

SOURCES OF CRIMINAL LAW

Sources of Maori CL: 1) framework of social relationships/concerns based on group rather than individual concerns. The rights of the individual were indivisible from welfare of the collective. 2) reciprocal obligations were founded in shared genealogy and behavioral precedents set by common tipuna. 3) laws were woven into everyday interactions, were not a separate set of rules to be invoked upon infringement. **Sources of modern CL:** Codified in the Crimes Act 196, all elements of offences found here. Found in common law due to discretion of judge's when interpreting statute. **Issues with inclusion of Maori CL in modern sources:** **Moana Jackson:** Many acts which are regarded as hāra by Maori are not included as offences, also fail to acknowledge idea of collective liability. **Report of the Crimes Consultative Committee:** Appears to analyze issues from a Pakehācentric pov. Emphasis is on definition of criminal conduct and that in most cases they regard the same situations as criminal but fails to really address the fundamental differences in Maori CL sources – group responsibility. **Moana Jackson Response:** Maori should be subject to their own system of criminal law. Denying this means a consistent breach of the ToW.

CODIFICATION

Our statute law: Codification style leaves considerable scope for judicial interpretation of the law. **In some cases, there is silence on mental or blameworthiness element to be attached,** leaves open to courts to interpret. **Reasons for:** Attempt to deal with areas of uncertainty and difficulty, and to restate others in a rational and principled way. **Reasons against:** Without the general part, our codification is incomplete and open to criticisms made of pre-code situation. But to this can say that no criminal code is ever likely to be truly comprehensive. **General Part Arguments:** **What is it:** A definition of general principles and basic concepts. **Arguments for:** Many questions around definitions and degrees over issues such as culpability of different mental states etc., can lead to inconsistency. It is the role of Parliament to resolve such question, not to leave it up to courts to decide on basis of a few, fortuitous cases heard on appeal. Codification of principles of liability is not worthwhile unless it is comprehensive. **Arguments Against:** A general part would lead to confusion and uncertainty in the law. Codification itself isn't an end in itself, the C Act must be a practical working document.

CRIMINALIZATION STRUCTURE

Normative approach: CL is a system which operates within a particular social space by setting down standards of conduct, and by enforcing in distinctive ways, those substantive standards of norms (Lacey). **MORALITY:** L DeVin: Is it a vice so abominable that its mere presence is an offence? **Criminal law as a moral and retributive system.** It is a reflection of societies basic values and has a strongly symbolic function (Lacey). **Moral Analogy:** Compare alongside moral judgement. Criminal law does and should engage in a legal entrenchment of certain fundamental moral precepts (Devlin) **RvBrown [legal moralism?]:** Majority decided mostly on morality, that society is entitled to protect itself against certain types of behavior. Pleasure from infliction of pain is an evil thing. Cruelty is uncivilized. **WHAT IS THE HARM: Harm Principle (Mill):** Actions of individuals should only be limited to prevent harm to other individuals. **Notion of 'harm' however is difficult to apply.** **Types of harm (Kaplan):** **Primary Harm (Kaplan):** Direct harm to others. **Secondary Harm (Kaplan):** **Note that this usually is relevant when the actor is primarily harming themselves.** Kaplan uses helmet example, but note this is an anomaly in deciding paternalistic law. **Public Ward:** society will have to help person get better/prevent them from dying, so has the right to demand that a people do their share to protect themselves. **Note can be monetarily calculable so maybe can use something other than criminal sanction e.g. taxes, license payments.** **Non-Support:** Other's may be reliant upon a person e.g. a child on parents. Note can be monetarily calculable so taxes or license payments may be more appropriate than criminal sanction. **3) Modelling:** When one repeats a kind of behavior seen in others. Children are more likely to model dangerous conduct, and we have a responsibility to protect them. **4) Categorical Imperative:** Although few would may be harmed in act is performed by relatively few people, it could cause harm to everyone if it were performed by almost all. Usually used in relation to homosexual and drug laws. **Categorical Imperative Issues:** Nothing to suggest it will become widespread, also doesn't imply that it will be

