clearly known the nature and consequences of their conduct. Neither could these defences be said to have rendered the proscribed conduct involuntary. Defendants pleading duress or necessity would typically have been conscious and exercised control over their bodily movements. The underlying rationale for acquittal is that the threats, which lie at the core of these defences, have considerably reduced the individual's capacity to exercise free and rational choice of action. Since their freedom of choice had been severely undermined by threats that were not of their own making, it would be unfair to impose criminal responsibility upon them. From this brief discussion it may be seen how the defences of duress and necessity are premised on the principle of individual autonomy.

As against this approach are the arguments based on the community welfare principle. These focus on the protection of the innocent victims injured by the offences claimed to have been committed under duress or necessity. The result is that certain objective considerations have found their way into these defences.[69] One consideration is the reasonableness of the accused's belief that the threat existed and would occur. Hence, an objective evaluation is added to ensure that the perception of the threat was not fanciful. Another is the consideration that a person of ordinary firmness could likewise have succumbed to the threat and done what the accused did. By this consideration, the notion of individual freedom of choice is compromised since the enquiry shifts away from the impact of the threat on the particular accused to its effect on a reasonably steadfast person. Third, the threats recognised for the purposes of the defences are confined to those of death or serious bodily harm so as to restrict the defences to cases of extreme danger. A fourth consideration is based on the doctrine of prior fault. The defences are denied to people who had created the circumstances giving rise to the threats. For example, the defence of duress is unavailable to a person who was threatened by members of a criminal organisation into committing a crime if he or she had voluntarily joined the organisation in the first place. Similarly, people cannot successfully plead necessity to justify or excuse harm-causing conduct if they had produced the situation of emergency (such as a fire). The criminal law has sought to strike a balance between the principles of individual autonomy and community welfare by reflecting certain aspects of both principles in the elements required for the defences of duress and necessity.

SELF-DEFENCE

Through this defence, the criminal law empowers individuals to exercise force against their aggressor for the purpose of protecting themselves or others.[70] The defence is premised on the principle of individual autonomy. Individuals should have a basic right to repel an unlawful attack in situations where society cannot provide the protection. Unlike the other defences previously discussed, which are excusatory in nature,[71] self-defence is a justification. Society regards an accused's act of self-defence as rightful conduct.

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69 At common law, see the leading cases of *R v Abusafiah* (1991) 24 NSWLR 531 (for duress) and *R v Rogers* (1996) 86 A Crim R 542 (for necessity). Under the codes, see, for example, s. 31 (for duress) and s. 25 (for necessity) of the Queensland and Western Australian codes.

70 The leading case on self-defence at common law is *Zecevic v DPP* (1987) 162 CLR 645. The codes contain specific provisions covering the defence: see, for example, ss. 271 and 272 of the Queensland code, and ss. 248 and 249 of the Western Australian code; and see further *Nguyen v The Queen* [2005] WASCA 22.

71 Except certain cases of necessity where the harm caused by the defendant was less than the harm avoided.

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Another view of self-defence sees the need to consider the rights of the aggressor. After all, an act of self-defence causes bodily harm and consequently also impinges on the bodily integrity of another. It might be argued that people who initiate unlawful attacks forfeit all their rights to protection of the law.[72] But surely, this goes too far as it places no value whatsoever on the right of aggressors to life and physical safety. This goes against a society that regards life as the most basic value and places physical violence high on the range of harms. While society should accord the right of self-defence in cases of unlawful attacks, there should be restrictions placed on the application of such a right. These restrictions are needed to prevent the defence from becoming a disguise for revenge or retaliation.

The criminal law does, indeed, impose certain restrictions on self-defensive action in order to accord some recognition of the rights of aggressors.[73] One is that the defendant must have honestly as well as reasonably believed in the existence and nature of the perceived attack.[74] Thus, the defence would be denied to a person whose belief as to the threatened danger was honest but fanciful or unreasonable. Another restriction is that the defensive response must have been reasonable. This requirement of reasonableness is usually seen in terms of the defensive action being reasonably proportionate to the threatened danger posed by the attack. Hence, a defendant should be permitted to use fatal force only in cases of life-threatening attacks or against certain extremely serious offences.[75] A third restriction is that the defensive response must have been necessary. Necessity is measured by several factors including the imminence of the attack, the availability of alternative means of avoiding the harm posed by the attack, and the value or interest to be protected by the defensive action.

