

1

CRIMINAL LAW: DEFINITION AND AMBIT

The aim of this chapter is to introduce some of the theory that surrounds the criminal law: to explain why the criminal law matters, and to highlight the issues it raises. The chapter begins by considering the defining features of the criminal law, those which distinguish it from other varieties of law. Secondly, the ambit of criminal law is investigated—when is it apt to declare someone a criminal? The discussion in this chapter will lead on, in Chapter 2, to a discussion of the constitutional and Rule of Law principles that constrain the enactment and interpretation of criminal law; and later, in Chapter 16, to consideration of what sorts of actions properly attract criminal prohibitions.

§ 1.1 A search for definition

Like other types of law, the criminal law is a means by which the state participates in the ordering of its citizens' lives. Yet throughout the world, every society with a formal legal system distinguishes between criminal and civil law.¹ This raises a question about the scope of criminal law: what marks a law out as criminal rather than civil? One way of approaching that question is to look for a definition of the criminal law. Broadly speaking, a crime is an event that is prohibited by law, one which can be followed by a prosecution in criminal proceedings and, thereafter, by punishment on conviction:²

“A crime must be defined by reference to the *legal* consequences of the act. We must distinguish, primarily, not between crimes and civil wrongs but between criminal and civil proceedings. A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment etc.) known to follow these proceedings.”

Criminal law, in turn, is the variety of law that prohibits such crimes.

But to define criminal law only in these procedural terms fails to shed any light on a more fundamental problem: why does the distinction between criminal and other law matter? It is true that criminal prosecutions follow a different legal procedure from their civil counterparts. But if that is the sole difference, and there is no underlying reason for separating the two, drawing the distinction would be pointless.³ We need to identify the distinguishing features that also justify treating crimes as a separate body of law.

¹ Robinson, “The Criminal–Civil Distinction and the Utility of Desert” (1996) 76 *Boston ULR* 201, 201–2.

² Williams, “The Definition of Crime” (1955) *CLP* 107, 123.

³ Moreover there would be a problem explaining why the distinction is maintained in those countries which do not observe the procedural safeguards normally found in criminal law. See Robinson, “The Criminal–Civil Distinction and the Utility of Desert” (1996) 76 *Boston ULR* 201, 203.

(i) The harmful nature of the prohibited event

One suggestion might be that the harm proscribed by criminal law is greater in degree than that in the civil law, or is somehow public rather than private in nature. For example, across most if not all cultures, the criminal law contains provisions proscribing serious forms of violence and dishonesty. However, while it is true that prevention of harm is central to the criminal law, the distinctiveness of criminal wrongs cannot be captured by reference simply to the moral gravity of the wrongdoing and the importance of the interest being violated. For one thing, most harms are both public and private. The major oil spillage in Sydney harbour that gave rise to the *Wagon Mound* tort cases affected more than one person,⁴ while by contrast an ordinary assault typically involves a single victim. Similarly, consider the situation where D plc has placed a large contract for the supply of raw materials with V Ltd. D is aware that without the contract, V would be forced to close with the loss of hundreds of jobs. If, despite this, D breaks the contract in order to obtain supplies from a cheaper overseas source, it commits no offence. Compare this case with the situation where a company fails to send its annual return to the Registrar of Companies within the time limits prescribed by the Companies Act 2006. It seems, therefore, that the events prohibited by criminal laws are not inherently distinguishable from those regulated by other sorts of law. Indeed, the same act can sometimes lead to both criminal and civil liability. If D takes V's car without V's consent, for example, he may be prosecuted for theft. He can also be sued in tort for conversion.

That said, there is intuitive appeal in the idea that criminal wrongs are typically more serious than their civil counterparts; sufficiently serious that, whether or not they also give rise to civil causes of action, the state feels constrained to step in and regulate them directly. This can be seen in the rule that a victim who forgives his attacker may discontinue his civil suit for damages, but cannot stop the prosecution of that attacker. Criminal offences are not merely a private matter. The public as a whole has an interest in their prevention and prosecution. Thus, according to Allen, behaviour is criminalised "because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured".⁵ Allen's remark is a useful pointer to why assaults are crimes while breaches of contract are not. Assault involves an interference with fundamental rights of the victim, rights which the State is perceived to have a duty to protect. By contrast, individuals are normally able to protect themselves against breach of contract, and can satisfactorily undo any damage suffered with the aid of the civil law.

Another possible basis for differentiating civil from criminal law is that criminal acts are those acts which are intrinsically morally wrong. (Such acts are sometimes called *mala in se*.) To some extent this is true of the more serious, stigmatic offences—assault, murder, and so forth.⁶ But much of the modern criminal law involves prohibitions which constrain conduct

⁴ *Overseas Tankship (UK) Ltd v. Morts Dock Engineering* [1961] AC 388; *Overseas Tankship (UK) Ltd v. Miller Steamship Co Pty* [1967] AC 617. Cf. public nuisance cases: *Halsey v. Esso Petroleum* [1961] 1 WLR 683.

⁵ *Legal Duties and Other Essays in Jurisprudence* (1931) 233–4. Compare Coffee: "Characteristically, tort law prices, while criminal law prohibits". On this view, the criminal law should be invoked when the "price" of an action, that the defendant would have to pay in tortious damages, is insufficiently prohibitive. Coffee, "Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991) 71 *Boston ULR* 193, 194.

⁶ Cf. Gross, *A Theory of Criminal Justice* (1979) 13.

which may be wrong only in the technical sense of breaching the terms of the prohibition (*mala prohibita*). Prohibitions of that kind are often in the public interest. For example, driving on the roads is safer overall because of speed limits. Yet there is little intrinsic moral difference, for instance, between driving safely at 70 miles per hour on the motorway and driving safely at 75; but the latter is an offence.⁷ And conversely, lying may be immoral, but it is not *per se* a criminal act.

More generally, the sheer variety of conduct that has been designated a criminal wrong defies reduction to any “essential” minimum. One finds no unifying thread to the subject matter of the multifarious crimes known to England and Wales.⁸ The criminal law has been used—indeed, overused—as a regulatory device, and consequently extends to conduct that can lack any inherent moral turpitude whatsoever, such as failing to notify the licensing authority of a change of address for one’s driving licence, or omitting a required statement from a consumer credit contract. In this country, the fact that some particular action is criminal may reflect only a decision on the part of a regulatory body that the public interest requires resort to public means of suppression, and that the matter cannot be left to private redress or bargaining. Amongst the available public means of suppression, the criminal law is the most commonly employed coercive mechanism.

So there are limits to the extent to which we can safely elaborate upon our initial definition by reference to the things that criminal law prohibits. In part, this reflects the fact that criminal law engages with political and societal pressures which find expression in the form and content of the law. In Chapter 16, we shall discuss some of the reasons for the State to criminalise certain harms rather than others. But it should always be borne in mind that, in practice, criminal laws are characteristically deployed to control behaviour and events because there is perceived to be a societal, and political, interest in doing so.

(ii) *Punishment*

A second element of the preliminary definition given in § 1.1 was punishment. Perhaps the main distinction between criminal and civil law is that the criminal law licenses punishment whereas redress for civil law wrongs is predominantly compensation?

Punishment is an important facet of the criminal process. Indeed, it is an indispensable feature of criminal prohibitions. Parliament does not say, “Do not assault other people, *please*”. That would not be a law at all. Rather, the law declares, “Do not assault other people, *or else . . .*”. Of course, civil laws also specify sanctions. As Posner points out, however, the nature of the civil sanction differs from that found in criminal law. A defendant who is convicted of a crime will normally be imprisoned or fined. By contrast, someone who loses a civil action faces perhaps an injunction, an order for specific performance, or a requirement to pay damages.

