

1. INTRO – CRIME, LAW AND MORALITY

– intro

- * a crime is a legal wrong that can be followed by criminal proceedings which may eventuate towards punishment
- * within this week, there are 2 questions that are looked at:
 - how *do* we determine the limits of criminal liability
 - how *should* we decide whether certain behaviour is criminal
- * there are various principles in crim law that conflict with each other
- * ideas of individual autonomy have influenced criminal law, but so too has a judicial concern to protect the community and to ensure that the existing social order isn't undermined.
 - these competing influences explain the criminal law's unclear approach to subjective mental states.
- * purpose of crim law
 - **individual autonomy principle**
 - everyone should have as much freedom as possible to enjoy their rights, but except for when their conduct harms other people
 - tend to favour this principle
 - **community welfare principle**
 - in some situations, to protect the continuing wellbeing of the community, it is necessary to restrict the individual autonomy of some individuals
 - **accord the degree of seriousness of criminal conduct**
 - **distinguish between criminal and civil wrongs (torts)**
 - **preserving morality**
 - **punishing offender**

– constructing individual guilt and innocence

- * primary concern of people studying crim law is that of **criminal responsibility** —> **given that behaviour, prohibited by crim law, has been carried out, under what circumstances will we be prepared to hold someone responsible and convict them**
- * sometimes, people who are involved in crim activities aren't always held as being criminally responsible —> e.g. person is found with drugs at an airport, but they claim they didn't know it was there
- * the **actus reus** has transpired, but there has been no **mens rea**
 - as a result, the **courts will inquire into the accused's actual state of mind at the time the event took place**, as well as which side (defence or prosecution) should have the onus in proving such a state of mind
- * **significance of fault**
 - today, the law will generally only find an accused responsible if they realised what was happening —> in some circumstances, even if someone didn't realise what was going on, a reasonable person would have.
 - to be found guilty of a crime, it must be proven that the accused were at fault in the sense that they intended to commit the crime, **and** that the accused actually committed the crime —> **HLA Hart (2008)**
 - this idea stems from the notion that one should not be punished for a crime unless they have **chosen** to act in the way that they did
 - **mens rea** (guilty mind), refers to one's intention to commit a crime except in strict liability —> e.g. traffic offences, the prosecution must prove that the accused was aware of their wrongdoing.
 - **actus reus** (act element), is the physical performance of a criminal act
- * **irrelevance of motive**

- motive = the emotional force behind a person's conduct
- intent = person intends a consequence if it is their purpose to achieve that result
- criminal law doesn't allow a person's good/bad motives to be taken into account in determining guilt
 - e.g. mercy killings still amount to murder because D intended to kill the victim, despite that it may be for the best of motives
 - e.g. stealing bread to feed your family can still amount to theft
- motive, can however, be taken into account in relation to sentencing
- it may act as an aggravating or mitigating factor
 - e.g. a mum who steals bread to feed her children will be convicted of theft, but her sentence may be reduced because of her motive.

– objective and subjective mens rea standards

- * determining the accused's state of mind is a **subjective** standard that is used by a judge/jury to decipher an accused's guilt
- * alternatively, a focus can be placed on the reasonableness of the accused's claim that they lacked awareness → standard is **objective** because we are no longer seeking to discover what the accused's state of mind was, but rather what a reasonable person would have done if they were in the accused's position
- * **intent ==> subjective**
 - we clearly intend to bring about consequences where this is our purpose or desire → where we mean to bring them about
 - it is irrelevant as to whether a person's intent to bring about a consequence was premeditated
 - prosecution must prove that not only were the accused's act/omission voluntary, but that they had an intent to act
 - e.g.
 - when A strikes B, his action is divided into A's movement of the fist and B's presence in the path of A's movement
 - although A's movement may be voluntary, he is not said to have intentionally struck B unless he knows that B (or someone else) is in the path of his moving fist → general (basic) intent
 - this is distinguished from specific intent
- **general (basic) intent**
 - a basic crime is one where the mens rea does not exceed the actus reus.
 - this means that the defendant intends to perform an act (intends to perform the AR)
 - e.g. assault
 - e.g. assault occasioning ABH → there was no INTENT to cause ABH, but it just caused ABH
- **specific intent**
 - specific intent is an intent to cause a particular consequence (i.e., intent to kill/cause grievous bodily harm) → e.g. murder, intentional wounding.
 - the physical act committed with the intention of bringing about a particular result
 - e.g. offence of **wounding with intent to cause grievous bodily harm** under the **Crimes Act** not only requires an intention to wound, but an intent to cause GBH from the commission of that act
 - here, prosecution doesn't have to prove that the wounding amounted to a grievous bodily harm
 - it could be a relatively minor cut (like my **CCP court report**) → as long as there is an intent to cause them grievous bodily harm, they are guilty of the offence even if they have failed to effectuate their intent