harmful if engaged by relatively few. **Issues with implementing secondary harm prevention:** 1) **Mill's Harm principle:** A secondary harm is not harm to others, so should not be considered. Uses reduction ad absurdum arguments (where do a stop?), and on lack of standards available once society to prevent a person from harming themselves. 2) Reductio ad absurdum argument: Not all secondary harm should be prevented e.g. overeating. Main issue however is that if criminalization aimed to prevent all these harms, it would be so impossible to carry out that it would hardly affect an individuals autonomy. 3) Law overestimating itself. Once protection of secondary harms has begun, may be difficult of knowing which are appropriate actions for legislative actions so we should avoid effort entirely. 4) Can turn into a public welfare program, and people generally do not like resources going towards improving a minority, especially when regarded as not desirous or worthy of the help 5) Stigmatization of unpopular groups in society is usually a pressure behind secondary harm laws. E.g. anti opium, alcohol and marijuana laws have been generated by emotion effort/dislike for groups which in public mind were associated with these drugs. 6) Most situations were self-harm is prevented are heavily moral ones, with temptation to overlook whether the act is sufficiently harmful. Political pressures regarding popularity may also add to this. Those groups may not believe it to be immoral, will often lead to resentment towards law enforcement. 7) Alternatives: see Public Ward/Non-support section. Also in seatbelt case, motorist cannot be made to wear one but legislation can ensure they have the option to. **Category of harm (Gross*):** Violations of interest in what one is entitled to as an individual 1) Offences to sensibility 2) Impairment to collective welfare 3) Violations of government interests. **Seriousness of harm (Von Hirsch and Jareborg*):** How will it affect victim's ability to live a good life: 1) Subsistence (most extreme) 2) Minimal well-being (only having minimum benefit of your life) 3) Adequate well-being (had a great life, now you don't) 4) Significant enhancement. (somebody steals \$1000 but you have \$1 million. Doesn't mean that it won't be criminalized) **Probability /Risk of Harm (Frienburg*):** The greater the gravity of a possible harm, the less probable its occurrence needs to be to justify prohibition of the conduct (cell phone/gas station) / The greater the probability of harm, the less grave the harm needs to be to justify criminalization. / The more valuable the dangerous conduct, the more reasonable it is to take the risk of the harmful consequences (surgery). **PUBLIC INTEREST: (outweighs other considerations?)** **Criminal law has a regulatory, instrumental or utilitarian aspect:** it prohibits certain things on the grounds of public health or safety, or for economic or political reasons, and serves purpose of deterring this behavior (Lacey). **R v Brown Ratio:** It is not in the public interest that a person should wound or cause actual bodily harm to another for no good reason and, in the absence of such a reason, the victim's consent affords no defense. (Go to consent defense if used). **R v S: Public policy reasons which condone withdrawal of consent defense, if outweighs social utility of the act:** Condone a mature man intentionally inflicting harm on a teenage female, may encourage domestic violence, also a significant power imbalance in the relationship and she was vulnerable due to mental health issues. **R v BM:** It is part of a balancing act, law should punish significant violence even if consented to (go to consent defense). Talks about protection of the public as a means of not providing consent defense to body modification. (risk of infection, profound long-term consequences). **Packer: (enforcement issues) Note: uses drug criminalization as example of misapplication** 1) Behavior in question is socially threatening behavior, not condoned by significant segment of society (many people such as users have been subject to criminalization) 2) Criminalizing such behavior would be consistent with goals of punishment. (Illegal drug traffic has contributed significantly to the growth and prosperity of organized criminal groups, a lot of crime is also related to people trying to get money for unreasonably high drug prices). 3) Suppressing it will not inhibit socially desirable conduct (research on the causes, effects, and cures of drug use has been stultified) 4) The behavior can be dealt with even-handedly by enforcement. (Undesirable policy practices such as unconstitutional searches and seizures have become habit, directed towards urban poor and Mexican-Americans) 5) No disproportionate qualitative or quantitative response would be required in enforcement (billions of dollars have been spent). 6) No reasonable alternatives to criminal sanction exist. **Extra Reasons to not criminalize/Defenses: Principle of Liberty:** what would the effect be if we didn't suppress the conduct by criminal regulation? Would criminalization curb individual freedom too much? Should be a means of preventing harm to others (Mill) **Utilitarian response to individual autonomy:** Not an absolute value. Will always be affected to some extent (people only being able to buy cars with seatbelts). Is something to be balanced against other values. **Reflection of an inadequate system:** We must ask how crime comes to be attributed exclusively to individual offenders rather than (also) to the social, legal and political systems which define and enforce criminal law (Lacey). **Example: Feminism in CL:** Discrimination against women as defendants, an assumption that their criminality comes from a pathological state of mind as opposed to an assumption that it is rationally chosen. Also a failure to provide adequate protection against

male violence and sexual abuse. **Consent Defense: RvBrown:** To avoid criminal liability through consent def, conduct must fall into a special exception: "...surgical operations, sports, the chastisement of children jostling in a crowd, tattooing and ear piercing...". **R v BM: 2 requirements:** must produce discernible social benefits, and that it would simply be regarded as unreasonable for the common law to criminalize the activity if engaged in with consent by (on behalf of) the injured party. New exceptions should not be recognized on a case by case basis unless there is a dose analogy with an existing exception to the general rule established in Brown. **R v S:** Consent def always available unless violence intended is at grievous bodily harm level. Believed it could be withdrawn if there were good public policy reasons to do so and it outweighed the social utility of the act in question and personal autonomy. **Wilson:** not in PL that husband/wife in privacy of home should be sanct where no aggressive intent. **Extra – ideology of criminalization, alternatives to criminal sanction:** **Lacey:** Older ideas of crime were ones of public wrongdoing, more morally driven. Modern reality of criminal law is that it is predominantly an administrative system management relatively non-serious and 'regulatory offences'. **Lacey:** We should look at these principles not as ideals or explanations but as an ideological framework. **Lacey:** Ideologies have been influential in marginalizing and obscuring significant areas of CL which do not fit the philosophical paradigm (more regulatory aspects etc.) **Ashworth: Criminal sanction should be given in ways other than formal court-based procedures** (can use formal police caution etc.). **Reasons:** Not cost effective (reserve for most serious cases), not preventative, not necessary (where D is willing to plead guilty), not appropriate (in case of ongoing conduct, does not examine broader issues or continuing patterns, only examines actual charge), not effective (high attrition rates for some kinds of crime suggest that some aspects may have effect of preventing defendants being brought to trial).

PRINCIPLES OF CRIMINAL LAW - LAW MAKING AND INTERPRETATION ONLY?

