

## Chapter 1A

# What is a Crime?

This is probably the hardest question in this book. Perhaps time and space should not even be devoted to answering it. The issue may be avoided by saying that there are various kinds of conduct which are prohibited and which may in some way or another be the subject of official punishment. It may be said that the kind of punishment will vary greatly between different kinds of crime and that there will be room for disagreement over whether some conduct should be prohibited by the criminal law and hence punished at all. Conversely there may be conduct which many people think should be criminal but which is left untouched by the criminal law. So how far does this indecisive musing assist in answering the question? Implicit in it is the proposition that there are types of conduct which are crimes recognised as such both by the criminal law and by the overwhelming body of ordinary people – things like murder, rape, wounding, stealing, damaging property and threatening people. Both lawyers and non-lawyers alike would say that these kinds of conduct are crimes but even when the scope is limited to such obvious candidates for the stigmatising term ‘crime’, there is room for quite marked differences in the way in which the lawyer and the lay person approach the question.

For example, both lawyer and non-lawyer can agree with a fair measure of common ground that murder and rape are crimes. They will have little difficulty in agreeing that the contract killer who deliberately takes life in order to enrich himself is a murderer or that the hooded attacker who overpowers a struggling victim and has sexual intercourse with her against her will is a rapist.

But even in these seemingly clear cut cases there may be room for differences of opinion between the lawyer and the lay person. The cautious lawyer may ask: what if the contract killer is a doctor who has been hired by the victim who is willing to pay for a lethal injection as the only escape from intolerable pain? The lawyer may insist that this is still murder while agreeing with the lay person that a lesser charge or no charge at all would be the appropriate way to handle the case. And what if the suspected rapist is suffering from an insane delusion that he has orders from another planet to populate the world in his own image? Is talk of crime and punishment then appropriate? If not, does that mean that the criminal law has no part to play in dealing with these cases?

The examples, so far, have been ones where the conduct is clearly a crime in the typical case but where there is room for debate around the edges. Expand these core cases to those where even the typical case may be more debatable, and further problems are encountered. Take causing injury. It is clear that though this will often amount to a crime, the same kind of variation as in the case of the suspected rapist may be readily envisaged. If the attacker's delusional mission were to chastise rather than impregnate, the same sort of question would arise as with the alleged rapist. But a much wider range of possibilities comes into focus where the alleged crime is described in terms of causing injury rather than murder or rape.

Though familiar to the lay person, the terms 'murder' and 'rape' also carry fairly precise legal messages to the lawyer. In their legal context, these terms build in considerations which not only filter out the insane perpetrator, but also confine their scope to those who act in some criminally blameworthy fashion. Conduct described in terms like 'causing injury' does not necessarily deserve criminalisation, even if there is no unusual feature such as insanity about the case. The injury may have been caused directly or indirectly, intentionally or by accident, carelessly or without fault. All or any of these factors may be relevant to the question of whether the lawyer or the non-lawyer considers the conduct criminal.<sup>1</sup>

Moving further from the paradigmatic crime even greater problems of definition are encountered. In the cases considered so far there is at least some clear and immediate harm which the criminal law ought in principle to prevent, even if insanity or lack of fault provides a reason for refusing to treat the harm as criminally inflicted in some cases.

But what if there is no immediate tangible harm at all but only some perceived potential for harm? Is exceeding the speed limit really a crime if no one is in fact hurt or put in danger? It does not look like a 'real crime'. A person convicted of speeding should not be regarded as a criminal, at least where no actual harm was caused – although attitudes are changing on this, especially where a person exceeds the speed limit by a considerable margin. Yet 'speed kills', even if the driver is only slightly over the limit. The potential harm of the speedster is greater than that of the petty thief, yet few people doubt that the latter is a criminal, unless there are persuasive mitigating factors.

If speeding is a crime because of the danger in which it places other people, what about failing to wear seat belts or safety helmets? Does non-compliance with laws enforcing their use make one a criminal? Or should this kind of behaviour be left to the civil law and the assessment of damages? Maybe the civil law is not a very good way of dealing with the problem, because it is not desirable to leave the patient who has suffered serious injury from not wearing a seat belt or helmet to languish without help on a 'serves you right' basis. That would be a kind of punishment much greater than the criminal law is prepared to mete out.