- therefore, a specific intent to cause a prescribed result can be established by knowledge that such a result will probably (or is likely) to occur

– *means rea as to acts*

- * see “general intent”

– *mens rea as to consequences*

- * intent

- (see “specific intent”)

- * recklessness/knowledge ==> subjective

- as distinct from intent, covers situations where the accused perceives a risk that a consequence may occur, but nevertheless takes it
 - e.g. mens rea for murder in NSW includes “reckless indifference to human life” —> prosecution must prove that the accused foresaw the probability of death

- * negligence ==> objective

- some criminal offences don’t require the prosecution to show that the accused intended/ was reckless with regard to a consequence of a specific actus reus
 - it is sufficient to prove that a reasonable person in their position would have foreseen the risk of it occurring and taken steps to avoid it
 - e.g. manslaughter by criminal negligence

– *criticism of mens rea*

- * there is a criticism that motive should be taken into account during the criminal process —> **Norrie (2001 & 2005)**

– *euthanasia*

- * mercy killing

- general position is that those who help to bring the death of someone who is suffering (even if they have consent) are guilty of homicide/aiding in the suicide —> compassionate motives are irrelevant (**R v A Primary Care Trust [2013]**)

- * voluntary euthanasia

- there is a difference between a discontinuation of treatment (e.g. doctor turning off life support —> passive euthanasia) and actively bringing a patient’s life to an end (active euthanasia); the latter of which would constitute homicide.
 - voluntary euthanasia is not reinforced by the individual autonomy principle
 - intentionally taking a life = murder (**s 18**)
 - assisting suicide (**s 31C**)

- * **Crimes Act 1900**

- involves issues relating to euthanasia
 - **murder (s 18 (1)(a))**
 - shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
 - **manslaughter (s 18 (1)(b))**
 - every other punishable homicide shall be taken to be manslaughter

– *temporal coincidence rule*

- * where actus reus and mens rea must coincide —> they must happen at the same time.

2. SCOPE AND PRINCIPLES OF CRIMINAL LAW

– *Ashworth and Horder (2013)*

* **INDIVIDUAL AUTONOMY**

- is a fundamental concept that is considered when making/not making certain conduct criminal
- refers to each individual being treated as responsible for their own behaviour
- assumes individuals have the capacity and free will to make meaningful choices → we should be respected and treated as agents capable of choosing their acts/ omissions
- this principle assigns a great importance to liberty and individual rights
- however, the difficulty is to decide how far this is to be taken
 - whilst this principle gives strength to the protection of individual interests and liberty, it is in constant conflict with the utilitarian needs of society
- overarchingly, this principle has 3 main characteristics → **Raz (1986)**
 - 1. promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of adequate range of options, and of the mental abilities necessary for an autonomous life
 - 2. the State has the duty not just to prevent the denial of freedom, but to promote it by creating conditions of autonomy
 - 3. one may not pursue any goal by means which infringe people's autonomy, unless such action is justified by the need to protect/promote autonomy of others