⁷ A great deal of modern, statutory criminal law proscribes conduct that is not intrinsically problematic but which is suppressed for anticipatory or pre-emptive reasons. For a discussion and defence of such offences see Horder, “Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation” in Sullivan and Dennis (eds.), *Seeking Security: Pre-empting the Commission of Criminal Harms* (2012) 79; a more critical discussion of such offences in the same volume is Simester, “Prophylactic Crimes”, *ibid.*, 60. See also Chapter 16 below.

⁸ See Ashworth, “Is the Criminal Law a Lost Cause?” (2000) 116 *LQR* 225.

Posner argues that this difference reflects a crucial distinction between the functions of criminal and civil laws. In his opinion, the criminal law exists to impose punishments such as imprisonment in situations where tortious remedies are an insufficient deterrent.⁹ But Posner's explanation is doubtful. Both criminal and tortious remedies can operate as deterrents. Each is likely to be regarded as unwelcome by a defendant, and indeed civil damages awards that compensate to the extent of the harm done often far exceed criminal fines in magnitude.

On the other hand, it is instructive to consider the reasons *apart from deterrence* which underlie the imposition of sanctions in these cases. In particular, whether or not they have deterrent effects, civil remedies are not normally regarded as punitive. Punishment involves more than simply imposing something unwelcome upon a defendant. A *punitive* sanction imposes hardship *because the recipient deserves it*.¹⁰ Damages in a contract dispute, for instance, are a sanction; but ordinarily they are imposed without censure. It is not necessary to show that a defendant is at fault when he breaches his contractual obligations.

Punishment, by contrast, is imposed with censure as an integral aspect. It responds to the fact that the defendant has done something wrong.¹¹ Indeed, the level of sentence is one way in which a court signals the wrongfulness of the defendant's actions.¹² Of course, there are also fault-based actions in the law of tort. Nonetheless, damages for tort losses are normally compensatory, not punitive, and are understood as such. That is why one may usually insure against contractual or tortious damages, but not against criminal fines.¹³

Punishment, then, is one function of the criminal law. But punishment is not what is unique about crime. Indeed, punishment is not even a specifically legal phenomenon, let alone specifically the province of criminal law. We do not require a criminal conviction before punishing children or for a footballing foul,¹⁴ and it is sometimes possible to obtain exemplary (or "punitive") damages in civil cases. One may be fined or even imprisoned for a civil contempt of court.¹⁵ Conversely, neither is a conviction always accompanied by punitive sanctions. Sometimes offenders are discharged without receiving any sentence for their wrongdoing. Offenders may also be subject to confiscation orders,¹⁶ or indeed to life sentences or extended sentences of imprisonment for purposes of public safety rather than

⁹ Posner, "An Economic Theory of the Criminal Law" (1985) 85 *Col LR* 1193.

¹⁰ Which is not to say that all defendants actually convicted of a criminal offence deserve punishment, particularly in the case of strict liability offences (below, § 1.2(ii)(c); Chapter 6). But it is to suggest that there is something morally problematic about imposing punitive sanctions upon defendants who do not deserve it.

¹¹ For discussion, see von Hirsch, *Censure and Sanctions* (1993).

¹² Cf. *Martineau* (1990) 79 CR (3d) 129, 138 (Lamer CJ): it is a "fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally".

¹³ *Askey v. Golden Wine Co Ltd* [1948] 2 All ER 35; cf. *Clunis v. Camden and Islington Health Authority* [1998] QB 978.

¹⁴ At the same time, criminal punishment is a distinctive variety of punishment in as much as its imposition is the responsibility of the community as a whole: Lamond, "What is a Crime" (2007) 27 *OJLS* 609, 614ff.

¹⁵ On civil penalties more generally, see White, "Civil Penalties: Oxymoron, Chimera and Stealth Sanction" (2010) 126 *LQR* 593.

¹⁶ Proceeds of Crime Act 2002. See Ulph, "Confiscation Orders, Human Rights, and Penal Measures" (2010) 126 *LQR* 251; Alltridge, "The Limits of Confiscation" [2011] *Crim LR* 827. The proportionality constraints on confiscation orders appear to be outer bounds rather than core determinants: *Waya* [2012] UKSC 51. For example, in *Varma* [2012] UKSC 42, the Supreme Court upheld the imposition of confiscation orders even in the context of a conditional discharge.

punishment.¹⁷ This suggests that while punishment is an important facet of the criminal law, it is not its most distinctive feature.

(iii) *Convictions*

In addition to prohibition and punishment, a third aspect of the criminal process is the conviction itself—the type of verdict that the Court makes. Convictions are the most distinctive aspect of criminal law. In particular, while it also licenses the imposition of sanctions, a criminal conviction (at least for stigmatic offences) is regarded as a penalty *in its own right*, both by legal officials, such as judges, and by the public. This is because it has the effect of labelling the accused as a criminal.¹⁸ A conviction makes a public, condemnatory statement about the defendant: that she is blameworthy for doing the prohibited action. It is, literally, a pronouncement that she is “guilty”.¹⁹ By contrast, civil judgments seem merely to pin the salient breach upon a defendant, without necessarily saying anything about her moral culpability. Thus, as we have noted, a claimant can sue for breach of contract without having to show fault by the defendant. The adverse civil verdict is made for the claimant’s benefit and entails no formal public censure; the adverse criminal verdict is a pronouncement made on behalf of society and is a form of community condemnation.

This facet is not mentioned in the definition of criminal law that we proposed earlier. Rather, it is something that accompanies the procedural differences. Thus the essential distinction between criminal and civil law lies not so much in the operation as in the social significance of the criminal law—in the way criminal laws and convictions are understood. The criminal law has a communicative function which the civil law does not, and its judgments against the accused have a symbolic significance that civil judgments lack. They are a form of condemnation: a declaration that the accused did wrong. Public recognition of this fact can be seen in the relevance of the criminal law to applications for a visa, or for admission to practise as a lawyer, in which applicants are required to disclose any previous convictions. Or consider the difference between publicly denouncing someone as a “convicted criminal” and calling her a “tortfeasor”.²⁰ The law exists in society, not in the abstract. Correspondingly, the law’s labelling of a defendant as “criminal” imports all the resonance and social meaning of that term.

§ 1.2 Ambit

Three salient functions of criminal law emerge from the discussion so far. The first might be called *criminalisation*: the law sets out for citizens those things which must not be done.²¹

¹⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012, part 5. These provisions replace the life sentence and imprisonment for public protection scheme set down in ss. 224–36 of the Criminal Justice Act 2003 with a more moderate regime; which nonetheless imposes periods of imprisonment beyond retributivist desert.

¹⁸ Chalmers and Leverick, “Fair Labelling in Criminal Law” (2008) 71 *MLR* 217.

¹⁹ For extensive discussion of the communicative function of the criminal law, see Duff, *Punishment, Communication and Community* (2001).

²⁰ The former is certainly defamatory. Cf. *Carver v. Pierce*, an action for slander based on the words, “Thou art a thief, for thou hast stolen my dung” (1648) *Sty* 66, 82 *ER* 534.

²¹ Or allowed to subsist: below, § 4.1(ii).

The second thing the law does is *convict* persons who are proved to have transgressed its prohibitions. Finally, it may *punish* those whom it convicts; and, more generally, the criminal law offers the prospect of punishment to reinforce its function of criminalisation.

The criminal law, then, is a powerful and condemnatory response by the State. It is also a bluntly coercive system, directed at controlling the behaviour of citizens. Criminalisation involves rules backed up by threats. In a sense, criminal law is the means by which the State forces citizens into complying with its injunctions.