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<sup>1</sup> See Mason A, 'Law and Morality' (1995) 4 *Griffith LR* 147.

Anyway, what about the potential damage to the community? Scarce medical resources devoted to treating those who fail to wear seat belts or helmets may be denied to others, thus harming innocent third parties. This could not be predicted as more than remotely possible in any given case, so that the neglect of wearing a seat belt or helmet 'per se' could hardly be categorised as causing injury. Yet in the statistical totality injury will result.

Conduct with some similarity to failure to wear required protection may push the inquiry about the nature of a crime still further. What about smoking, even if done privately so as to avoid the direct, if gradual, infliction of harm by passive smoking? What of boxing, speedway racing, mountain climbing, all of which may inflict indirect harm on others? These are not generally criminal, but every now and again questions of banning them arise, at least in the case of boxing.

Both lawyers and others readily recognise that breaches of some of the Ten Commandments warrant criminal sanction. But there is room for considerable difference between the criminal law and this version of God's law. While murder, perjury and theft are prohibited by the Ten Commandments and criminal law alike the world over, adultery is prohibited by the seventh commandment but not by the criminal law in Australia. Yet in some societies adultery is not only regarded as a crime, but as a very serious crime. Under Islamic law, for instance, adultery could be punished by death by stoning.<sup>2</sup> This is not to say that this is the law in most Islamic countries. For instance, Turkey has recently decriminalised adultery. Adultery was also a capital offence in the English Commonwealth period,<sup>3</sup> and a crime in most American States,<sup>4</sup> and remains a crime in Utah.<sup>5</sup>

The fact that the criminal law is not concerned with all instances of harm occurring is brought home even more generally if omissions rather than positive acts are considered. The criminal law more readily punishes acts than omissions. However, failure to provide food, medical treatment or protection for one's children may result in criminal conviction. In the Northern Territory, failure to save life in certain circumstances is a crime.<sup>6</sup> Most omissions, however, do not lead to criminal liability, even if they result in death. There is no blanket obligation to 'save a life a day'.

Now let us push the inquiry still further from the core of obvious crimes with which this inquiry commenced. So far concentration has focussed on the harm aspect of criminal conduct with only fleeting references to fault. Can it be said that a crime is the causing of certain kinds of harm by blameworthy conduct? As with the component of harm, the answer has to be a guarded one. If fault rather than harm is examined it is possible to identify a number of states of mind, or standards of conduct, which could fall either side of the question of whether the person causing the harm was at fault. Depending on

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2 Mansour AA, 'Hudud Crimes' in *The Islamic Criminal Justice System* (1982) p 199.

3 Blackstone 4 Comm 64-65.

4 Weinstein JD, 'Adultery Law and the State: A History' (1987) 38 *Hastings LJ* 195 at 225.

5 Utah Code Ann 76-7-103.

6 *Criminal Code* (NT) s 155, considered by Kearney J in *R v Salmon* (1994) 70 A Crim R 536.

the kind of crime involved, harm may be caused maliciously, dishonestly, deliberately, recklessly, drunkenly, carelessly, by unforeseeable accident, uncontrollably or out of overwhelming necessity. It is easy enough to pick the 'baddies' from the 'goodies' in this list, which could no doubt be expanded. The main problem is that one cannot select from this list a set of adverbs or adverbial phrases which has any claim to cover the whole ground. Attempting to draw the line concerning individual fault, it would probably be drawn at 'carelessness'. The terms which precede 'carelessly', and the term itself, suggest fault, whereas those which come after suggest lack of fault, whether through referring to a valid excuse or a justification for inflicting harm. But any attempt to formulate a definition of crime based on any such dividing line will not do as a description of the criminal law in Australian jurisdictions.

In large measure, the reason that criminal conduct cannot be identified on the basis of fault lies in the criminal law's attitude towards what it describes as negligence, an objective failing to observe the standards of the ordinary reasonable person. Negligence is not to be confused with carelessness, considered as a subjective state of mind or attitude manifested in people's conduct. A person can still be negligent despite taking all the care in the world. Carelessness is undoubtedly blameworthy, but negligence not necessarily so, especially where the person concerned has made all reasonable efforts, given his or her character and capacities, to comply with the standard in question.