* **COMMUNITY WELFARE**

- is another fundamental concept that is considered when making/not making certain conduct criminal
- refers to the fulfilment of basic interests like maintaining one's personal safety, health and capacity to pursue one's chosen life plan → **Lacey (1988)**
- due to the limited-nature of the individual autonomy principle, theorists (such as **Raz**) have developed approaches that emphasise the State's obligation to create the social conditions necessary for the exercise of full autonomy, and furthermore, asserting the importance of collective goals
- a risk of invoking this notion of community is not giving special weighting to individual rights → however, some criminalisation may be accepted as the only justifiable means of upholding certain social practices as 'necessary for the general good'
- whilst autonomy principle suggests that individual rights should be given high priority in legal structure, the principle of welfare recognises the social context in which the law must operate and gives weight to collective goals
- whilst there is conflict between these 2 principles, this shouldn't lead to a vague notion of 'balancing them' → rather, it should lead to the development of ways of prioritising some rights, and of the structuring of public interest arguments to ensure that they are effective.

* **HARM PRINCIPLE & PUBLIC WRONGS**

- asserts that the State is justified in criminalising any conduct that causes harm to others
- *3 conditions that must be satisfied before conduct is held as criminal*
 - harm
 - is a state of set-back interest that is a consequence of a wrongful act
 - wrongfulness
 - involves the culpable attacking of one's interests, and abusing them by using them as a means to another's satisfaction
 - also involves the act being morally wrong
 - public element

- it is a wrong that properly concerns and is against the public as a whole
- the 'public' element doesn't necessarily have to be in public —> e.g. swearing with friends in public doesn't mean it's a public wrong
- alternatively, just because it isn't in public (e.g. DV), doesn't mean it isn't a public wrong
- e.g.
 - calling an African a 'nigger' is usually not a criminal offence, but the rationale for these crimes (racist/religious insults) is clearly connected with a belief that is proper for the State to promote the basic value of racial tolerance —> thus, this value is so significant that it justifies criminalisation

* **MINIMALIST APPROACH**

- *respect for human rights*
 - states that this approach should respect human rights protections
 - any criminal laws should respect freedom of expression, freedom of thought and religion, right of privacy and right not to be discriminated against
- *right not to be subjected to State punishment*
 - states that we shouldn't be subjected to State punishment; an idea stemming from the social significance of the public condemnation involved in conviction, and also from the sacrifice of human rights usually entailed by the imposition of punishment
- *criminal law shouldn't be invoked unless other techniques are inappropriate*
 - civil law (tort and contract) can be used as alternatives to criminalisation
 - asserts that criminalisation should be reserved for the most serious of invasions of interests
- *conduct should not be criminalised if the effects of doing so would be worse than not doing so*
 - e.g. drug laws
 - the criminalisation of possession of soft drugs (e.g. weed) gives rise to social consequences that are worse than if it was not to be criminalised:
 - creation of black markets
 - police adopts intrusive means of enforcement
 - lead to police corruption
 - e.g. alcohol prohibition
 - more people delve underground to black markets and use it

* **MORALLY WRONG BEHAVIOUR**

- there has been constant debate as to whether conduct that is immoral should be criminalised
- *Devlin's argument*
 - says that society is entitled to use crim law against behaviour which may threaten its existence, and that there is a common morality that brings together all of society —> any deviation from this common morality is capable affecting society injuriously
 - as such, it may therefore be okay to penalise immoral behaviour
 - however, this argument relies on a very loose concept morality
 - he assumed that immorality is to be defined and measured according to the strength of the feelings of ordinary people
 - the problem is that these feelings of ordinary people may be more conducive of prejudice rather than of moral judgement
- *Mill's argument*
 - claim that the only acceptable reason for criminalising behaviour is that it causes harm to others
 - immorality is not a sufficient reason for criminalisation

- the law should respect the autonomy of each individual above all —> should allow each person to pursue their conception of the good life subject only to the minimum number of constraints necessary to secure the same freedom to others

* REMOTE HARMS

- a justification offered for criminalisation is that certain conduct can create an opportunity for serious harm to be caused subsequently —> preventative function of criminal law
- the conduct itself may not be harmful in itself, but it is criminalised because of the consequences that may flow from it
- e.g. criminalising possession of a gun/knife as it can be used to kill/injure/threaten others