Where a justification (such as self-defence and certain forms of necessity) is involved, the claim is that the harm-causing conduct of the accused was rightful. Accordingly, it is without question that justificatory pleas are integrally connected with the issue of criminal responsibility—that is, whether to convict or acquit a defendant. Where excuses such as duress and some types of necessity are involved, a difficulty arises whether these pleas should be relevant to criminal responsibility rather than to sentencing. It would be possible to regard these excuses only as mitigating factors in the sentencing exercise following a conviction. It is certainly true that the task is a difficult one of delineating between when excuses do and do not reach such a high level as to warrant a complete acquittal. But the task is important to ensure a just and proper apportionment of blame and cannot be abandoned simply on the ground that it involves difficult judgments of degree.

In your view, how satisfactory has the criminal law been in devising criminal defences that accommodate the competing claims of individual autonomy and community welfare?

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72 Such a notion of forfeiture of rights might be supported on the ground that it serves to deter potential attackers and thereby promotes peace: see S. Kadish, *Blame and Punishment: Essays in the Criminal Law*, Macmillan, New York, 1987, p. 117. However, this assertion requires empirical support.

73 For a further discussion of these objective requirements, see Fairall and Yeo, 2005, paras 10.23–10.53.

74 *Zecevic v DPP* (Vic) (1987) 162 CLR 645. Some judges have suggested that an honest belief will suffice: see, for example, *R v Kurtic* (1996) 85 A Crim R 57. This is the position in New South Wales and South Australia by virtue of the *Crimes Act 1900* (NSW), s. 418; and the *Criminal Law Consolidation Act 1936* (SA), ss. 15 and 15A.

75 In New South Wales and South Australia, legislation provides for a defender whose use of fatal force was unreasonable to be convicted of manslaughter instead of murder.

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EXTENSIONS OF CRIMINAL RESPONSIBILITY

Most crimes concern people who have caused one or more of several varieties of harm. But there may be people who, while not causing the proscribed harm, may nevertheless be held criminally responsible. We shall consider two ways in which the criminal law has extended its scope of criminal responsibility. The first is by developing the doctrine of criminal complicity and the second is by recognising 'inchoate' offences.

The doctrine of complicity is designed to convict and punish people who have not actually committed a particular offence but have played a significant role in promoting its commission by others. Hence, criminal responsibility can be imposed on a person who 'aided, abetted, counselled or procured' the commission of a crime by another. Inchoate offences are the preliminary crimes of attempt, conspiracy and incitement. The word 'inchoate' means 'undeveloped' and aptly describes the kinds of offences under consideration—an attempt indicates failure to complete a substantive offence, the objective of a conspiracy may not be achieved, and words of incitement may be ignored. While no harm may have occurred in these situations, the criminal law nevertheless finds it necessary, for various policy reasons, to impose criminal responsibility.

COMPLICITY

The doctrine of complicity regards people who assist or encourage others to commit a crime as deserving of criminal condemnation in certain circumstances. People who so assist or encourage are called accomplices and those who commit the crime promoted by them are described as principal offenders. Take the case of A, who engages a professional assassin to kill her or his enemy, or of B, who stands watch while another commits the offence of housebreaking. A and B, in urging or providing support, may arguably be no less culpable than the principal offender.

The conduct element of complicity may be satisfied merely on evidence of some encouragement or assistance. In respect of the mental element, a conflict arises between the principles of individual autonomy and community welfare. The first principle would confine the mental element of complicity to intention in the limited sense of a conscious purpose to promote or facilitate the commission of the principal offence. Criminal liability should be so narrowly construed since, otherwise, the criminal law would spread its net too widely to punish people who, unknown to them, had performed acts that encouraged or assisted the commission of the principal offence. The principle of individual autonomy also advocates a policy of minimal criminalisation. In the context of the law of complicity, such a policy would insist on the most culpable form of mental state (namely, intention) to be proven given that what is involved is an extension of criminal responsibility beyond its traditional limits. On the other hand, the community welfare principle would extend the net to cover people who may have been reckless as to whether their actions might promote the commission of a crime. This is done on the basis of social responsibility, which regards people as having a social obligation to desist from engaging in conduct that they know has a risk of causing harm. Which principle should prevail is problematic. The common law has confined the mental element for complicity to an intention to assist or encourage the commission of an offence by another person,[76] and so has the Commonwealth Criminal Code.[77] However, the High Court has endorsed the common law principle that, where