Range of Criminal Law (in pairs) 1) **Principle of Minimum Criminalization: Definition:** Ambit of CL should be kept to a minimum (NOT absolute minimum). **Reasoning:** Should resort to criminal sanction only in order to protect individual autonomy or to protect those social arrangements necessary to ensue individuals have the capacity and facilities to exercise their autonomy. Issue is that it freezes contours of criminal law. 2) **Policy of Social Defense:** Argument against minimum crim. CL may be used against any form of activity which threatens good order or is thought reprehensible. We all want as much individual freedom, but also are a member of the community. **Be skeptical towards claims of SD,** ask whether wrong involved in serious enough to justify sanction and whether another means is more appropriate. 1) **Principle of Omissions Liability:** Key idea is that positive duties are regarded as incursion on individual liberty. Courts regard it as exceptional and in need of special justification. Have in some cases held that familial ties and voluntarily assumed obligations may be acceptable as bases for criminalizing omissions. 2) **Principle of Social Responsibility:** Argument against OL. Society requires certain level if co-operations and mutual assistance between citizens. **Three issues are:** 1) will be unclear what is expected of citizens, fails to make clear of what should be done and when. 2) Prosecutorial discretion becomes major determining factor for CL. Can weaken Rule of Law. 3) OL calls for greater justification than the normal liability for acts, due to the widely felt moral distinction between the two (actually killing somebody is worse than doing nothing). **So when should we impose OL?** When attention is paid to the Rule of Law and principles such as Fair Warning. Imposition of duties may be justified to safeguard vital interests and give people more autonomy. 1) **Principle of Necessity:** Applies only where it is necessary for the defender to use force in order to prevent the infringement of the right to life or the right to security of person. 2) **Principle of Proportionality:** places limitations on the amount of force that may properly be used in conditions of necessity. **The Rule of Law and Fair Procedures. CL must guide conduct of members in society and courts and law enforcement.** : 1) **The non-retroactivity principle: Definition:** EU Convention Human Rights art 7: 'no one shall be held guilty of any offence on account of any act or omission which did not constitute a criminal offence...at the time when it was committed.' **Reasoning:** Based off the respect for autonomy to plan and rely on the law. **Issues with development of common law:** 'Adaption' of law to a situation is surely retroactive? A citizen cannot be sure of conduct avoiding sanction if it is up to the courts to interpret. **Shaw v DPP:** about prostitution, HOL adapted law to fit despite absence of clear precedent. It's were convinced of immoral and anti-social nature of conduct. Legislative context of P didn't suggest it was their intent. Affords more rights to executive and judiciary, police can press unknown charge and courts can uphold validity. **Strasbourg Court decision regarding SW v UK:** It is not that the law ought to exist before the conduct took place, but that it ought to have been foreseeable (if necessary with legal advice) that it will be changed in a

particular direction. **C v DPP:** 1) If doubtful, J's avoid own remedies. 2) Pay attention to Parliament's intent 3) stay away from broader social policy areas. 4) Fundamental legal doctrines are important 5) Don't change unless achieving certainty and finality. **Excusatory Defense:** judicial creativity seems to be more accepted. 2) **The thin ice principle: Definition:** Citizens who know their conduct is on the borderline of illegality take risk that this behavior will be criminal. **Reasoning:** Based on moral/social/political elements. **Issues:** 1) Assumes may be ok to extend law by analogy, but this is against article 7. Article 7 is an absolute right so cannot be trumped by thin ice. Also likely to be dominated by powerful groups. **Where can it be applied?** See Strasbourg decision about SW v UK. 1) **The principle of maximum certainty: Definition:** Individual should know from wording of relevant provision and, if needed with the assistance of courts' interpretation of it, what acts and omissions will make him liable. **Reasons:** Uphold Rule of Law, guiding citizens and giving them autonomy to make sound decisions. If rules are vague, law enforcement gets more power. **Issues:** Some vagueness is needed in order to avoid rigidity and to allow law to keep pace with changing circumstances. Note that it is not absolute, suggest a compromise. Vague terms can maybe be aided by guidelines etc.. **Sunday Times Case: Quality of Law Standard:** Law must be adequately accessible and a 'norm' cannot be regarded as law unless it is 1) formed with such precision which 2) enables the citizen to regulate own conduct. 2) **Policy of social defense: Definition:** Supports thin ice principle, CL should be used against any form of activity which threatens good order or is thought reprehensible. **Reasoning:** People can still stick to strict letter of the law, while dishonoring its spirit, especially those in business and financial world. Using 'maximum certainty' to defend themselves. **Issues:** Interests of powerful likely to prevail. Uncertain and unclear. 1) **Principle of strict construction: Definition:** Relates to court's task in interpreting legislation. Any doubt in the meaning of a statutory provision should, but strict construction, be resolved in favor of the defendant. **Reasoning:** Fair-warning. When one person acts on apparent meaning of the statute and court decides to give it a wider meaning, unfair to convict that person retroactively. **Applying:** Status of principle is unclear, as is how and when the Court would apply this principle. BUT the courts have begun to reassert it. HOL say not bound by any strict dictionary definition, but instead construe in accordance with perceived purpose of that statute. 2) **A broader purposive approach: Definition:** Should rely on broader aims of criminal law as a whole rather than on a particular legislative purpose. **Reasoning:** 1) Why should the courts allow those who indulge in obviously wrong behavior to escape conviction due to a principle which assumes that citizens take care to understand the law beforehand, and that govt and parl can deal with issues which are social problems? 2) Purpose of CL is to punish those who engage in significant wrongdoing, so courts should be able to interpret to meet this end. **Counter-arguments:** 1) Judicial function is to uphold individual rights, leaving broader issues of social policy to parliament. J's shouldn't concern themselves with overall social welfare/policy. 1) **The presumption of innocence: Definition:** Woolfington v DPP: everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. **Realities:** Presumption has been neglected in the UK. Strasbourg Court has not developed principle with any vigor. Upheld Salabiaku v France decision which placed onus of proof on the defendant stating that it was 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense'. **Evidential Burden:** Lambert case: HOL interpreted s28 Misuse of Drugs Act 1971 to impose an evidential burden on defendant. 2) **The policy of ease of proof: Definition:** essentially an explanation for neglect of presumption of innocence. **Reasoning:** Legislative draftsmen do not follow strict rules, elements may be expressed as a defense or as part of element of a crime. Certain matters are much easier for one party to prove than the other (D proves that they had a license rather than P proving absence of one). **Application:** Should not be shaded into argument that D should prove any matter that 'lies within his own peculiar knowledge'. This applies to intention, knowledge etc. and undermines presumption completely. **Principles about the Conditions of Liability:** 1) **Principle of Mens Rea:** **Note is subjective test: Definition:** Defendants should be held criminally liable only for events or consequences which they intended or knowingly risked. Only if they were subjectively aware of possible consequences of their conduct should they be liable. 2) **Policy of objective liability: Definition:** Going beyond subjective liability and imposing objective liability, such as failure to fulfil duty of care. **Closest* example:** Offences such as dangerous and careless driving – make drivers criminally liable for the degree to which they fall below the standard expected of a competent motorist. **From negligence liability to strict liability?** Some see strict liability as going too far. Negligence liability so long as in clear terms can still be within the rule of law and principle of autonomy. 3) **Principle of correspondence: Define:** Not only should it be established that the defendant had the required fault, in terms of mens rea of belief; it should also be established that the defendant's intention, knowledge or recklessness related to the proscribed harm. 4) **Constructive Liability: Definition:** Anyone who decides to transgress the criminal law should be held liable for all the