Understandably, then, negligence is of relatively little significance in the criminal law – although it is a prime basis for awarding compensation in the law of torts. Negligence is not generally of a sufficiently blameworthy quality to make conduct criminal. Intention or recklessness – assessed subjectively – is usually required. So murder, rape, personal injury crimes, thefts, and other property offences require more than negligence. Manslaughter is the best example of negligence being sufficient, but there are plenty of statutory crimes of negligence. So, for instance, Victoria has added, through s 24 of the *Crimes Act 1958* (Vic), negligently causing serious injury. Consider also negligent driving offences, especially where death results.<sup>7</sup> And other crimes are in a sense partly crimes of negligence, like bigamy and under-age sexual offences.

Beyond negligent crimes there are offences which require no fault element. These are described in Australia generally as offences of absolute liability and in England as offences of strict or absolute liability. The terminology is very sloppy but the idea is clear enough. With these offences, the definition of a crime comes close to breaking point.<sup>8</sup> The concept of the innocent criminal is not easy to accept. Though courts acting in their criminal law capacities or divisions are prepared to impose criminal law type sanctions on some kinds of innocently inflicted harm, they are somewhat uncomfortable with allowing the results of their reasoning to be labelled as crimes. So it is that Lord Reid in the leading English case on strict or absolute liability, *Sweet*

7 For example, *Crimes Act 1958* (Vic) s 318(1), (2)(b).

8 See also Ashworth A, 'Does the Criminal Law have a Future' (2000) 116 *LQR* 225; Husak D, 'The Criminal Law as Last Resort' (2004) 24 *OJLS* 207.

*v Parsley*,<sup>9</sup> was moved to describe these kinds of wrong as 'quasi-criminal', or not criminal in any real sense, and to distinguish them from acts of a 'truly criminal' character. A similar distinction was recognised by Gibbs CJ of the High Court of Australia in *He Kaw Teh v R*.<sup>10</sup>

So far the kind of conduct which the law may make criminal, taking account both of the harm done and the blameworthiness of the person causing the harm has been considered. No very clear criterion emerges from that examination. It may be possible to come a bit closer to a definition if the effect of a finding that a crime has been committed is examined. At this point the difference between crimes and civil wrongs (torts) becomes important. There is a substantial amount of overlap between conduct which is criminal and conduct which is tortious. The killing of a human being may be both the crime of murder or manslaughter and a tort under wrongful death legislation. A wounding may amount to any of a number of crimes from attempted murder down to battery or common assault. It may, at the same time, be tortious as a trespass to the person or an act of negligence. It has been seen that in terms of fault the criminal law generally requires more blameworthiness than the law of torts, but there are significant departures from this principle. However, there is conduct which will not amount to a crime but will be tortious, for example, negligently inflicting minor injuries, and conduct which will be criminal but not tortious, for instance, reckless driving which results in no actual harm or damage.

But the most significant difference between the law of torts and the criminal law is in the principal aims of the two branches of the law. This results in a difference in the kind of sanction or remedy likely to be imposed. This is not to say that even here there is a wide chasm between the effects of the two kinds of wrong. The principal weapon in the hands of a court administering the law of torts is the power to award damages payable by the wrongdoer to compensate the injured party. One of the main weapons in the armoury of the criminal courts is the imposition of a fine which is intended to punish the wrongdoer. The effect on the wrongdoer's pocket may be the same in both cases and so it is the motive with which the remedy is imposed which marks the difference. But even on this basis the distinction is not clear cut. Civil courts may have power to award exemplary damages where the tortious conduct has something of a criminal flavour and deserves punishment. Conversely, criminal courts increasingly have power to order restitution and compensation<sup>11</sup> (consider also the establishment of specific criminal compensation tribunals), and, especially with the development of influential victims' rights groups, this could come to be a major purpose of the criminal law.<sup>12</sup>

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9 [1970] AC 132 at 149.

10 (1985) 157 CLR 523 at 530.

11 See Lanham D, 'Criminal Fraud and Compensation Orders' (1986) 10 *Crim LJ* 297; 'Restitution Orders' (1986) 10 *Crim LJ* 394.