When should the criminal law be invoked? No one, including the State, should coerce others without good reason. The constriction of people's conduct calls for justification, especially when it is accompanied by censorious and punitive treatment of those who do not comply. Unless there are compelling reasons, the criminal law should not be deployed by Parliament.

Nonetheless, sometimes the use of the criminal law *is* justified. Imagine the following scenario:

One fine September morning, Jim is discovered dead in his home. His skull has been crushed by a blow inflicted with a heavy object. The police are called. Upon further investigation, they establish that he was murdered by his daughter, Alice, who killed him in order to receive her inheritance under his will.

Intuitively, most of us would regard this as a classic example of criminal wrongdoing. The reasons are twofold. First, what Alice has done is precisely the sort of activity that the State should prohibit. Murder is both harmful and wrong, and people ought to be protected against it. Secondly, Alice is clearly blameworthy, and deserving of censure for her actions. Thus she is precisely the sort of person who deserves the condemnation of a criminal conviction, as well as the punishment that a conviction exposes her to.

Alice's behaviour is a central case for the application of criminal law. It involves deliberate, culpable infliction of the sort of serious harm that the criminal law is meant to prevent. However, not every case is as clear as this. Suppose the following alternatives:

Case I: Jim is discovered dead in his home. This time, the police establish that he died instantly after being struck by a vase. The vase was accidentally dislodged from the bookshelf by Barbara.

Case II: During an argument, Clare insults Jim. Jim is deeply hurt by Clare's words.

It is much less obvious that the criminal law should intervene in these situations. In case I, Barbara has caused Jim's death, but there is no suggestion that she is at fault. Given this, it is inappropriate—indeed, wrong—to apply to her the sanctions of public condemnation and punishment. In case II, Clare has wronged Jim, and deserves censure. But not by the criminal law. Unlike murder, this is not the sort of behaviour that ordinarily should be prohibited by the Draconian technique of criminalisation.

In questioning when application of criminal law is legitimate, guidance may be had from the functions identified earlier. There are two dimensions to the operation of criminal law: *ex ante* and *ex post*. *Ex ante*, the law marks out actions that are prohibited, and warns citizens not to do those actions lest they be punished. *Ex post*, it censures (convicts) and punishes (sentences) persons who transgress its prohibitions. In the following pages, we investigate these two roles separately, and discuss some of the issues affecting when they should be invoked.

(i) Criminalisation ex ante

Why should some behaviour be criminalised, while other behaviour is permitted? The answer to that question is complex and somewhat fragmented. Prima facie, a legislature has the power to proscribe almost any sort of conduct.²² Earlier, we pointed out that there is no obvious distinction between actions which are criminal and those which generate civil liability (§ 1.1(i)). When the legislature marks some action as criminal, however, it condemns it and rules it out as an acceptable option for citizens. A responsible legislature ought to take such drastic measures only if there are compelling reasons so to do.

There are a number of reasons to oppose the overuse of criminal law, but the most important of them is concern for individual *autonomy*. The need for tolerance, which underpins any liberal society, is grounded in autonomy. Prohibiting whatever is “wrongful” is likely to intrude much too far upon the liberties of citizens. This is not only to say that, in a liberal society, freedom of choice is to be fostered. It is also to claim that if the law is to respect the right of citizens to control their own lives, it should not deprive them of that control without good reason.

The criminal law stands in the way of free choice. It coerces people by threatening them with criminal liability unless they submit to its commands. Consequently, it circumscribes the individual’s capacity to live her own life, in a manner that she herself dictates. By restricting the ways in which a person may shape her life, the law has the potential to prevent her from pursuing the goals and aspirations which matter to her. Indirectly, the criminal law imposes the legislature’s view and, on occasion, even a judge’s view²³ of an acceptable life.

Individual freedom is valuable. Even though it is right, indeed necessary, to have criminal prohibitions, the fact that they restrict autonomy means we should be careful of overextending the reach of the criminal law, and of damaging the right of self-determination. When a person’s choices are not voluntary, but instead decided by laws, the life she lives is not entirely her own.²⁴ Of course, if one considers each crime separately, most criminal prohibitions are unlikely to interfere with someone’s freedom in any substantial, pervasive, or long-term sense. Outlawing arson still leaves us with a wide range of alternative activities. But the point about autonomy is more general than that. The effect of criminalisation must be assessed cumulatively, not in isolation. There are already thousands of things the State forbids. Autonomy requires us to have good reason before extending the reach of the criminal law.

None of this is to say that people ought to be allowed to disregard the interests of others, or that there is anything wrong with many of the criminal prohibitions we presently have. But it is a ground for the criminal law to beware of interfering more than the minimum necessary—a prima facie reason against the use of criminal sanctions. Bearing this in mind, once we have discussed various specific offences we will return to this issue in Chapter 16 and ask, what *should* the legislature prohibit through the criminal law? What sorts of considerations should a responsible legislator take into account when deciding whether to create a criminal offence?

²² The Human Rights Act 1998 inhibits the passing of legislation which contravenes ECHR rights. In formal terms, however, the Act leaves parliamentary sovereignty intact. See further below, § 2.5.

²³ For a notorious example, see *DPP v. Shaw* [1961] AC 290; below, § 16.3.

²⁴ Raz, *The Morality of Freedom* (1986) 382.

(ii) Ex post: *censure*

Our search for definition fastened upon the pronouncement of guilt through conviction as the distinguishing mark of criminal law. This pronouncement connotes fault on the part of the criminal; a connotation that can be at variance with the facts, as when a blameless defendant is found guilty of a strict liability offence. When the Court finds an accused guilty of committing a crime, and purports to punish her through sentencing, there is a public implication that she is blameworthy. Of course, there are offences of a minor character (e.g. related to parking infringements) where this element of reproof may be relatively trivial—such offences are often characterised as not being “truly” criminal in nature. Paradigmatically, though, censure is inherent in criminal convictions.

(a) *The need for mens rea*

An institution which condemns and punishes people must take care to do so accurately. Being just matters. In particular, if a person is not to blame when something goes wrong, the censure of the criminal law is not appropriate—and if it is inflicted upon her, the public will tend to think that is because she is to blame. When the law labels a defendant as “criminal”, it simply cannot avoid this implication. Consequently, it should not convict those for whom that implication is unjustified.

The grounds for wanting to avoid mislabelling defendants are twofold. First, it is unfair and unjust to stigmatise someone as a criminal when they do not deserve condemnation. Secondly, if the criminal law is seen regularly to make mistakes, it will lose its moral credibility. This, Robinson points out, will diminish its effectiveness as a tool of social control:²⁵

“The criminal law can also be more directly effective in increasing compliance with its commands. If it earns a reputation as a reliable statement of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative. . . . A distribution of liability that the community perceives as doing justice enhances the criminal law’s moral credibility; a distribution of liability that deviates from community perceptions of justice undermines it.”

For these reasons, the criminal law ought not to convict people unless they are culpable for doing a prohibited action.²⁶ Therefore, in so far as possible, criminal offences should be structured so that there can be no conviction without fault. This is achieved by including within every criminal offence some element that reflects culpability.

Suppose the following example:

Pam has killed Alex. Pam is a doctor, and Alex was one of her patients. Pam gave him a painkiller, to which he had an allergic reaction and died. Causing another’s death is generally regarded as a very undesirable thing, and is at the heart of the crimes of murder and manslaughter. The police investigate. They establish that Pam’s actions caused Alex’s death, and conclude that she has committed a homicide.

²⁵ “The Criminal–Civil Distinction and the Utility of Desert” (1996) 76 *Boston ULR* 201, 212–13. Robinson’s point is made about criminalisation, but applies in this context also.