consequences that ensue, even if they are more serious than expected. **Reasoning:** Decision to commit a crime is crucial moral threshold, once person crosses this they should be liable. **Moderate constructivism:** Accepts Mens Rea, but believes in liability for resulting harm in the same 'family of offences' (e.g. violence). 5) **Principle of fair-labelling** (mostly for legislature): **Definition:** Ensuring that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of law breaking. **Reasoning:** 1) Proportionality = between offence being broken and response which fulfills criminal law educative or declaratory function. 2) Distinctions and labelling may draw public attention towards the wrongdoing. 6) **Efficiency of administration:** Definition: The criminal law must be kept as simple as possible so as to avoid confusing people and producing erroneous verdicts. This argues against finely graded offences which necessitate complex instructions of the law. 7) **Principle of contemporaneity: Definition:** Conduct and fault must co-exist at the same time. **Issues:** Difficult with series of acts or continuing act

BURDEN OF PROOF

Woolmington Principle: The burden of proof is on the prosecution and the standard is 'beyond reasonable doubt'. **Limits of W Principle:** D has an evidential burden. This is a practical obligation to point to some evidence which suggests a reasonable doubt about conclusions one would draw from prosecutions case. Can include cross-examination of witnesses etc. Prevents it from being only the prosecutions story. / Also up to D to make a defence a 'live issue', to be considered by jury/Judge. **Exceptions to W principle: s23(1) Crimes Act:** Covers many exceptions which shift the onus of providing specific defenses or presuming certain ingredients of the offence to be present in the absence of evidence to the accused. **Rangi CA Case:** The policy or wording of a statute could shift the burden to the accused even in the absence of clear words. Unclear when this could happen though. **Regulatory type offences:** With statutory silence on matters, could have developed general no-fault defense and burden of proving it on accused. But not seen as exception to W principle – instead W doesn't apply here, administrative imperatives dictate burden location. **Note* Where statute provides for onus to "prove" or "show" something, courts interpret as shift in onus of proof, rather than evidential burden.** BUT may be changing as **Lambert (UK Hot case)** (misuse of drug, defense) decided differently: Judge's persuaded by Woolmington and BORA presumption of innocence. **R v Hansen (CA):** Similar conviction as in Lambert, but decided shift of proof. Tried to argue for application of BORA, but our BORA had meanings that can "only properly or reasonably" be applied, as opposed to UK any meaning "possibly". **R v Hansen (SC):** CA decision inconsistent with BORA. **Notions of Responsibility: Individual:** Focus on elements of offences to determine whether someone is at fault or to blame. Each individual must satisfy all. / Defendant has to have caused the harm/ Punishment is proportionate to harm and fault / some unattributed harm / Net of liability isn't too wide. Protects individual freedom/ Ignores right of the collective. **Collective:** Focus on the sphere of influence, irrespective of fault – 'Under whose Mana did this occur? / Does not require causal connection, no requirement of intention / Punishment focusses of restitution of compensation: on fixing the harms / Can cast the net too wide / Requires close knit relationships / May be ineffective / No unattributed harm. **The Great Muru: Story:** Kahu had eloped with Aperama's wife, this called for a Muru. Both Kahu and the wife were not involved in it. People from surrounding villages came and stripped everything from Kahu's village. Afterwards he felt a sense of pride, that his village had been subjected to the largest Muru and had restored Mana and brought honor upon Hapu. **Muru Definition:** The act or institution of ritual seizure or 'stripping' of goods from guilty individual or his whanau or community for alleged offence. **Colonial view:** Thought it was stealing, wanted to suppress it. **Moana Jackson:** Maori should be liable under a Maori system. In Western system offenders are alienated from victims of their crimes and from criminal justice authorities. As their communities are removed from sharing responsibility, offenders are unlikely to feel appropriate sense of shame. **'Collective' or parallel ideas in Western system:** Strict liability, hold people accountable even when it is beyond their control / Restorative justice.