12 Scutt JA, 'Victims, Offenders and Restitution: Real Alternative or Panacea?' (1982) 56 *ALJ* 156; Schwartz LC, 'In Search of the Ideal Type of Punishment: An Economic Analysis' (1988) 65 *University of Detroit LR* 431.

The ultimate sanction of Australian criminal law is imprisonment. But this power is not limited to courts exercising criminal jurisdiction. Civil courts have power to enforce their orders by imprisoning those who disobey them for contempt of court. The motivation here is coercive rather than compensatory or punitive and so this power occupies a kind of middle ground between crime and tort. But even allowing for a certain degree of overlap between crime and tort the primary purpose of the criminal law is punitive while that of the law of tort is compensatory.<sup>13</sup> This enables us to inject at least in broad terms another factor in identifying the essential characteristics of a crime. The notion of punishment is complex and will be taken up in later chapters. But emphasis on punishment rather than compensation leads us to consideration of another feature of a crime which can be brought out by contrasting it with a tort. That feature is the power and responsibility to initiate the court proceedings.

Australian law has developed to a stage where the prosecution of criminals is a public matter rather than a private function. However, as with other aspects of the story, the distinction here is not absolute. Private prosecutions are still possible but even they are brought by individuals acting as agents of the public rather than as people seeking private redress of even vengeance, and such prosecutions can be taken out of the hands of a private prosecutor by public officials such as Attorneys-General or Directors of Public Prosecution.

Further evidence of public control over the fate of the offender is provided by the wide discretion given to the judge or magistrate in sentencing and the power vested in the government to pardon offenders who have been convicted. These factors give further emphasis to the fact that the criminal law is concerned with punishment, control and protection rather than private redress. Satisfying some desire of the injured victim for retribution is part of the purpose of the criminal law but it is by no means the full story. Equally if not more important to the criminal law is the protection of the community generally.

This leads us to investigate the outer boundaries of the criminal law in a way which challenges, if within a fairly narrow scope, its most basic tenets. The question can be put in this way – when, if at all, is the criminal law prepared to replace its normal requirement of blameworthiness with one of dangerousness? This question goes to the root of criminal law theory because this theory is based on personal responsibility.<sup>14</sup> People are punished for their crimes because they could have chosen not to commit them. The theory works well in the majority of cases. But in some cases it breaks down because, though harm has been done, the alleged offender acts as a result of forces which he or she could not control. If those forces are likely to lead to their carrying out further harmful acts they make him or her a danger to the

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13 See further Wood D, 'Retributive and Corrective Justice, Criminal and Private Law' in (2005) 48 *Scandinavian Studies in Law* (Perspectives on Jurisprudence: Essays in Honor of Jes Bjarup, ed Wahlgren P) 541.

14 See Boldt RC, 'The Construction of Responsibility in the Criminal Law' (1992) 140 *University of Pennsylvania LR* 2245.

community. There may come a point where the likelihood of further harm is such that the community should be protected from that danger. The question is whether the criminal law should be involved in providing that protection.<sup>15</sup> In other words: is harm plus dangerousness a crime?

Put in these stark terms this is a problem which is barely glimpsed and hardly articulated. But there are features of the law where the problem is confronted and answers returned in a piecemeal fashion with little by way of an overall theory. The fault requirement inherent in the concept of personal responsibility generally dominates but makes way at least to some extent for more pragmatic solutions in some circumstances. The Australian approach has generally been to insist on the fault element so as to protect the less blameworthy offender from the fullest rigours of the law. However, it allows for sanctions to operate on the basis of danger as well as fault.

A few disparate examples will illustrate the nature of the problem. The most obvious case is the special defence of insanity. Is a person guilty of murder if they kill under the insane delusion that they are acting under orders from some supernatural being? What are the options? Starting from scratch they could include murder, insane killing, berserk killing (taken up in relation to provocation), manslaughter, acquittal with strings, and free acquittal. A successful insanity defence should certainly exclude a conviction for murder. The free acquittal would be excluded also, since it is desirable to have the option of keeping control over the insane killer. Unless specially adapted, the verdict of manslaughter would allow the court the full range of penalties up to the maximum allowed by law. Where the maximum is life imprisonment the range would be extensive enough to ensure the incarceration of the offender until he or she is fit to rejoin the community. If, as in Victoria, the maximum penalty is 20 years,<sup>16</sup> the sentencing options might not be wide enough to provide community protection.