²⁶ For an interesting debate which touches on this proposition, see Reiman and van den Haag, “On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con” in Paul, Miller, and Paul (eds.), *Crime, Culpability, and Remedy* (1990) 226.

On these facts alone, is Pam therefore bad, or blameworthy? Should we convict her of murder? The answer is no. Alex may have been the one patient in a million who was unknowably allergic to the painkiller and died as a consequence. It is important not to kill people, but it does not follow from the fact that killing is undesirable, and normally prohibited, that someone should automatically be convicted or punished for causing another's death. In the criminal law, this principle is expressed by the maxim, *actus non facit reum nisi mens sit rea*:²⁷ an act does not make a man guilty unless his mind is (also) guilty. There must be *mens rea*—a guilty mind. The action must be done intentionally or recklessly, or wilfully or knowingly, or negligently, or with some other mental state because of which we can say that the defendant is culpable. In Kenny's words, "no external conduct, however serious or even fatal its consequences may have been, is ever punished unless it is produced by some form of *mens rea*".²⁸

(b) Theories of culpability

The argument for having a mens rea element in criminal offences assumes that proof of mens rea establishes culpability. However, to what extent this is true is debated by criminal theorists.²⁹ Academics commonly argue over two accounts of when we may legitimately blame someone for her actions, which can only be sketched here. The first, which is reflected in the law regarding serious crimes, is sometimes called a "subjective" analysis: that culpability depends upon morally defective choices. We blame someone for choosing to do a wrong action—for instance, for choosing to set fire to the house. Conversely, fault is not made out unless someone *deliberately* does something bad.

The upshot of this approach is that the *actus non facit reum nisi mens sit rea* maxim transforms into a requirement that we should not convict without advertence. As will be seen in the chapter on mens rea, this would include such mental states as intention and recklessness. If Pam gave Alex the painkiller in order to kill him, we can blame her for causing his death because she intended to do so. Conversely, on the subjective account, it is perfectly reasonable for Pam to dose Alex if she is unaware that the medicine will kill him. Failing to take account of the risk of death is not something for which she can be blamed.³⁰

²⁷ Coke, *Third Institute* (1641) 5, 107; an adaptation of the rubric, *reum non facit nisi mens rea*, found in the context of perjury in *Leges Henrici Primi* c. 5, § 28.

²⁸ *Outlines of Criminal Law* (2nd ed., 1904) 39. This proposition is subject to qualification in respect of strict liability (below, § 1.2(ii)(c) and Chapter 6). Note that the present claim is only that mens rea is *necessary* for culpability. Unfortunately, liability for an offence requiring mens rea is sometimes incurred notwithstanding the absence of moral fault: *Yip Chiu-Cheung v. R.* [1995] 1 AC 111, following *dicta* in *Kingston* [1995] 2 AC 355, 364–6. These cases are, however, somewhat unusual: where mens rea is present but moral fault is absent, this is usually recognised by the availability of defences. See below, § 1.2(ii)(d); Fletcher, *Rethinking Criminal Law* (1978) 511f, 799f.

²⁹ See, e.g., Hampton, "Mens Rea" in Paul, Miller, and Paul (eds.), *Crime, Culpability, and Remedy* (1990) 1 (also in (1990) 7 *Social Philosophy and Policy* 1); Bayles, "Character, Purpose and Criminal Responsibility" (1982) 1 *Law and Phil* 5; Arenella, "Character, Choice, and Moral Agency" in Paul, Miller, and Paul (eds.), *Crime, Culpability and Remedy* (1990) 59; Duff, "Choice, Character and Criminal Liability" (1993) 12 *Law and Phil* 345; Hart, "Negligence, Mens Rea, and Criminal Responsibility" in *Punishment and Responsibility* (1968) 136; Sullivan, "Making Excuses" in Simester and Smith (eds.), *Harm and Culpability* (1996) 131; Alexander and Ferzan, *Crime and Culpability: a Theory of Criminal Law* (2009); Moore and Hurd, "Punishing the Awkward, the Stupid, the Weak, and the Selfish: the Culpability of Negligence" (2011) 5 *Crim Law and Phil* 147; Simester, "A Disintegrated Theory of Culpability" in Baker and Horder (eds.), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (2013) 178.

³⁰ For an extended argument that culpability is a function of the act of choosing rather than the material consequences that may arise from choices, see Alexander and Ferzan, *ibid.*, esp. chaps. 2, 3, and 5.

The alternative account is “objective” in nature. It grounds fault in *conduct* rather than choices, arguing that an action attracts blame if it inflicts harm when a reasonable person would not have acted that way. Under the objective analysis, awareness of wrongdoing is not essential. If homicide is undesirable, then Pam has a reason not to do it whether or not she foresees the risk. Homicide does not become acceptable just because it is done inadvertently. Since it involves harm, not only does Pam have a moral (and, in this case, legal) duty not to do it, but she also has a duty to *take care* so that she does not do it inadvertently either. On this account, Pam may legitimately be convicted of a crime if she is unreasonably careless.

The objective view works best when explaining why someone may be blamed for negligence, and in giving substance to the idea of the “reasonable man”. The “reasonable man” is archetypally a person of decent character. Thus if the defendant has failed to behave like a reasonable person, we may infer culpability, since her conduct has fallen short of reflecting that decent character.

These subjective and objective approaches are extreme alternatives, and middle ground is available. In the criminal law, inadvertent negligence is normally thought to be a standard of fault, but foresight of wrongdoing generally involves *greater* culpability. As we shall see in Chapter 5, adjudicating between the two approaches has not always been easy, particularly in the debate over subjective or objective interpretations of “recklessness”, which is the minimum fault requirement for many stigmatic criminal offences. Suppose that David causes a fire in a house and is charged with reckless arson. Traditionally in England, and still in many overseas jurisdictions, recklessness has required some degree of actual foresight. So for David to be guilty he must have actually foreseen the risk of setting fire to the house when he did the act that caused it. Were he merely negligent (or even grossly so), he would have to be acquitted. Where that view is taken, the subjectivist holds sway. On the other hand, for two decades the law in England regarding this offence was objective:³¹ David could be convicted of reckless arson even though he did not notice the risk, at least if the risk was an obvious one.

If fault is a prerequisite of criminal liability then it is easy to see why recklessness or other foresight-based mental states are so often required before a defendant can be convicted for his actions. Much more difficult are statutes that define an action to be an offence when it is done negligently. Indeed, subjectivists often argue that people should never be convicted for negligence.³² We disagree, and it seems to us that one may fairly be blamed for an unreasonable failure to take care; though no doubt the criminalisation of such cases ought to be sparing. But whether one adopts a subjective or objective stance, and whatever one’s views regarding the culpability of negligence, one thing is clear. Without at least some form of fault, a defendant should not be convicted of a crime. For the most part, this proposition is reflected in English criminal law where, in the absence of recklessness about the harm (or, in some cases, of negligence), a defendant must generally be acquitted of any serious criminal offence.

³¹ *Caldwell* [1982] AC 341. The decision in *Caldwell* was eventually reversed by *G* [2003] UKHL 50, [2004] 1 AC 1034, which restored the law to a subjective test. See below, § 5.2.

³² Below, § 5.5(iv).

(c) Regulatory offences

What, then, of strict liability? There are many crimes for which the prosecution need not prove any element of fault before the defendant may be convicted. In these offences, the defendant's liability is said to be "strict", and the *actus non fit reum maxim* is said not to apply. For example, under the Water Resources Act 1991 a defendant may be convicted for discharging polluting matter into controlled waters if the prosecution shows merely that he caused the pollutant to be discharged.³³ There is no need to prove that the defendant's involvement was a culpable one.