ACTUS REAS STRUCTURE

Definition: The external element/"Conduct" that constitutes, threatens or causes some harm forbidden by the criminal law. Note* however that conduct requirement can be minimal. **Why do we need it?** 1) Some argue towards punishment of evil thoughts/intention alone. Issue is how we distinguish evil intention from day-dream variety. Fantasies shouldn't be punished. 2) Even when intention is fixed to do something, still considerable doubt about whether actual offence will follow. 3) Introduces certainty for CL. 4) Threat on autonomy, 'thought-police'. **PART 1 Behavior/elements (Clarkson and Keating): objective test: Did D fulfil the AR elements of the offence: 1) Breakdown: 1) An act:** includes omission and status offences 2) **Committed in legally relevant circumstances:** i.e. on a road or public place 3) **(for result crimes) causing the prohibited result (includes omissions, continuing act).** Type of offence? Conduct, result, status, omission. **Match facts to elements:** Should be able to identify the relevant issues. Remember this is a 'prima facie' analysis, can get into arguments afterwards. **Omissions Liability: What is an omission?** Can be difficult to distinguish omissions and positive acts e.g. stopping a drip feed keeping somebody alive and cutting a tight walkers rope (Smith and Hogan). A failure to do things which there is some kind of duty to do, or at least things which it is reasonable to expect a person to do (on the basis of relationship or role) (Ashworth). **1) Is it a Continuing Act situation? Note* don't think this is an omission Fagan v Met Police:** Facts: Appellant drove onto officers foot on accident. Officer told him to get off and he said "fuck you, you can wait". The engine was turned off and this was repeated several times before the appellant reluctantly agreed and reversed the car. **James J (Majority):** 1) Act occurring due to a car: Assault can occur with the laying of an actual hand on somebody or a stick in that persons hand. Same principle applied. 2) Principle of Contemporaneity: The act was continuing (as opposed to completed). When appellant was told of wheel on foot he: 1) remained in the car so that his body through medium of car was in contact with officer and 2) switched off the ignition 3) maintained wheel of car on foot 4) used words indicating intention to keep wheel there. 2) **If not, is the offence one which can be committed by omission? Crimes Act: 1)** In general, "result crimes" can be committed by omissions as well. If AC is "causing damage" should generally not matter how that damage was caused. 3) **If so, is this a situation in which the accused's failure to act is culpable?** There must be some duty to act in the first place, and the criminal law rarely imposes duties on citizens. Apart from statutes imposing specific duties, it will do so when: **A) There is a special relationship:** e.g. parents to children, spouses. **B) Where there has been an assumption of responsibility:** If voluntarily take on a duty e.g. looking after a sick friend. **C) Where there is a duty by contract or by virtue of the accused's position:** Incl. police officers, ambulance staff etc. But beware of 'causation' issues. **D) Where the defendant has created the situation that produces the harm.** **Mwai Case:** "the common law duty not to engage in conduct which one can foresee may expose others to harm". **Miller case:** Need awareness + deliberate refusal to prevent/reduce risk of damage. **Note* Miller requirement is just to take reasonable steps to alleviate the situation you have produced and is ONLY applicable to situations when D created situation. Should there be a general duty to act in all situations of duty? (Ashworth). Conventional View:** CL should be reluctant to impose liability for omissions except in clear situations. Key argument is for individual autonomy and liberty. Can turn people into busybodies who are constantly advising others to avoid risk and danger. Arguments against = individual autonomy rarely promoted as a supreme value throughout a moral or legal system. **Social Responsibility View:** It may be fair to place citizens under obligations to render assistance to other individuals in certain situations. Arguments against = can be seen as unpractical however. How different is the person "sleeping rough" to the person about to jump off a bridge? Can also lead to the incultation of large numbers of people, e.g. the crowd who sees the person jump. How much social responsibility is needed to protect individual autonomy? **Status Offences: What is a status offence?** No conduct is required, but the crime is committed when a certain state of affairs exists or the defendant is in a certain condition or is of a particular status (Clarkson and Keating). 'Situational liability'. **Arguments about SO:** 1) Status offences are only unjustifiable if the person had no control over their conduct (Husak). 2) Miss Larssonner was the author of her own misfortune, it was her fault (Lanham). But difficult to justify Larssonner decision as surely fault must be related to offence charged of. **Find out why we have status offences. PART 2 RESPONSIBILITY FOR ACTUS REAS:** Even if it is a case of omission, status offence need to figure out 1) whether they voluntarily did that and 2) if it caused the result **QUESTION 1: Was this a voluntary act?** 1) Did the actor have "control" over the conduct? **Yes – go to question 2. No – was it involuntary conduct/Automatism: Hill v Baxter:** D must show extraordinary mischance that made control impossible. Defense of automatism is saying that accused did not know or appreciate the nature and quality of his actions, it is getting very near a defense of

