CRIMINALISING PREPARATION:

THE LIMITS OF THE LAW

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Abstract

This thesis evaluates the justifiability of preparatory offences: offences that target acts of preparation carried out with the intent to commit some further crime. The preventive turn in the criminal law has seen, amongst other changes, a broadening in the scope of preparatory offences. New offences reach far back into the early stages of preparation, targeting conduct that, but for the criminal intent, would often be entirely innocuous. Notable examples arise in the terrorist and child-sex offending contexts. Section 5 of the Terrorism Act 2006 criminalises any conduct in preparation for giving effect to an intention to commit acts of terrorism. Section 15 of the Sexual Offences Act 2003 criminalises communicating with a person under 16 and arranging to meet them, with the intention of committing a sexual offence against them in the future. The breadth of these offenses, and their focus on criminal intent, has led to concerns that they are akin to 'thought crimes' and thus represent an oppressive overreach of state power. This thesis begins by reviewing current theoretical thinking on the limits of the criminal law. It contributes to existing liberal accounts of the limits of the criminal law by exploring in more detail the specific issues raised by preparatory offences, structured as they are around an ulterior intent. The methodology will involve considering the familiar inchoate offences of attempt, conspiracy and possession with intent and the debates pertaining to their justifiability and scope. By engaging with the literature on these offences, this thesis moves the debate on the liberal limits of the criminal law forward by refining the constraints on criminalisation already identified by other theorists. More importantly, this thesis begins the difficult work of demonstrating how those constraints should be applied to specific offences: attempts, conspiracy and compound possession offences.

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I

Introduction

In October 2000 the case of Patrick Green made headlines.[1] Green was the first person in the United Kingdom to be convicted of child sex offending against a victim whom he had first met on the Internet. The case raised public awareness of the dangers of Internet 'predators' and also exposed a concerning gap in the law. Green had met and sexually abused one young girl (A) and was accordingly convicted and sentenced to five years for this conduct. However, there was evidence he had also been 'grooming' another victim (B) online and had met her with the intention of committing sexual acts. Police intervened before things could progress. Despite Green's clear criminal intent, and the steps he had taken to prepare B, there was no offence available with which he could be charged in relation to B. The state of the law at the time meant that police had to make a choice between intervening early and sacrificing the possibility of securing a conviction; or waiting until Green more or less had his hand on B and then charging him with an attempted sexual offence. This was of course no choice at all, with police intervening early and Green escaping prosecution for his conduct toward B.

The Green case lead to enactment of a new offence: section 15 of the Sexual Offences Act 2003. Section 15 criminalises communicating with a child and arranging to meet them, with the intention of sexually offending against them. It is punishable by a maximum of 10 years imprisonment. The offence clearly covers circumstances such as

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[1] A. Chrisafis, '5 Years for Man Who Lured Girl Via Internet' *The Guardian* (London 25 October 2000) <http://www.guardian.co.uk/technology/2000/oct/25/childprotection.freespeech> accessed 8 January 2019; S. Pook, 'Internet Predator Jailed for 5 Years After Seducing Girl, 13' *The Daily Telegraph* (London 25 October 2000) <http://www.telegraph.co.uk/news/uknews/1371730/internet-predator-is-jailed-for-5-years-after-seducing-girl-13.html> accessed 8 January 2019.

those arising in the Green case, and thereby fills a worrying gap in the criminal law. It represents one of a growing number of offences targeting conduct preparatory to the commission of a crime. Another example in the context of child sex offending is section 14 of the Sexual Offences Act 2003. This criminalises intentionally facilitating or arranging an act which, if done, will involve the commission of a child sex offence. This offence was successfully prosecuted in a case where the defendant had asked a prostitute to find a 12-year-old girl for sex.[2] It is punishable by a maximum of 14 years imprisonment. Other preparatory offences concerned with sexual offending include: possession of any indecent photograph of a child with a view to its being distributed or shown to others;[3] intentionally arranging child involvement in prostitution or pornography in any part of the world;[4] administering a stupefying substance with intent to engage in non-consensual sexual activity;[5] committing an offence with the intention of committing a sexual offence;[6] trespassing with intent to commit a sexual offence;[7] and installing equipment or adapting a structure with the intent to commit the offence of voyeurism.[8]