We deal with strict liability offences more fully in Chapter 6. For now, two observations may be made. The first is that, as we shall see, the courts in some overseas jurisdictions have moved to base "strict" liability on a presumption of fault—where culpability on the part of the defendant is presumed, but may be rebutted. If D can prove that the harm was not at all his fault, he will be acquitted. Thus the essential difference, in other countries, between offences of strict liability and those of negligence is the burden of proof. Arguably, for some minor offences it may be appropriate for that burden to rest upon the defendant rather than the prosecution; and it is to be regretted that English courts have rejected this possibility, which would substantially have ameliorated the harshness of strict liability in this country.³⁴

The fact that strict liability offences are often minor raises a second point. Strict liability offences tend not to involve the same level of public censure as serious crimes. A parking offence, for example, comprises an altogether different order of wrongdoing from murder. This is not to deny that traffic offences and their like are part of the criminal law, although perhaps they should not be.³⁵ But most people distinguish in ordinary life between minor, regulatory-type offences and "true" crimes, and the element of public condemnation is and should be conveyed only by a conviction of the latter type. The difference in social significance is illustrated by the question we mentioned earlier, commonly found in visa and employment applications, about an applicant's criminal record. It is not a request that is intended to elicit disclosure of minor infractions such as parking infringements. To the extent that English law restricts strict liability to minor offences (and it does not do so invariably³⁶), its use is therefore somewhat less objectionable.

³³ Section 85. Cf. *Alphacell Ltd v. Woodward* [1972] AC 824.

³⁴ There remains, hopefully, the prospect of legislative reform: the Law Commission has recently proposed that a due diligence defence be provided for strict liability offences: LCCP No. 195, *Criminal Liability in Regulatory Contexts* (2010) para. 6.95.

³⁵ According to Robinson, "[s]erious deterrent sanctions can and ought to be imposed [for regulatory violations] but they can as easily and effectively be imposed under an administrative system distinct from criminal law that carries a noncriminal label, such as 'violation': "The Criminal–Civil Distinction and the Utility of Desert" (1996) 76 *Boston ULR* 201, 214. Cf. Mann's proposal for a separate system of justice to deal with such minor crimes, in "Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law" (1992) 101 *Yale LJ* 1795. No such distinction exists in English law: cf. Reid, "Strict Liability: Some Principles for Parliament" (2008) *Stat LR* 173. Notably, however, Part 3 of the Regulatory Enforcement and Sanctions Act 2008 empowers ministers to make orders that authorise regulatory bodies to impose civil fines in lieu of criminal prosecutions: a bypass mechanism that allows for practical "civilisation" of many regulatory crimes. For an illuminating contrast with France and Germany, see Spencer and Pedain, "Approaches to Strict and Constructive Liability in Continental Criminal Law" in *Simester* (ed.), *Appraising Strict Liability* (2005) 237.

³⁶ See, e.g., the child sex offences proscribed by ss. 5–8 of the Sexual Offences Act 2003; below, § 12.12.

(d) Allowing defences

The medical homicide example (§ 1.2(ii)(a)), in which Pam kills Alex, illustrates one way in which the defendant may be absolved of fault when a prohibited consequence occurs. Her answer is that, although she killed Alex, it was an accident. She neither intended his death, nor was she negligent in bringing it about: she lacked *mens rea*. Sometimes, however, a person may not be culpable even though she harms another person deliberately. For example:

Ian is a policeman in the Armed Offenders squad. He is standing outside a bank when a robbery occurs. John, who is one of the robbers, comes out of the bank and runs toward him, pointing a gun. In order to protect himself, Ian shoots and injures John.

Prima facie, this is a crime. Ian cannot claim that he shot John by accident. Nevertheless, Ian is not to blame. His action, we would say, is *justified*, and he does not deserve to be convicted of any crime.

In order to deal with this sort of case, the law recognises a number of general defences, under which the defendant may acknowledge that he did an otherwise prohibited act and yet escape conviction. Examples of these justificatory defences are self-defence, prevention of crime, and defence of property. In effect such defences allege that, although D's conduct was harmful and normally unlawful, his conduct was nevertheless appropriate in the circumstances.³⁷ They claim that the defendant's conduct was the right (or an acceptable) thing to do, and so was not deserving of censure. As such, justifications are generalised: they involve judgements about the situation which apply to all the participants; so, e.g., John is not entitled to resist Ian's justified use of force.

There are other predicaments where inflicting harm can be defensible on a more restricted basis. In these cases a person may choose to do something wrong, i.e. unjustified, but we may nevertheless think her insufficiently blame-worthy to warrant the censure of the criminal law. For example:

Susan is arrested after taking part in the bombing of a Government building. She drove the car in which the bombers, a gang of terrorists, had made their escape. After her arrest, it is discovered that she did so only because the terrorists had threatened to kill her otherwise.

In this type of case, Susan's conduct may not be justified, and other people would be entitled to try to stop her. Nevertheless her culpability is lessened by the fact that she was coerced. Thus she has an *excuse*. The rationale for allowing excusatory defences is that advanced by H.L.A. Hart: "unless a man has the capacity and a fair opportunity or chance to alter his behaviour to the law its penalties ought not to be applied to him".³⁸ Susan's wrongdoing was deliberate, but understandable. By admitting compulsion as a defence,³⁹ the criminal law acknowledges that Susan did not have a genuine and fair opportunity to choose not to break

³⁷ Indeed one may say of such cases that no prohibited harm occurred. Thus A.T.H. Smith remarks, "[w]here the defendant's conduct can fairly be described as coming within the terms of the proscribed activity, an offence has, prima facie, been committed: liability will ensue unless he advances some explanation of his conduct which shows that it was justified, in which case there is no *actus reus*": "On *Actus Reus* and *Mens Rea*" in Glazebrook (ed.), *Reshaping the Criminal Law* (1978) 95, 97.

³⁸ "Punishment and the Elimination of Responsibility" in *Punishment and Responsibility* (1968) 158, 181.

³⁹ Subject to restrictions: below, Chapter 20.

the law. We may have no reason to praise her. But she does not warrant the penalties of the criminal law, because she is below the threshold of blameworthiness that is appropriate to criminal liability.

(e) *Accountability*

So far in § 1.2, we have argued that the criminal law should convict only people who are culpable when a prohibited event occurs, and that events should be prohibited only when they are sufficiently harmful to override considerations such as the need to protect the autonomy of citizens. There is, however, a further requirement to be met before the criminal law may convict someone of a crime: accountability. Recall the example with which we began this discussion:

One fine September morning, Jim is discovered dead in his home. His skull has been crushed by a blow inflicted with a heavy object. The police are called. Upon investigation, they establish that he was murdered by his daughter, Alice, who killed him in order to receive her inheritance under his will.

This, as we said earlier, is a plain case. But it is not just the fact that Alice is culpable which licenses her conviction. Culpability, by itself, is insufficient. Suppose that Jim's brother, David, had suspected Alice might try to murder Jim and had done nothing to warn him? David may be blameworthy, but ought we to prosecute him? Certainly not for homicide, at any rate. The difference between David and Alice is that only Alice is legally accountable, or *responsible*, for Jim's death. Only Alice has performed an action that caused Jim's death. Because he is not legally responsible, there is simply no point in prosecuting David, however much we may disapprove of his conduct.⁴⁰

Although a great range of differing conduct can be subjected to criminal sanction, the process of finding guilt and pronouncing a conviction entails certain limits on the boundaries of criminalisation. The finding of guilt on which the conviction is based assumes a degree of accountability for something done or omitted to be done. Unless one subscribes to some extreme version of Calvinism or other doctrine of the damned, guilt is not a state of being, a natural property. Guilt can be generated only in respect of something additional to what the defendant is; something for which he is accountable. Otherwise, the "presumption of innocence" is meaningless. Consider, for example, a nation-state where the government is following a policy of expelling all citizens who are not members of the dominant ethnic group. Acting through civil law process, such a State could pass legislation confiscating the property of minority citizens and impose various forms of disability in terms of profession, marriage, etc., in ways all too familiar. But it would be incoherent for the State to make it a crime simply to be a member of a minority racial grouping; there would be nothing on which the conviction could be based.⁴¹

The constraint may be ineffective in practice. Where the political environment is so extreme that a State is willing to create an offence simply of being a member of less favoured groups,

⁴⁰ Or, as Lord Esher MR put it, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them": *Le Lievre v. Gould* [1893] 1 QB 491, 497.