insanity. **Examples** where: struck by a stone, overcome by sudden illness; being attacked by swarm of bees. In this case, there was a state where he was falling asleep and therefore failing to perform drivers duty to keep himself awake / **Involuntary:** Pretty much that it wasn't within their control – typically status offence kind question. 2) **Is it the actor's fault the involuntary conduct occurred? Killbride v Lake (AR omission case):** Facts: D's warrant had been removed from car while he was away. Offence was one of 'strict liability' with no mens rea element. **Issue:** Can something done lawfully by D become an offence on his part by reason of an intervening cause beyond his influence, control, and which proved an effect entirely outside his means of knowledge? Has the action actually been caused by the appellant? **Decision: Opportunity of choice.** A person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. **The situation was outside of D's control. Note* Car can make statutes where AR is not voluntary.** But this mostly still involves some sort of control element (e.g. **Police v Taylor:** Wandering stock) **Note* That Killbride principle is narrow one. R v Larsonneur:** Facts: Larsonneur was French and had to leave England by certain date. Left England on date for Ireland but was deported from Ireland back to England. Was convicted under Aliens Restrictions Act. **Issue:** Does it matter she was forced into England? **Decision:** What is being punished is status over which there is control. She put herself in the position to get deported. Appeal dismissed despite fact it was not voluntary. **Tifaga v Department of Labor:** D's argument: He had no choice about leaving or remaining in NZ so his conduct was involuntary. Uses Killbride v Lake. **Decision:** Kvl doesn't help here. D was able to produce the forbidden situation that occurred when he failed to leave country on prescribed day. **Had voluntarily arrived in NZ, knew he would eventually have to leave. Lind v Laursen:** Defect had occurred prior to its discovery on said journey. **It was within D's control to check whether there was a defect.** I found a necessary link between defective state of device and voluntary omission on part of respondent. **Note* Tifaga and Lind make clear the limited ambit of lack of voluntariness claim. Practical Justice:** Logically, whether you see volition as part of AR should make no difference. PJ requires that those in very limited situations in which it is an issue, lack of volition should exonerate. **The Issue of Automatism:** Courts are naturally skeptical about 'unconscious acts'. Difficulty arises when such states can be traced to some form of mental malfunctioning or abnormality e.g. epilepsy, brain damage. Hill v Baxter makes clear there is likely to be overlap with special defense of insanity. **Reform:** 1989 Crimes Bill made provision for involuntary acts. Committee said we should rely instead on well-settled common law principles. Nothing was done. **QUESTION 2: Did the voluntary act cause the result?** In case of result crimes, voluntariness must cause it. 1) **Operative cause:** Question of fact e.g. death caused by heart attack. 2) **Was there causal connection between injury and act?** 'But for' the D's actions, would it have occurred? Diminishing causal sense limitation: Was the impact of D's involvement sufficiently central to the incident? 3) **Was there causal responsibility?** Usually flows on. But occasionally intervening factors may impact D's causal responsibility. These are the following three **Intervening Factor: Nature v R Hallett:** Facts: D attacked V and left him at waters edge. Argued that tide coming in broke chain of causation. **Decision:** It was the act of D in reducing V to consciousness that led to death. Would require extraordinary act of nature e.g. tidal wave that would become cause of death. **Intervening Factor: Third Party: Roberts Case:** Facts: D made advances towards V, in getting away from him she jumped out of the car and was injured. **Decision:** Were TP actions a reasonably foreseeable/natural consequence of D's actions? **Pagett Case:** Facts: D used V as shield during gun battle with police. Police firing in self-defense killed V. **Decision:** A reasonable act performed for purpose of self-preservation, does not operate as a Novus actus interveniens. D causally responsible for death. **Ashworth's 'Alternative Danger' theory:** In response to Pagett. If having to choose between two drastic causes of action, anything which is not totally irrational or unjustified can be regarded as involuntary. Leaves open that police should have acted with more circumspection towards hostage in Pagett. Especially since we expect more duty from trained police as opposed to hapless. **Intervening Factor: Medical Misadventure: Smith Case:** Facts: Accused stabbed V. Dropped twice by ambulance then given inadequate treatment, no transfusion facilities which increased survival rate to 75% available. **Decision:** At time of death, original wound was still an operating cause and substantial cause – so death can said to have been caused by the wound. Only if original wounding is merely the setting in which another cause develops, can it be said that the death does not result from the wound. **Jordan Case:** Facts: V stabbed, but then given overdose at hospital. **Decision:** Death had not been caused by the stabbing but by the introduction of tetracyclin after deceased had shown he was intolerant to it, and by introduction of abnormal quantities. Stab had also mainly healed. **Crimes Act s166:** Bodily injury must be operating cause of death, but not necessarily the final or proximate cause. Thus, CL still imposed on accused where treatment is applied in good faith but fails. **Dear Facts:** Appellant had slashed V for sexually abusing daughter. V had then committed suicide by either

reopening the wounds or reopening themselves and failing to prevent blood flow. **Decision:** Injuries inflicted by appellant were an operating and significant cause of death. Death was due to bleeding from artery that appellant had slashed. **R v Fenton:** For an unlawful act or omission to justify a conviction for manslaughter, it must be a substantial and operating cause of death for the deceased. **Blame Case:** refusal of blood transfusion after stabbing. Take the victim as you found them. **Causation and Reasonable Foreseeability: Question is not whether consequences were foreseen. It is whether D caused the pollution.** Intervening acts, seem to be discussed in terms of a reasonable foreseeability test. However term is misleading – D does not need to foresee or be able to foresee the intervention as the test is one of causation not culpability. Sometimes even where acts are not foreseeable in particular circumstance, still held to not break causal chain. Also, depending on nature of provision, fully informed acts by TP may still not be enough to remove causal responsibility from D. **Empress Car Co: Facts:** D left unguarded tank on large diesel tank next to a river. Unknown vandals trespassed and opened the tank, allowing discharge into river. Strict liability offence to cause the discharge of diesel into a river under Water Resources Act 1991. **Decision:** Defendants caused discharge. Act reads in a way which makes liability strict. D's 1) Created a situation which allowed for the discharge ("inadequate arrangements"), would only escape liability if intervening act was extraordinary. 2) Was not extraordinary, given local opposition to defendants, that tap may be opened by a vandal. **Criticism of Empress (Simster and Brookbanks):** 1) Test was to "apply for all" but judge's failed to adequately distinguish informed acts from uninformed, free acts or those by nature. 2) Contrary to principle of personal autonomy and individuals separate identity and responsibility: gives TP power to render D guilty of a crime dissempowers D. 3) D's storage of oil provided no more than a setting, he did not do the act. 4) Only unequivocal authority cited was a tort case. 5) **It is hoped that Empress will not be followed in NZ. English CA has sought to limit effect of it by treating it as specific case of statutory interpretation.**