Preparatory offences carrying particularly high penalties are found in the anti-terrorism context. Section 5 of the Terrorism Act 2006 criminalises any conduct in preparation to committing acts of terrorism or assisting another to commit such acts. This

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[2] *R v R* [2008] EWCA Crim 619; [2009] 1 WLR 713: The conviction was upheld on the basis that, even if this request did not amount to an arrangement or facilitation of the intended offence, it certainly amounted to an attempt to commit the offence.

[3] Protection of Children Act 1978, s 1(1)(c).

[4] Sexual Offences Act 2003, s 50(1).

[5] Sexual Offences Act 2003, s 61.

[6] Sexual Offences Act 2003, s 62.

[7] Sexual Offences Act 2003, s 63.

[8] Sexual Offences Act 2003, s 67(4).

is broad enough to cover, for example, the buying of a map, if it can be shown that the map was acquired for use in the planning of a terrorist offence. A person guilty of this offence can be sentenced to imprisonment for life. Similarly, section 6(2) of the Terrorism Act 2006 makes it an offence to receive instruction or training with intent to use the skills obtained for or in connection with the preparation of acts of terrorism. This can also be punished by life imprisonment.

Preparatory offences are utilised throughout the criminal law. For just a taste of their disparate application, consider the following examples: the offence of knowingly taking any steps with a view to fraudulent evasion of any duty of excise on any goods;[9] possession of a controlled drug with intent to supply;[10] possession of anything with the intent to use it for the purposes of making a counterfeit of a currency note, with intent that the counterfeit be tendered as genuine;[11] possession of any article for use in the course of or in connection with any fraud;[12] possession of threatening, abusive or insulting written material with a view to display or distribute, with intent thereby to stir up racial hatred;[13] possession of a video recording with no classification certificate for the purpose of supplying it;[14] possession of any document closely resembling a vehicle licence with intent to deceive;[15] possession of anything with intent to destroy or damage property;[16]

[9] Customs and Excise Management Act 1979, s 170B(1).

[10] Misuse of Drugs Act 1971, s 5(3).

[11] Forgery and Counterfeiting Act 1981, s 17(1).

[12] Fraud Act 2006, s 6(1).

[13] Public Order Act 1986, s 23(1).

[14] Video Recordings Act 1984, s 10(1).

[15] Goods Vehicles (Licensing of Operators) Act 1995, s 38(1)(c); Public Passenger Vehicles Act 1981, s 65(2)(b); Road Traffic Act 1998, s 173(1)(c).

[16] Criminal Damage Act 1971, s 3.

having an article with you when not at your place of abode for use in the course of or in connection with any burglary or theft;[17] possession of a firearm with intent to endanger life;[18] and carrying something that counts as an offensive weapon because one intends to use it.[19]

The thread that connects these disparate offences is their structure. All of these offences target an act (or in the case of possession offences, a state of affairs) that does not of itself cause harm, or at least not the harm with which the offence is primarily concerned. All of these offences include an ulterior intent element: that is, a requirement that the person has the intention to commit some other offence in the future. Preparatory offences are thus oriented toward some future, as yet-to be committed harm. They target conduct that is preparatory to the commission of this future harm. They are largely preventive in focus, enabling police intervention and criminal prosecution before the commission of the intended crime, before the causation of any harm.

1. Why Consider Preparatory Offences?

Much has been said in the recent criminal law literature about the proliferation of measures focussed on prevention.[20] This preventive turn in the criminal law has been the

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[17] Theft Act 1968, s 25.

[18] Firearms Act 1968, s 16.

[19] Prevention of Crime Act 1953, s 1(4).