⁴¹ See further Sullivan, "Conduct and Proof of Conduct: Two Necessary Conditions for the Imposition of Criminal Liability" in Kaikobad and Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice* (2009) 235.

it is quite likely the judges of that State would be unreceptive to the argument sketched here. But in countries with a judiciary prepared to judge in good faith, the need for accountability—for something additional to one's state of being—should properly limit the scope of criminalisation. This should have been required in the notorious case of *Larsonneur*,⁴² a case castigated by Jerome Hall as the “acme of strict injustice!”⁴³ On what can be ascertained from the available law reports, D, in circumstances wholly beyond her control, was brought from the country then known as Eire into police custody in the United Kingdom. Once here, she was charged with being an alien (she was French) who was in the United Kingdom without permission to land. With an excessively literal interpretation of the legislation in question, the Divisional Court upheld the trial conviction. Lord Hewart ruled that the circumstances of her entry and continuing confinement were “perfectly immaterial”. It was enough, said the Court, that she was present in the United Kingdom without permission. In substance then, she was convicted solely for being French. But that, in our submission, is not enough.

Even at the level of principle, the argument from incoherence is narrow. It would be perfectly coherent, however unconscionable, for the nation-state described above to make it a crime for members of a minority group to give birth to children. Neither does the argument rule out what are known as *status*, or *situational*, offences, such as being an illegal immigrant or a parent of a child of compulsory school age who is not regularly attending school. If it can be shown that there were acts or omissions for which D is responsible and by which D could have avoided the proscribed status, then the accountability requirement is satisfied. Translated into criminal law doctrine, this condition is embodied in a requirement of *voluntariness*, which is discussed in § 4.3. Where one's status is involuntary, it cannot legitimately be a criminal offence simply to be what one *is*. The criminal law is concerned with the acts, omissions and, on occasion, acquired status of human beings. It takes human beings as its starting point and then asks what they are accountable *for*.

In addition to the requirement of voluntariness, the need for accountability can raise other difficult issues. Suppose a further variation on the death of Jim:

Case III: Jim is discovered dead in his home. The police establish that he died after being struck by a vase which fell accidentally from the bookshelf. However, his daughter, Edith, had observed the scene and deliberately failed to summon an ambulance in time to save him.

This is very similar to Alice's case, except for one aspect: our complaint here is not about what Edith did, but about what she *failed* or *omitted* to do. Another way of expressing the difference might be to say that, unlike Alice, Edith did not *cause* Jim's death.⁴⁴ Either way, however, because of that distinction, criminal liability does not necessarily follow.

The issues of omission and causation will be discussed in more detail in Chapter 4, but it is important to note that these, too, are crucial matters affecting the range and intrusiveness of the criminal law. Prohibiting an omission is not like prohibiting an action. When the law prevents Ian from (say) punching Bob, it leaves him with plenty of options and rules out only one. Ian is free to choose what to do or not do instead. By contrast, when the law proscribes an omission, it tells him exactly what to do. If Jim is dying, Edith *must* rescue him—she is not

⁴² (1933) 149 LT 542. The case is discussed further below, § 4.1(ii)(a).

⁴³ *General Principles of Criminal Law* (2nd ed., 1960) 329 n. 14.

⁴⁴ Cf. Moore, *Act and Crime* (1993) 267–78. But the law may disagree: see below, § 4.2(iv)(a).

free to choose what to do or not do instead. One option is *required*, and all the other options are ruled out. Thus liability for omissions is much more likely to impinge upon individual autonomy and freedom of action.

In a liberal community, the right to autonomy is fundamental.⁴⁵ If the law is to acknowledge and respect individuals as independent members of society, then it must judge them according to their own actions, and not those of others. The process of shaping and controlling a person's life should be left to that person, and would be undermined were citizens constantly forced to assume responsibility for events they do not bring about.⁴⁶ For this reason, it is a guiding principle of the law that defendants are liable according to what *they* do, not what others do and they might prevent;⁴⁷ correspondingly, they should be left free to live their own lives and pursue their own goals without having legal duties to act or intervene constantly thrust upon them, unanticipated, unpredictable, and unwanted, because of the actions of others. This is why there is no general duty to prevent crime,⁴⁸ and why principles of accountability are so important.⁴⁹

Implicit in this reasoning, however, is that omissions are special not because they deny culpability, but because of the implications of their proscription for individual freedom. Thus they are not ruled out *tout court*. In practice, a criminal law duty to intervene is imposed, if at all, only when the defendant has a special connection to the harm—for example, when the defendant is the victim's parent.⁵⁰ But even that need not be true. Sometimes an altruistic reason for a stranger to get involved may justify the extension of responsibility. Suppose that Ian, a passer-by, sees a child drowning in a paddling pool. He can rescue the child at no risk to himself. In this situation, for Ian not to intervene would be monstrous. Although English criminal law does not at the moment criminalise such cases, it might justifiably do so, depending upon such factors as the seriousness of the impending harm and the degrees of risk and inconvenience involved in averting it. In many other jurisdictions, it is a crime not to rescue someone in peril when doing so involves no personal danger.⁵¹

Similarly, the criminal law need not always require D's behaviour to *cause* a specified consequence. For example, the law of secondary liability recognises the responsibility of those who do not themselves perpetrate a crime, but are nevertheless parties to its commission.⁵² Suppose, for example, that David plans to kill Tony. Knowing this, Rebecca lends David her

⁴⁵ Above, § 1.2(i)(b).

⁴⁶ Thus *Hart and Honore* lxxx–xi: “respect for ourselves and others as distinct persons would be much weakened, if not dissolved, if we could not think of ourselves as the separate authors of the changes we make in the world”. For further discussion, see below, § 4.1(i).

⁴⁷ To a degree, criminal liability as an accomplice to another's crime may be seen as a qualification to this principle. However, proof of complicity by D in P's crime requires proof of an *actus reus* and *mens rea* personal to D: see below, Chapter 7. There is also some limited use of vicarious liability, discussed in Chapter 8.

⁴⁸ Cf. *Coney* (1882) 8 QBD 534, 557–8; *Clarkson* [1971] 3 All ER 344, 347.

⁴⁹ There is a pragmatic side to accountability. If a swimmer drowns, the law cannot afford to prosecute every person on the beach. More generally, the State could not possibly contemplate prosecuting everyone who might have prevented it each time a prohibited harm occurs. So the general principle against liability for omissions has a realistic air about it as well as a philosophical justification.

⁵⁰ See below, § 4.1(i)(b). There can also be something to be said for offences, separate from homicide, of failing to take reasonable steps to safeguard the lives of others. For instance, members of households must take reasonable steps to safeguard the lives of children or vulnerable adults who reside in the household: Domestic Violence, Crimes and Victims Act 2004, s. 5.

⁵¹ See Ashworth, “The Scope of Criminal Liability for Omissions” (1989) 105 *LQR* 424.