76 See *Giorgianni v The Queen* (1985) 156 CLR 473.

77 Section 11.2(3).

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A agrees with B to participate in a criminal enterprise, he or she should be liable for any offence committed by B so long as A foresaw that B might commit it (even if A did not want it to happen).[78] This position also has the support of the committee that drafted the model Criminal Code.[79]

ATTEMPT

The criminal sanction may, in certain cases, be justly imposed on people who tried to commit a crime but were unsuccessful. Take the case of A, who snatches at a handbag but it is just out of reach; or B, who throws a punch at a person but misses; or C, who discharges industrial waste into a blocked pipe leading out to a river. A, B and C all possessed the culpable mental state required respectively for theft, assault and pollution of clean waters. On this basis, the criminal sanction is deserved. It might also be justified on account of the deterrent effect that punishing such people will have on others who may wish to commit similar offences.

Since the culpable mental state forms the primary justification for sanctioning criminal attempts, it would seem that the conduct element is not so important. On this view, any overt act performed by the defendant will be sufficient. The objection to this is that the police may be tempted to arrest and press charges upon the slightest conduct suggesting an intention to commit a crime. This would be too great an infringement of individual liberties and would come dangerously close to creating a society controlled by thought crimes and thought police. To safeguard individual liberties, the law should require conduct that unambiguously indicates the defendant's intention to commit the offence. The extreme manifestation of this latter view is to require proof that the accused performed the last act they were capable of doing in order to carry out the offence. But this may be objected to, on grounds of social defence, for not leaving sufficient time for police intervention, and for enabling the accused to gain an acquittal by casting doubt on what comprised the very last act. We are of the view that concerns over individual liberties and social defence are best served by taking a pragmatic approach to what constitutes the conduct element of criminal attempts. This is achieved by requiring conduct to be performed that was 'more than merely preparatory to the commission of the offence attempted'.[80] This is the proposal of the committee charged with drafting a national model criminal code. While the committee concedes that the distinction between preparation and perpetration may be difficult in some instances, this could safely be left to the jury to decide.[81]

The mental element for criminal attempts requires intention—recklessness will not suffice.[82] Further support for this narrowing of the mental element is found in reminding ourselves that, in criminalising attempts, the criminal law is stretched to its outer limits. Since no harm was actually

78 *McAuliffe v The Queen* (1995) 183 CLR 108; *Clayton v The Queen* (2006) 231 ALR 500.

79 Model Criminal Code Officers Committee, 1992, p. 89. However, under the Criminal Codes of Queensland, Western Australia and Tasmania, an objective test is applied: *A* is liable for the offence committed by *B* if it was a probable consequence of carrying out the common purpose: see *R v Keenan* (2009) 236 CLR 397.

80 Section 401.1, draft Model Criminal Code. See further Ashworth and Horder, 2013, p. 97.

81 Model Criminal Code Officers Committee, 1992, p. 75. However, with respect to terrorism offences, preparatory acts may be sufficient. For criticisms, see B. McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in B. McSherry, A. Norrie and S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, Hart Publishing, Oxford, 2009, p. 141.

82 This is the position under the code jurisdictions and also under the common law: see *R v LK* [2010] HCA 17; *Knight v The Queen* (1992) 63 A Crim R 166. The committee producing a model criminal code for Australia was of the same view: see s. 401.1 of its draft Model Criminal Code.

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inflicted, cases deserving of punishment should be restricted to those where the accused possessed the most culpable mental state. This argument was also raised earlier when discussing the mental element for criminal complicity.

Occasionally, the law may encounter cases where an individual had done everything possible (with the requisite intention) to complete the offence, but nevertheless failed due to physical impossibility. Take the case of X, who possessed a harmless vegetable matter that he believed to be cannabis; or Y, who shot at a theatrical dummy thinking it was her enemy; or Z, who poured pure water into a stream assuming it was a potent poison. After some initial uncertainty, the law is now clear that X, Y and Z deserve to be punished.[83] This stance complies with the principle of individual autonomy as these defendants had believed that they were committing an offence and had freely chosen to do so. Their mental state would consequently be as blameworthy if the facts had actually been as they had believed. The law also thereby supports the community welfare principle by promoting social defence against acquitting people who, by pure chance, were thwarted from achieving their objective of causing harm to others.