The novel verdict of insane killing would enable us to provide a range of sentencing options tailored to and adequate for the solution of the particular problems presented by this type of killing, without disturbing the provisions relating to manslaughter. Something like this was obtained under English law when the form of verdict in this kind of case was guilty but insane. The implications of this verdict were that, in a murder case, the offender would neither be executed as a murderer (in the days of capital punishment), nor be set free as an acquitted defendant. Rather, they would be detained until, if ever, it was considered safe for them to rejoin the community (something which might never occur). The ground for this action was the protection of an unblameworthy killer from the full penalty for murder and protection of the community from the risks from a killer. The current law provides the insane killer with an acquittal but subjects him or her to automatic incarceration for the period of apparent danger: this has much the same practical consequence

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15 See Wood D, 'Dangerous Offenders and the Morality of Protective Sentencing' [1988] *Crim LR* 424, reprinted in von Hirsch A and Ashworth A (eds), *Principled Sentencing* (1992) p 129; also reprinted in Peay J (ed), *Criminal Justice and the Mentally Disordered* (1998) p 419.

16 *Crimes Act* 1958 (Vic) s 5.

as a verdict of insane killing but imparts the flavour of a part criminal and part civil commitment process. This tends to seal off insanity as a special case which carries no messages for similar problems elsewhere in the criminal law.

The loss of control requirement in the defence of provocation raises problems. The main field of operation of this defence is that of murder. Provocation works to reduce liability from murder to manslaughter. This means that a quite different approach is taken in cases of provocation from that in cases of insanity, with its special verdict. Were a similar approach taken, the rules would look somewhat different from the present law. There would be no limit of an objective nature except as a matter of evidence – it being easier to believe that those subjected to great provocation would lose the power of self-control. The result of a successful defence of loss of the power of self-control could lead to a special verdict such as killing by provocation. The sentencing regime would have to contemplate as a not unusual remedy the imposition of an indefinite period of incarceration. This would not be on the basis of culpability but of apparent dangerousness.

Similar arguments could apply to the defence of diminished responsibility where it exists. This matter will be examined further in the chapter on the purposes of the criminal law (Chapter 1B). For the moment enough has been said to raise the question of whether a crime should be broadly enough understood to cover conduct which is harmful and accompanied by indications of danger, or should be limited, at least in the case of real crimes, to conduct which is harmful and culpable.

The preference of one of the present authors is for recognising both kinds of crime.<sup>17</sup> Protecting the community from dangerous people is one of the responsibilities of government. This means taking coercive measures against some people who cannot be blamed for the harm they have caused. Powers necessary to perform this function could be vested in local authorities, government departments, special tribunals, civil courts exercising powers of committal,<sup>18</sup> or criminal courts. On the other hand, fears of ‘the dangerousness of dangerousness’<sup>19</sup> point towards retaining an exclusive, and not just significant, role for the criminal law.

Because of the wide variety of considerations examined in this chapter it is not possible to readily define a crime in terms that are not merely formally correct (for example, conduct which the state defines as criminal) or so hedged by qualifications as to be obscure. The best that can be done is to offer a broad description. A crime is conduct regarded by the state as sufficiently harmful to warrant the punishment or control of the offender through the process of courts which adopt rules of evidence and procedure designed largely to safeguard the alleged offender.

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17 An alternative view is that, if it is to exist at all, preventive detention should be quite separate from punishment and the institutions of the criminal law. See Wood D, ‘Dangerous Offenders and Civil Detention’ (1989) 13 *Crim LJ* 324; Wood D, ‘Reductivism, Retributivism, and the Civil Detention of Dangerous Offenders’ (1997) 9 *Utilitas* 131.

18 See Pardee RE, ‘Fear and Loathing in Louisiana: Confining the Sane Dangerous Insanity Acquittee’ (1994) 36 *Arizona LR* 223.

19 Tomasic R and Dobinson I, *The Failure of Imprisonment: An Australian Perspective* (1979) p 20.