⁵² Below, Chapter 7.

gun. Rebecca is a participant in Tony's murder, and his death may be attributed to her as a secondary party. The point here is that Rebecca does not cause Tony's death.⁵³ (David would have killed him anyway, using someone else's gun.) But she is not like a mere bystander, who can claim that David's action has nothing to do with her; that it is none of her business. Instead, she has involved herself in the murder, and *made* it her business. Thus, although it is David who kills Tony, Rebecca shares in the responsibility for his death.

Like liability for omissions, secondary liability involves an extension of the criminal law beyond the core cases of wrongdoing. As such, it involves a greater intrusion upon people's freedom of action: not only may D not strike V, he may not do anything to help someone else strike V either, a much greater limitation upon what he is left free to do. This raises difficult questions of policy: if Rebecca is a shopkeeper, should she refuse to sell matches to David if she suspects or believes he has an illicit purpose? Secondary liability has the potential to force individuals to police the actions of others, and squarely raises issues of autonomy once more.⁵⁴ It is a hard question how far such extensions of responsibility should go, since, like vicarious liability,⁵⁵ they can have the effect of imposing liability largely on the basis of the defendant's status rather than his behaviour. Yet, once again, accountability is not ruled out *tout court*.

(iii) Ex post: *sanction*

Although punishment is not a constitutive element of the criminal conviction and lies outside the scope of this text, one cannot overlook its salience in the criminal process. If we were to dismantle punishment and its forbidding infrastructure, much of the *raison d'être* of the criminal law would go with it. Despite its importance, however, the question *why* we punish remains a matter of perennial and irresolvable dispute and has given rise to a vast and challenging literature.⁵⁶ In the following paragraphs, we can only sketch the major competing punishment theories, as any attempt to enter the debate would not do it justice.

The common starting point is to require grounds which justify the imposition of punishment on a candidate individual. One should always be sure that the legal verdict which licenses punishment is well founded, a restraint with implications for criminal procedure and evidence. If we can be sure of the facts for the instant case, one group of theorists, commonly known as retributivists, would then ask whether punishment is *deserved*.⁵⁷ Desert

⁵³ See, e.g., *Hart and Honoré* 51ff, 363ff; J.C. Smith, "Aid, Abet, Counsel, or Procure" in Glazebrook (ed.), *Reshaping the Criminal Law* (1978) 120, 131–4.

⁵⁴ Particularly in cases of complicit liability for omissions, which may arise when the secondary party has some form of control over the wrongdoer. See for example *Du Cros v. Lambourne* [1907] 1 KB 40, in which the passenger in a car was convicted of being a party to dangerous driving, on the basis that he owned the car and failed to exercise his right of control over the driver's actions. The case is further discussed below, § 7.4(iii).

⁵⁵ The doctrine of vicarious liability provides a second route with which a causal requirement may be bypassed. However, vicarious liability is normally to be avoided in criminal law, since it arises out of a more general relationship between the defendant and the actual perpetrator of a wrong, and so is not specific to the wrongful action; consequently the defendant risks being convicted of a crime for which he is not morally responsible. As a rule, "*Qui peccat per alium peccat per se* is not a maxim of criminal law": *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153, 199 (Lord Diplock). See further below, § 8.2.

⁵⁶ For excellent accounts of questions of punishment and sentence see Ashworth, *Principles of Sentencing and Justice* (5th ed., 2009) Duff and Garland (eds.), *A Reader on Punishment* (1994) and von Hirsch and Ashworth (eds.), *Principles of Sentencing: Readings on Theory and Policy* (2nd ed., 1998).

⁵⁷ A classic account is von Hirsch, *Doing Justice* (1976).

is a function of the moral quality of the conduct; if it is bad (i.e. wrongful and culpable), a measure of hard treatment may be dispensed, the measure dependent on how bad that conduct is.⁵⁸ Once the grounds of desert are present, punishment ceases to be problematic. Indeed, it becomes something that ought to be imposed, a required response to the moral imbalance that the malefactor has caused. A consistent retributivist will confine punishment to wrongdoing and will typically (though not necessarily) find culpability in the mental state of the person to be punished rather than the consequences of her actions.⁵⁹ Consistent retributivism would entail a criminal law more scrupulous about finding fault sufficient to allow just punishment.

Retributivism is contrasted with utilitarianism, a species of consequentialism which asserts that any instance of punishment is justified only if the welfare of society is advanced. For a utilitarian, the pain of the person to be punished is a disutility, a diminution in the quantum of general welfare. Accordingly, pain should be inflicted only if it entails net gains in welfare across society: the institution of state punishment must produce overall beneficent effects. The particular effect that utilitarians most commonly seek from punishment is general deterrence, i.e. that without hard treatment of offenders there would be more offending and less welfare overall.⁶⁰ As the term “consequentialism” implies, the moral character of a defendant’s action is determined primarily by its results. A death remains a death whether it ensues from a brutal killing or a blameless accident. Many attempts have been made to demonstrate that blame and desert matter to utilitarianism,⁶¹ but the relationship is, at best, a contingent one.⁶² There is no reason, internal to utilitarianism, why a legal system should differentiate deliberate killings from accidental deaths. If it could be demonstrated that an unvarying penalty of life imprisonment for anyone who causes death in whatever circumstances would radically diminish the number of untimely deaths, then a utilitarian has reason to endorse that practice. The only permissible objections in consequentialist terms to such indiscriminate hard treatment must be made in terms of its cost to net social utility. Indeed, consequentialism need not imply a system of criminal law. Other forms of deterrence may be more efficient tools for social control.

Consequentialism and retributivism are incompatible theories. That, of course, does not preclude individuals, even judges, from using consequentialist and retributivist justifications at one and the same time, as when D is sent to prison for a very long time “because you deserve it and because it will deter others of like mind”—an example of belt and braces rather than contradiction. In terms of English sentencing policy, the retributivist approach reached its apogee with the Criminal Justice Act of 1991, whereby proportionality became the primary criterion for deciding penalties. By 1993, concern with the impact of this approach, particularly in the area of fines on motorists, had become politically salient and the then Criminal Justice Act 1993 and Crime (Sentences) Act 1997 departed significantly

⁵⁸ On evaluating the gravity of wrongdoing see von Hirsch, *Censure and Sanctions* (1993) chap. 4.

⁵⁹ A stimulating example is Ashworth, “Taking the Consequences” in Shute, Gardner and Horder (eds.), *Action and Value in Criminal Law* (1993) 107. We discuss problems of moral luck further in § 6.5 below.

⁶⁰ This claim is, of course, an empirical matter. Even if it is true in general terms, there is disagreement whether increasing punishment levels for a particular offences will reduce the incidence of their commission. For a survey of the literature, see von Hirsch et al., *Criminal Deterrence and Sentencing Severity* (1999).

⁶¹ Hart, *Punishment and Responsibility* (1968) chaps. 1, 7.

⁶² See Wootton, *Crime and the Criminal Law* (2nd ed., 1981).

from the “just deserts” rationale in sentencing.⁶³ Prior convictions are once again a significant aggravating feature in sentencing decisions, following a shift of emphasis from the moral deserts of the crime at hand toward law-and-order considerations of the offender’s general dangerousness. The Criminal Justice Act 2003 further widened the range of sentencing factors by stipulating five explicit principles underlying sentencing: as well as a retributive punishment principle and a consequentialist goal of crime reduction through deterrence, the three additional principles are reform and rehabilitation of criminals; public protection (itself a crime-reduction principle); and reparation.⁶⁴ Part 5 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 permits the imprisonment of offenders beyond retributivist limits, in the interests of public protection.⁶⁵ Proportionality, thus, is no longer primary. It is no coincidence that rates of incarceration in England and Wales remain at a high level even though general crime rates have fallen.