CONSPIRACY

The crime of conspiracy prohibits, on grounds of social defence, two or more people from agreeing to commit some types of unlawful acts. The law justifies imposing criminal responsibility for mere agreements on grounds of social defence. Group behaviour results in individuals finding it difficult to withdraw and in participants spurring one another on. Hence the harm intended by the agreement is more likely to materialise than in the case of a sole individual's thoughts about causing harm. There is also the social defence perception that group criminal activity causes greater fear in victims and more public alarm. Such activity should therefore be eradicated, whenever possible, at the earliest opportunity—this is usually at the stage of agreement.

The conduct element of conspiracy is, of course, the agreement. The agreement may be a simple case of a meeting of minds around a table or involve more complex 'chain' and 'wheel' conspiracies.[84] There is a view that the criminal law of conspiracy goes too far to accommodate social defence at the expense of individual liberties. The concern is that the offence encourages the police to use intrusive tactics of law enforcement (such as bugging phones and premises), and inhibits the exchange and development of controversial ideas. However, we believe that there is a place for conspiracy in the criminal law. In reply to objectionable police intrusions, the remedy lies in internal police disciplinary measures and control, not the abolition of the crime of conspiracy. As for stifling freedom of speech, the remedy would be to confine the subject matter of conspiracies to crimes alone as opposed to other kinds of unlawful acts such as a tort, corrupting public morals, and outraging public decency.[85]

With regard to the mental element, the law of conspiracy has confined this to intention alone. This may be supported on the ground that any lesser culpable mental state, such as recklessness, will be foreign to an offence based wholly on agreement. It is also justified on the basis that conspiracy, as

83 See, for example, *Britten v Alpogut* [1987] VR 929; *Mai and Tran v. The Queen* (1992) 26 NSWLR 371; *R* v. *Irwin* [2006] SASC 90. The uncertainty lay with the common law. The code jurisdictions have always disregarded physical impossibility: see, for example, s. 4 of the Queensland and Western Australian codes.

84 See P. Gillies, *The Law of Criminal Conspiracy*, 2nd edn, Federation Press, Annandale, 1992, pp. 16–18.

85 These other unlawful acts are recognisable conspirational objects in certain Australian jurisdictions: see Fisse, 1990a, pp. 356–63; Kenny, 2008, para. 11.30.

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with complicity and attempt, is an extension of the criminal law. As has already been noted for these other forms of criminal responsibility, the further away proscribed conduct is from the actual infliction of harm, the more culpable should be the mental state.

Identify those elements of complicity, attempt and conspiracy that extend the scope of criminal responsibility, and the restraints that seek to prevent the extension from going too far. Should any of these restraints be removed or tightened?

CORPORATE CRIMINAL RESPONSIBILITY

The preceding discussion shows that the general principles governing criminal responsibility have evolved around the fault and conduct of natural persons. Consequently, non-natural persons such as corporations are able to avoid being convicted and punished for conduct that frequently produces serious harm. In the words of the New South Wales Law Reform Commission, 'the present law ... does not seem to take into account adequately the complexity of processes in corporations where decisions are made by a number of individuals at different levels of management.'[86] The courts have sought to rectify this defect by devising a principle[87] that renders a corporation directly liable for the conduct of its key personnel who are in a position to control the corporation and are said to represent its will. This approach has proven somewhat ineffectual because it requires the 'hands' of a corporation to be separated from its 'brain' with only the latter attracting criminal liability. While the board of directors or managing director would clearly constitute the 'brain', it is possible for mere employees (the 'hands') to be delegated with sufficient authority to manage the corporation. The approach fails to adequately stipulate when a person has a sufficient degree of management over the corporation so as to be its controlling mind.

There have also been legislative efforts to render corporations criminally responsible.[88] A good example is the *Criminal Code Act 1995* (Cth), which makes the conduct element of a crime easily proven against a corporation by providing that such conduct is made out 'if it was committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority'.[89] The legislation also regards a corporation as having the intention or knowledge required for a crime if it had failed to create and maintain a corporate culture requiring compliance with the contravened law.[90] 'Corporate culture' is defined as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.'[91] Additionally, the fault element of negligence may exist for a corporation 'when viewed as a whole, that is, by aggregating the conduct of a number of its employees, agents or officers'.[92] These legislative innovations

86 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report No. 102, Sydney, 2003, p. 9.

87 Called the Tesco principle, which is discussed further in Chapter 10, p. 337.

88 See further Chapter 10, p. 338–9.

89 *Criminal Code Act 1995*, s. 12.2.