– *Rush and Yeo (2006)*

* **R v Murrell (1836)**

- facts
 - Murrell, an Aboriginal man, had killed another Aboriginal man and was subsequently convicted of murder under the Australian legal system
 - however, he argued that as an indigenous person, he was bound by traditional Aboriginal law and not by the colonists' British law
 - said that British law didn't apply to NSW because it was territory neither conquered nor uninhabited when settlers arrived from England
- question
 - did ATSI customary law apply over the common law in relation to Aboriginal offenders?
- verdict
 - judgement for the State
 - Crown rejected Murrell's argument on the basis that British law applied to everyone in NSW —> including Aboriginals
 - court held that on the arrival of British settlers, the indigenous didn't have sufficient numbers, nor a recognised system of laws and gov which would entitle them to be regarded as a sovereign state governed by its own laws

* **R v Bonjon (1841)**

- facts
 - same as **Murrell**
- question
 - did ATSI customary law apply over the common law in relation to Aboriginal offenders?
- verdict
 - **Willis J** noted that it was true that the colonial courts had jurisdiction over crimes committed by Aboriginal people against the colonists
 - however, he went on to show sympathy for the Aboriginals.
 - discussed their evident decline, and questioned why the government had not done anything to support them —> since they were considered as British subjects
 - he said his answer would depend largely on the way in which sovereignty was acquired
 - observed that the country was already occupied by the Aboriginals. and that it had not been conquered
 - ultimately, his Honour concluded that the question was too great to be resolved immediately, and concluded:
 - "I desire to see the state of the Aborigines of Australia improved...to see all due protection extended to this unhappy race — the protection of their rights by laws

adapted to their capacity and suited to their wants — the protection of all equal and all powerful justice.”

* **native criminal jurisdiction after Mabo**

- there have been various attempts, since the Mabo case, that have challenged the jurisdiction of Aust. courts to try an Aboriginal person
- *Mabo ruling on the survival of Native Land Title*
 - court held that Aust. was not conquered by British
 - asserted that *terra nullius* was a legal fiction
 - however, annexation of territory by settlement later came to be recognised as a applying also to territory which was newly discovered by a European State and which was inhabited by native who weren't subject to their jurisdiction —> therefore, Britain was permitted under international law to extend its sovereignty over Australia
 - **Brennan J** says that it is imperative that the common law should not be frozen in an age of racial discrimination —> however, he observed that there is a limit beyond which the common law's recognition of contemporary standards of justice and human rights would not extend
- *survival of native criminal jurisdiction*
 - have native laws governing Aboriginal life remained unextinguished by subsequent Aust. legislation?
 - whether native criminal jurisdictions survived settlement
 - with the establishment of settle came the English crim. law
 - native crim laws which survived settlement can not be of general application in the contemporary law
 - nevertheless, these laws are entitled to recognition within their spheres of operation
 - as a result, they have generally survived the advent of British settlement —> however, doesn't necessarily mean they reman unextinguished from statutes
 - whether native criminal jurisdictions remain unextinguished
 - according to Mabo, extinguishment occurs where there is a clear intention, on behalf of the legislature, to do so
 - there have been many statutes that were passed over the years that explicitly asserts the superiority of English law over ATSI customary law in all jurisdictions
 - as a result, these customary traditions were subsequently extinguished by the clear intentions of the legislature/executive
- *cases challenging criminal jurisdiction of courts*
 - the **Bonjon** case correlates most with Mabo
 - other than that, no other case has prevalently discussed the issue of extinguishment of native criminal jurisdictions