Some theorists, most notably H.L.A. Hart,⁶⁶ have argued for a composite theory of criminal responsibility and punishment, expressed in terms of a distinction between the “general justifying aim” of the criminal law on the one hand and the principles of criminal responsibility and just punishment on the other. For Hart, the general purpose of the criminal law was consequentialist: to deter anti-social conduct. However, this goal is properly inhibited by reference to issues of blame and proportion when adjudicating guilt and passing sentence. The inhibition is necessary to ensure fairness and to maximise autonomy. Although Hart argued for his composite theory with incomparable elegance, the predominating if not the exclusive element within it would appear to be retributivism. To be sure, utilitarianism is given the task of determining which conduct will be punished. Yet retributivism would generate many of the same primary norms and it is retributivism which resolves who will be punished and how much punishment will be meted.⁶⁷ For the moment, however, the role of retributivism as a limiting principle in a consequentialist matrix is on the wane in England and Wales.

§ 1.3 The structure of a criminal offence

The discussion in this chapter has practical implications for criminal offences. We have characterised the criminal law as a system of prohibition and censure. Correspondingly, the main elements of crimes are twofold, harm and fault. The first of these is primarily an external element:⁶⁸ an event or conduct which causes the harm that the law is designed to prevent.

⁶³ For an account of the background to the 1991 Act and the move away from its principles, see Koffman, “The Rise and Fall of Proportionality: The failure of the Criminal Justice Act 1991” [2006] *Crim LR* 281.

⁶⁴ Reparation is given greater salience by s. 63 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which provides that a court must consider whether to make a compensation order whenever it is empowered to do so.

⁶⁵ The legislation does, however, ameliorate the more draconian public protection sentences formerly allowed by ss. 224–36 and schedules 15 and 15A of the Criminal Justice Act 2003.

⁶⁶ *Punishment and Responsibility* (1968) chaps. 1, 7. Compare Simester and von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011) chap. 1.

⁶⁷ See the critique of Hart’s “mixed theory” by Galligan, “The Return to Retribution in Penal Theory” in Tapper (ed.), *Crime, Proof and Punishment* (1981) 144.

⁶⁸ Although it may not be entirely external. Sometimes actions acquire a harmful or criminal character only when done with a particular mental state. For illustrative discussion of this point, see Horder, “Crimes of Ulterior Intent” in Simester and Smith (eds.), *Harm and Culpability* (1996) 153; see also below, § 5.3.

For example, the external element in murder is the killing of one human being by another.⁶⁹ This external element is known as the *actus reus* of the offence. It sets out the physical thing that must happen before the criminal law can be invoked, and will be discussed in detail in Chapter 4.

Generally, the *actus reus* is not enough by itself to constitute an offence. In § 1.2(ii)(a) we discussed the example of Pam, a doctor, who killed Alex by injecting him with a painkiller to which he was allergic. Pam has done the *actus reus* of a murder. But if Alex's allergy was unknowable, then Pam is not to blame, and should not be convicted. Alex's death is simply a tragic accident. The need for fault in an offence gives us the second element, which is known as *mens rea*. This is what might be termed the "mental" element—the guilty mind, such as the intention, knowledge, or recklessness, of the defendant with respect to the *actus reus*. *Mens rea* is the subject of Chapter 5.

Like the *actus reus*, the *mens rea* varies for each offence. In some crimes, intention or recklessness will be required before D can be convicted, while in others negligence or some other fault element may suffice. An example will help to illustrate. Imagine that Tom has been charged with an offence against section 15(1) of the Forgery and Counterfeiting Act 1981. He recently purchased a toaster from the local shop, paying for it in £10 notes. However, it later turns out that the notes are not genuine, as both Tom and the shopkeeper had thought, but very high quality forgeries. The relevant section provides as follows:

15. Offences of passing etc. counterfeit notes and coins.

(1) It is an offence for a person—

(a) to pass or tender as genuine any thing which is, and which he knows or believes to be, a counterfeit of a currency note or of a protected coin . . .

In this crime, the *actus reus* is passing or tendering as genuine money which is in fact counterfeit. The *mens rea* of the crime is knowing or believing that the money is counterfeit. On the facts given, Tom will not be guilty of passing counterfeit notes since he lacks the *mens rea* required for an offence against section 15(1).

Sometimes the *mens rea* can be present without the *actus reus*. Suppose instead that Tom found the notes on the street and believed that they were counterfeit, but that they were actually genuine. In this case Tom does not commit the offence of passing forged notes, because the *actus reus* is missing.⁷⁰

(i) *Defences: a separate element*

The examples above illustrate that both specified parts of the offence, the *actus reus* and the *mens rea*, must be proved before there is any question of D's being guilty of a crime. Even if both parts are proved, however, there might still be a defence available, and so we have a third basic element of every crime: the absence of a valid defence.

Suppose, for example, that Tom had indeed known the notes were counterfeit, but had been forced to make the purchase because he had been accosted outside the store by two men who had supplied the notes and "asked" him to buy the toaster, while wielding a shotgun suggestively. Tom has performed the *actus reus* of section 15(1), with the required *mens*

⁶⁹ Below, Chapter 10.

⁷⁰ Cf. *Deller* (1952) 36 Cr App R 184.

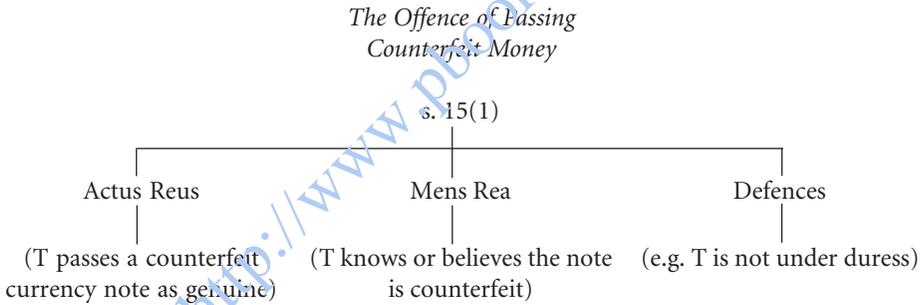
rea. So we can say that he has committed a *prima facie* offence. Despite this, he will not be convicted since he has a further defence of duress or compulsion.

The word “defence” can sometimes be misleading, because it tends to be used by lawyers to describe any reason why the defendant should be acquitted. Thus if the defendant has an alibi, he will rely on this for his defence. More precisely, however, an alibi is not a defence but rather a denial that there was a *prima facie* offence at all. If the alibi is accepted, it means that the defendant did not do the *actus reus*. Similarly, automatism is not so much a defence as a denial of responsibility for the *actus reus*. Duress and self-defence, by contrast, deny neither *actus reus* nor *mens rea*, but rather seek to defend the commission of a *prima facie* offence by reference to events not contemplated in the *actus reus*.⁷¹

Normally, defences reside at large in the common law, and are not expressly set out as part of each offence. Similarly, they are treated in separate chapters of this text. This is because defences are normally of general application to all crimes, unless expressly or impliedly excluded by the statute which creates a particular crime. The fact that defences make up a third element was accepted by Lord Wilberforce in *Lynch*. Duress, he stated:⁷²

“is something which is superimposed on the other ingredients which by themselves would make up an offence, i.e. on the act and the intention. *Coactus volui* sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.”

In case it is helpful, we represent this relationship by the following diagram:



⁷¹ Cf. A.T.H. Smith, “On Actus Reus and Mens Rea” in Glazebrook (ed.), *Reshaping the Criminal Law* (1978) 95, 97ff; Simester, “Mistakes in Defence” (1992) 12 *OJLS* 295, 295–6.

⁷² [1975] AC 653, 679–80.