MENS REA

Theoretical Foundation: Note* Subjective test. **Definition:** Reduced to its essence it refers to the choice to do a blameworthy act (Sanford). In its special sense, it refers only to the mental state which is required by the definition of the offence to accompany the act which produces or threatens the harm (Sanford). Most frequently it is used by judges, lawyers and writers as a shorthand reference to a list of more or less blameworthy states of mind – intention, recklessness and negligence. **Common Crimes Act MR Terms:** Intentionally, wilfully, with knowledge, recklessly, carelessly, without believing on reasonable grounds. **Why do we need mens rea?** It reflects ordinary notions of responsibility and blame for actions. Without it, people would be punished for doing things they couldn't avoid or knew nothing about ("Didn't mean it"). Punishment in these cases would be unjust and pointless. **Orthodox View: D should have Material Awareness:** In order to be liable, defendant must have intended or been reckless as to the material circumstances specified in the offence. Identifies moral blameworthiness. **Minimum mens rea requirement: Recklessness:** Awareness of the risk that the material circumstances will occur. Negligence (failure to realize a risk which would have been obvious to reasonable person) must generally be explicitly stated in statute. **Subjective test argument:** liability based on choice of prohibited action. **Objective test argument:** Liability grounded in prohibited conduct. **Criticism of Subjective: Dualism:** The theory that the mental and the physical are radically different kinds of things. Others behaving like me – can infer their mental state is like mine (Clarkson v Keating). **Mind is private and we should instead concentrate upon the behavior which we can observe – assume they must have intended those actions. Issues with Dualism:** We shouldn't separate the mind and behavior into two distinct realms. Feelings, desires and subconscious motivations also need to be included if we are to understand the relationship between action and mind. (Duff). **We shouldn't have mens rea: Determinism v Free Will:** People's actions are governed by preceding events and conditions. They are 'determined' and freedom of will is a myth (Thomas Morawetz, The Philosophy of Law). How can a person be brought to account and held responsible for something he was inevitably going to do? Mens rea would be redundant and another basis would have to be found (Franklin). **Issues with Determinism: State v Sikora:** Doctor believed that a man is a helpless victim of his genes and his lifelong environment, that unconscious forces dictate the individuals behavior with him being unable to alter it. Believed defendant had a kind of personality type which was his way of dealing with life, people and stress of it. The circumstances D had been subjected to imposed on this personality type and impaired or removed ability to make a conscious choice. **Court:** Rejected this view. If accepted then whole of criminal responsibility would have to be reshaped. **Realistically, in order to protect society, law accepts that all men are invested with free will**

and capable of making a decision. People must be held responsible for their behavior. **orge Fletcher:** Don't need to introduce all these terms (free will, determinism). Criminal law should express the way we live. Our culture is built on the assumption that we are accountable for what we do. **Tony Honore:** Just because our decisions are determined by something (which is a normal thought), does not make it implausible or illogical to treat ourselves as the authors of our actions. Also brings up the idea that punishing wrong in our society may be better tackled by eliminating the causes of wrongdoing, rather than punishing individual. **Is intent/guilt necessary?** Wrongful assumption that CL is about attribution of moral blame. It should be seen as correction and prevention of harm, or maintenance of some sort of social balance or web of group relationships. Thus, importance of individual guilt and blame may be diminished. **Maori Law Liability:** Pretty much strict liability, once harm done, focus was on dealing the hurt and restoring balance; not on questions of guilt and responsibility. This was because every action or inaction is deemed to be within someone's sphere of mana or responsibility. **Barbara Woolton:** Basic function of CL is prevention of harm rather than punishment of offenders. It is absurd to turn a blind eye to actions which are due to carelessness, negligence or even accident. Law should be able to deal with all cases where harm has occurred, irrespective of state of mind of accused. **Recommendation:** Mens rea is misplaced in the actual definition of a crime. Should come in later when thinking of appropriate measures to take to prevent recurrence of said act. **Rebuttal to Woolton/favour of Mens Rea: Kadish: Undermines democracy and social values. We should discourage wicked behavior.** Only redeeming feature it that it would eliminate many of perplexities which confront judge, practitioner and student of CL. Some small scale cases of this proposal such as strict liability. **Issues are:** 1) MR is crucial to description of behavior keen on preventing: e.g. unlawful assembly without intent to do unlawful acts is simply joining a group of people in a public place. 2) Would be damaging for law to run counter to the way humans view conduct: People generally do not view themselves as objects or circumstances but as responsible authors of conduct. Motivation and intention are the matters which are most important. 3) Threatens democratic values, human dignity. Assumes men are 'manipulatable things'. 4) Doesn't matter that MR may be brought in at later stage, it is crucial to issue of guilt or innocence. Functions to distinguish the responsible from the irresponsible, blameworthy from blameless. 5) Threatens our security and liberty, despite function being to protect that. Concept of innocence protects us from official interference in the conduct of our lives. Also emphasis the negative nature of criminal law. 6) It gives police and prosecutors, judges more discretion. This would constitute an invitation to abusive and discriminatory exercise of authority against the disliked or unpopular on political or other grounds. **Intention: The place of 'intention' in MR:** It denotes the highest level of culpability – the more serious the offence, the more the criminal law demands a high level of blameworthiness. For an offence requiring intent, unless D actually intended to do the act or produce the result, or knew that the circumstance existed, then D is not guilty. However, there is disagreement as to what state of mind is covered by the term. **Simster and Chan on Definition: Do we need a definition?** 1) 'intention' cannot be satisfactorily defined and does not need a definition since everybody knows what it is. Law definition is same as that of ordinary person – it can be safely left to jury's good sense. **Guidelines?** Placing guidelines may be inapplicable or misleading in some cases. But in some cases can be useful, especially in highly debated 'intention' ideas, usually when intention is on the borderline with recklessness. **Cunliffe v Goodman:** D intends an outcome if it is something that he decides or seeks to bring about. **Moloney Case:** Involves existence of state of mind comprising of a decision at least to attempt to achieve the intended result. **Duff:** If D can regard himself as 'failing' to have not killed V, this can highlight intent. **Formal definition: Direct and simple intention** D intends if A) He wants to do that action or B) He believes it is possible for him to achieve something he wants by doing that action (or bringing about that consequence) AND D) he behaves as he does bc of desire in (a) or belief in (b). Direct intent 1: A and C, Direct intent 2: B and C (means to end). **Note* Intention is different from mere motive or desire, wishful thinking. Disguising fact is that D acted because of that motive. Intention and Motive: R v Chandler: Motive is irrelevant Statutory Provision:** Official Secrets Act: "If any person for any purpose prejudicial to the safety or interests of the State..." = need to find specific intention. **Facts:** Chandler decides to walk onto air force base with idea to stop the base from working. Reason for doing this was that there was a connection between what was going on in that base and operational capacity of Britain for having nuclear weapons, believed it was a disaster for humanity. Wanted to bring issue to attention. **Useful:** Provides distinction between immediate intent (to carry out actus reus) and ultimate/ulterior intent (motive to carry out actus reus in order to achieve wider goal e.g. getting rid of nuclear weapons). **D's Argument:** Because motive/ulterior intent was good, they could avoid liability under provision. **Decision:** Immediate purpose: approaches prohibited place for purpose of obstruction. Found to be prejudicial to the state. Motive is irrelevant – good m does not cancel out prejudicial