3. ELEMENTS OF CRIMINAL OFFENCES I

– *criminal liability*

- * criminal resp. of someone requires evidence that they:
 - performed the physical/external/conduct element of the offence
 - held the requisite mental/fault/internal element
 - at the same time (actus reus and mens rea occur simultaneously)
 - absence of any defences
- * general principle → an act does not make a person guilty of a crime unless the person's mind be also guilty **Fowler v Padget (1798)**
- * **actus reus (physical element of an offence)**
 - the physical element of an offence may refer to:
 - conduct (e.g. act, omission); or
 - conduct which occurs in specified circumstances; or
 - the results or consequences of conduct
 - an act must be performed *voluntarily* for criminal responsibility → not a reflex action, accident or committed whilst in a state of impaired consciousness (e.g. sleepwalking)
 - legal presumption is that an accused's acts are voluntary, but this may be negated
 - if an offence has a consequences component, the conduct must have caused the prohibited consequence (issue of causation)
- * **mens rea (mental element of an offence) ==> Criminal Code Act p.g. 210**
 - subjective → intention, knowledge, recklessness; or
 - objective → negligence
- * **exceptions to the dual mental and physical element rule**
- *strict offences*
 - no mens rea requirement → conviction secured by proving actus reus
 - P not required to prove fault
 - with these offences, D will have the option of arguing an **honest and reasonable mistake of fact** as a defence
 - D has the **evidentiary burden** to raise HRMF, otherwise there is no mens rea
 - P then has to negative this HRMF beyond reasonable doubt → it is this a **persuasive burden** on P
 - in determining whether there was 'sufficient' mistake: ==> **SRA v Hunter District Water Board**
 - 1. a positive belief that the act was permissible WILL constitute HRMF
 - 2. the mere absence of a reason to believe that the facts were otherwise WON'T constitute HRMF
 - 3. the failure to consider whether the facts were otherwise WON'T constitute HRMF
- *absolute offences*
 - no mens rea requirement → conviction secured by proving actus reus
 - however, no defences (e.g. HRMF) are available → you either plead not guilty or you are considered as guilty
 - P not required to prove fault
- *preliminary offences*
 - an intention to act is a primary ingredient of the offence of attempt and conspiracy

– *proof in criminal law*

- * not only do we need to be concerned with what has to be proved by ways of mens rea, but who has to prove it (burden of proof)

- * there is a large difference between requiring P to prove intent, and alternatively, assuming that the accused intended to cause the natural and probable consequences of their acts until they prove otherwise
- * for D, it is better for the burden of proving the existence of a mens rea requirement to be on P → as here, the onus is not on D to disprove anything, which may be difficult for them given the difficulties in obtaining/producing relevant evidence

* **see p.g. 234 for an example**

* **Woolmington v DPP [1935]**

* **facts**

- accused was charged for the murder of his wife, from whom he was separated
- on the version of the facts he put forward, he visited his wife at her mother's house while in possession of a sawn-off shotgun → aim was to frighten her into returning to him by threatening to commit suicide
- whilst he was getting the gun out from underneath his coat, he brought it across his breast and it accidentally went off
- he was convicted of murder and was sentenced to death
- during this trial, the judge ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental
- he then appealed to the CCA, arguing that the judge had misdirected the jury by telling them that he was presumed guilty of murder unless he could satisfy the jury that his wife's death was due to an accident → argued that it was unjust for BOP to shift from prosecution to defence
- CCA said that no miscarriage of justice had occurred

* **verdict**

- judgement for Woolmington → he was acquitted
- mentioned the important **golden thread rule**
 - involves the duty of the prosecution to prove the prisoner's guilt beyond reasonable doubt → prosecution bears onus of proof ==> no requirement of D to prove innocence (doing so would be an abrogation of justice and the common law)
- because the trial judge erred in reinforcing this fundamental common law principle, the conviction was quashed
- "Throughout the web of English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt. If, at the end of the whole case, there is a reasonable doubt, created by the evidence given, that the prosecution has not made out the case and the prisoner is entitled to an acquittal."