90 *Criminal Code Act 1995*, s. 12.3(2)(c).

91 *Criminal Code Act 1995*, s. 12.3(6).

92 *Criminal Code Act 1995*, s. 12.4(2).

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enable the prosecution to circumvent the obstacles to proving the conduct and fault elements against a corporation that would otherwise be present due to conventional notions of criminal responsibility formulated on the basis of defendants being individual natural persons.[93]

CRIMINAL RESPONSIBILITY UNDER INTERNATIONAL CRIMINAL LAW

As a result of the *Statute of the International Criminal Court*[94] ('ICC Statute'), a permanent international criminal court composed of judges who are independent of their home states, was established in 2002 for the first time in history, to try perpetrators of crimes against humanity, genocide, war crimes and aggression. Australia was among the first of over 100 states that have ratified the Statute.[95] The ICC Statute contains a set of general principles of criminal responsibility covering all those discussed in this chapter such as the conduct and mental elements of crimes, criminal defences, complicity, attempt and conspiracy.[96] As a leading player and supporter of the creation of the International Criminal Court ('ICC'), we can expect Australia to comply as much as possible with the ICC Statute. This renders the Statute an important source of law, which Australian lawmakers (both legislators and judges) should take cognisance of.

The specific application of the ICC Statute to an Australian may be illustrated by the case of a member of the Australian defence forces serving overseas who was accused of a war crime and sought to plead self-defence. The ICC would have jurisdiction over such a case as the state of the nationality of the soldier (namely, Australia) has ratified the ICC Statute.[97] The rule of complementarity contained in the ICC Statute[98] makes it very likely that Australia will retain jurisdiction over prosecution of the soldier with the result that he or she will be subject to the provision on self-defence under the *Criminal Code Act 1995* (Cth).[99] However, the possibility remains that the Australian Government may decide that it is more politic to have the ICC try the case, whereupon the self-defence provision under the ICC Statute becomes operative. This would also happen were the ICC to decide to try the case on the ground that Australia was unable or unwilling to genuinely carry out the investigation or prosecution of the soldier.[100] Were any of these scenarios to occur, fundamental fairness would be achieved if the provisions on self-defence under the Commonwealth Criminal Code and the ICC Statute were substantially similar, but not if they were materially different so as to result in an acquittal under one but not the other provision. We therefore need to determine the extent to which the provisions on self-defence are similar under the Commonwealth Criminal Code and the ICC Statute

93 Regrettably, these legislative innovations have not been adopted in State jurisdictions and also resisted by Federal regulators: see J. Gans, *Modern Criminal Law of Australia*, Cambridge University Press, Melbourne, 2012, p. 228.

94 See UN Doc. A/CONF.183/9*, available at <www.un.org//law/icc/index.html>, reprinted in 37 ILM 999 (1998), and known as the 'Rome Statute'.

95 By virtue of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

96 For a detailed discussion of these principles, see O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn, C. H. Beck, Hart and Nomos, Oxford, 2008.

97 By virtue of Article 12(2)(a) of the Rome Statute.

98 See paragraph 10 of the preamble of the Rome Statute, and Article 1 of the Rome Statute.

99 Because such a soldier would be subject to the jurisdiction of the Commonwealth.

100 Article 17 of the Rome Statute.

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or whether they could be interpreted in ways that promote harmony between them. And where there are material differences between the provisions, efforts should be made to remove or reduce them.[101]

CONCLUSION

This chapter has been necessarily selective in its coverage of substantive criminal law. The discussions on the aims and functions of the criminal law, the major elements of crime, and extensions of criminal responsibility, have all been cast in a particular framework. This framework reveals how the principle of individual autonomy competes with the community welfare principle in moulding the criminal law. Justice to the individual and to the society in which he or she belongs is best served by a careful and reasoned balancing of these competing principles. As the discussion has shown, the criminal law is governed primarily by the principle of individual autonomy. However, there will be many occasions when the community welfare principle is allowed to override the claims of individual autonomy. When this occurs, justice to the individual may still be served so long as lawmakers are keenly aware of their choice of principle. They should, in addition, make every effort to have in place safeguards to ensure that the scope of criminal responsibility is not so widened as to create conditions more in keeping with a police state.

101 See S. Yeo, 'Commonwealth and International Perspectives on Self-defence, Duress and Necessity', *Current Issues in Criminal Justice*, 19(3), 2008, p. 345.

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