purpose/actions. Narrow reading of 'purpose' – excluding motive as ulterior intent. **Intention and Motive: Alan Norrie (interesting perspective that motive is relevant) – can't separate the two so need to consider both:** Motive eventually stripped out of English Common law and development as certain property rights developed more firmly over centuries. Desperate social need and claim of right were motives of the poor, but thus, motive's relevant to duty was firmly squashed – tool of Rich./ **Individual morality:** When D acts in belief of moral rightness of actions. Motive legally irrelevant, no legal distinction can be drawn between circumstances exhibiting great moral differences (e.g. merry killing of mother and contract killing of third party). **Political morality:** One of the grounds for excluding motive from responsibility comes up in situations where an accused finds a way to argue the moral or political rights and wrongs of actions in a courtroom. **Example: Chandler:** Case hinged on competing political claims of rightful conduct (view on nuclear armament) and question of who defined the interest of the state. Claim of defendants was dismissed on basis on their purpose was really their motive and therefore irrelevant. Lord Devlin supported this, **Where is motive relevant:** In sentencing, rigors of law are compensated. **R v Woollin (OBLIQUE INTENTION):** Facts: Death of baby, involved father who lost tempo bc of crying and threw baby onto hard surface. Father charged with murder. **Previous English Cases:** Stand was confusing. **R v Moloney:** Court directed D who foresaw death or serious injury as 'natural consequences' had oblique intention. **Hancock v Shankland:** Jury should consider the 'probability of a consequence' when establishing intent. But ultimately two issues arose: 1) What role should D's foresight of the result have in finding intention? 2) What role should probability of the result have? **Nedrick Case:** Can infer intention if 1) that death or serious injury was virtually certain to occur as a result and 2) did D foresee/appreciate the death or injury as **virtually certain?** **Issue:** Direct intent was not an issue – court accepted father did not intend death. Was there indirect/oblique intent, should he have foreseen the risk of serious harm? **Decision: 1) Overturned conviction for murder** and substituted it for man slaughter, holding that original trial judge had enlarged the mens rea element for murder by introducing question of whether D foresaw a 'substantial risk'. The term 'substantial risk' blurred links between intention and recklessness. Recklessness not adequate for murder charge. Were not convinced virtual certainty had been reached. 2) **Confirmed Nedrick Test** – should be used when considering oblique intention. A result foresee as virtually certain is an intended result. However amended one word – rather than intention being inferred, it only allows jury to find intention. Means that while jury are able to find that D had intention, they are not obliged to find that the defendant actually acted with intent when offence was committed. Gives them some wiggle room for discretion in finding that D did not have intent. **Remember* Woollen doesn't say that foresight of virtual certainty = intention. Instead it is a jury direction, they can find it if they want, but they don't have to – moral leeway. Also, not only must D know outcome is virtually certain, it must actually be virtually certain (foreseen + probability) – article challenges this conclusion, because requiring factual virtual certainty is problematic.** Brook also gave tip of virtual certainty being where you were shocked death didn't result. **Ongoing Issues:** 1) Hard to read, framed in the negative. 2) Keeps things as matter of fact rather than a factual test. Requirement of factual certainty has the wrong emphasis. Should be more on foreseeability of death or serious harm as a virtuous certainty, not whether death etc. was in fact a virtual certainty. But both seem to be present in text we currently have. **Remember* Direct intention and oblique intention (known side effect) both comprise intention: the highest form of culpability.** There is no difference between all of them. **Michael J Allen article: Moral Leeway:** Decision is left to jury and they can be influenced by a variety of factors e.g. take pity on D and not find intention. Can create inconsistency on issues of oblique intention **Factual Certainty unnecessary:** If D thought it was virtually certain, why do we actually have to look at it? (Can say that it may not align with principles of why we have MR such as to protect people who 'didn't mean it'. But can also say it aligns with principles for why we have criminalization in general – to stop harmful conduct). Sandbar example – somebody could have believed it even though it wasn't, shouldn't we punish that? **Virtual certainty definition:** Don't actually know what it means as judges have refrained from giving it a precise definition. Depends on the person viewing the facts – is 85% enough? Or does it need to be 95%?