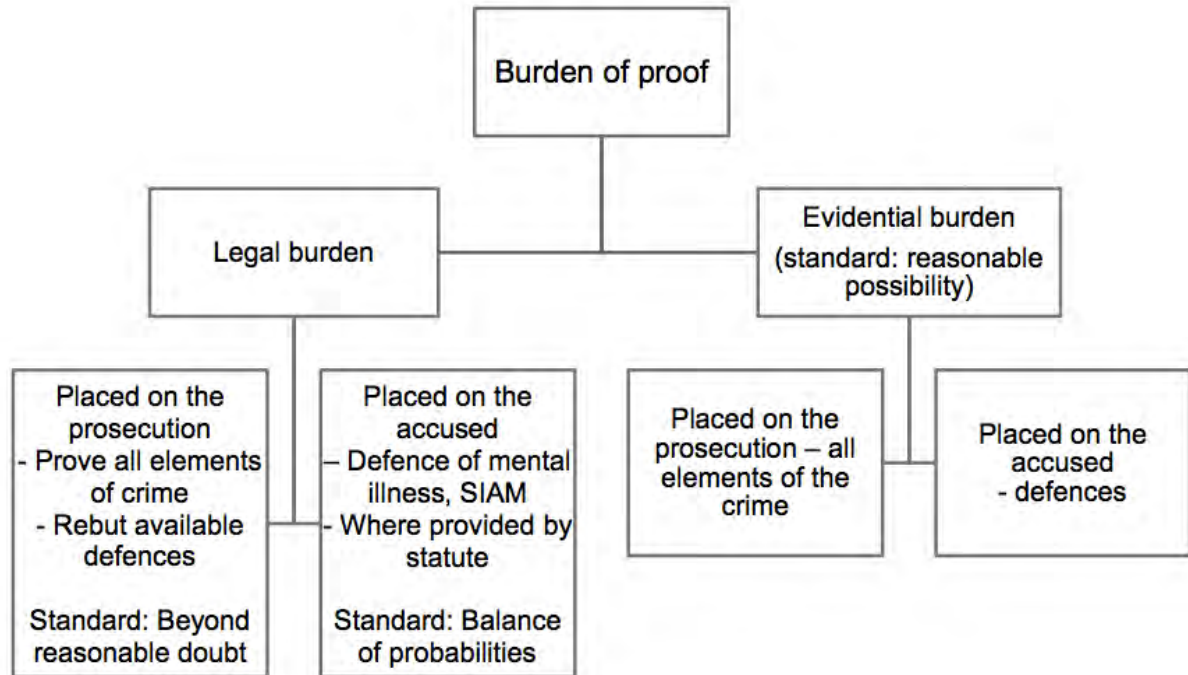
* **persuasive (legal) burden**

- is the general rule that P bears the burden in proving D's guilt beyond reasonable doubt – **Woolmington**
- however, there are 2 exceptions to this general rule:
 - when a plea of insanity is raised by D
 - statutory provisions which explicitly or implicitly place the burden of proof upon D

* **evidential burden**

- is a party's duty to produce sufficient evidence to call upon the other party to answer
- the burden of introducing evidence rests on the party whose duty it is to bring forward sufficient evidence to get the issue before the jury
- in relation to D, it means that the matter must be taken as proved against him unless there is sufficient evidence to raise an issue on the matter
- once an allegation of fact has been put in issue, it's the duty of the judge to decide whether there is any evidence on which the jury can reasonably find that the fact is proved → judge does not state his own opinion

- if judge is not satisfied that there is enough evidence to make the issue one that is sufficiently arguable to be placed before the jury, he may withdraw that specific issue or even the whole case from the jury
- e.g.
 - a D will have an evidentiary burden for things like an HRMF (adducing evidence which suggests there was an HRMF)



– principles in *He Kaw Teh v R* (1985)

- * where a statutory offence is silent concerning *mens rea*, the courts are responsible for determining which mental element (intent, knowledge, recklessness) applies to the relevant conduct element (act, circumstance, consequence)
- * in doing so, they are guided by the presumptions identified in **HKT**

* **facts**

- D (HKT) came into the airport with which a large amount of heroin was hidden
- he was charged for two offences under the **Customs Act 1901 (cth)**
 - possession
 - importation
- **Customs Act 1901 (Cth) s233B(1)**
 - Any person who...
 - **(b)** imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies [importation offence]; or
 - **(c)** without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act [possession offence];
 - ... shall be guilty of an offence.
- **Customs Act 1901 (Cth) s233B(1A)**
 - On the prosecution of a person for an offence against the last preceding sub-section, being an offence to which paragraph (c) of that sub-section applies, it is not necessary for the prosecution to prove that the person knew that the goods in his possession or of which he attempted to obtain possession had been imported into