[20] For example, see: Bernadette McSherry, Alan Norrie and Simon Bronitt, 'Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law' in Bernadette McSherry, Simon Bronitt and Alan Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2008) 3; Lucia Zedner, 'Fixing the Future? The Pre-Emptive Turn in Criminal Justice' in Bernadette McSherry, Simon Bronitt and Alan Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2008) 43; Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Simon Bronitt and Alan Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2008) 87; Matt Matravers, 'On Preventive Justice' In Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 235; A.P. Simester, 'Prophylactic Crimes' in G.R. Sullivan and I.H. Dennis (eds), *Seeking Security: Pre-Empting the Commission of Criminal*

cause of much concern. Arguably, it contributes to the criminal law being overused, resulting in the conviction and punishment of people who ought not to have attracted the attentions of the criminal law at all.[21] As the criminal law expands to target a broader range of conduct in the name of prevention, this also mandates an expansion of investigatory and other policing powers. Surveillance, search, seizure and arrest powers are extended as the criminal law extends. So too the potential for oppressive and discriminatory use of these police powers increases.[22] There are also concerns about misuse of prosecutorial discretion. Many preventively focussed offences are drafted very broadly, capturing a wide range of conduct. It is unlikely that all conduct falling foul of such broad offences will be prosecuted: it will instead be a matter of prosecutorial discretion. This raises concern that preventive laws will be enforced unequally, undermining the rule of law and marginalising portions of society.[23] There is already a significant body of work addressing how this expansion of the preventive criminal law might be understood and ultimately constrained. The bulk of this work has been general in nature, setting out in broad brush strokes the normative framework that might be applied in limiting the preventive use of the criminal law.[24] However, there are a range of

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Harms (Hart 2012) 59; John Pratt, 'Dangerousness and Modern Society' in Mark Brown and John Pratt, *Dangerous Offenders: Punishment and Social Order* (Routledge 2000) 47; Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press 2017) 1-11.

[21] Simester, 'Prophylactic Crimes' (n 20) 60; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2009) Chapter One.

[22] Andrew Ashworth and Lucia Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011); Peter Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in Antony Duff and others (eds), *The Structures of Criminal Law* (Oxford University Press 2011) 219; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012).

[23] For further arguments against reliance on prosecutorial discretion, see: Victor Tadros, 'Crimes and Security' (2008) 7 Modern Law Review 940 956-7.

[24] See: A. P. Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart 2011); von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation: "Remote" Harms and Fair Imputation' in A.P Simester and A.T.H. Smith, *Harm and Culpability* (Oxford University Press 1996); Simester and von Hirsch, 'Remote Harms and Non-

different offence types which have prevention as their primary focus. Each is structurally different and raises a subtly different combination of issues when it comes to considering their justification and scope.

Ashworth and Zedner have devised a taxonomy of preventively focussed offences. The offence types they identify are: inchoate offences, substantive offences defined in the inchoate mode, preparatory crimes, crimes of possession, crimes of membership, and crimes of endangerment.[25] Inchoate offences and substantive offences defined in the inchoate mode, as understood by Ashworth and Zedner, criminalise acts of attempt, conspiracy, solicitation, encouraging and assisting. Inchoate offences are those offences of general application, such as the general law of attempts. Substantive offences defined in the inchoate mode are offences specifically defined to apply to the attempt of a particular offence which 'occupy the existential space that the crime of attempt would otherwise have occupied'.[26] The effect of defining a substantive offence in the inchoate mode is to extend the criminal law. This is because the general inchoate offence of attempt will still apply to the substantive offence defined in the inchoate mode. This creates the possibility of double inchoate liability: it will be an offence to attempt to commit an inchoate offence.

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constitutive Crimes' (2009) 28 Criminal Justice Ethics 89; Simester, 'Prophylactic Crimes' (n 20); Husak, *Overcriminalization* (n 21); Douglas Husak, 'The Nature and Justifiability of Nonconsummate Offenses', *The Philosophy of Criminal Law: Selected Essays* (Oxford University Press 2010); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014); Ashworth and Zedner, Prevention and Criminalisation: Justifications and Limits' (2012) 15 New Criminal Law Review 542; Ashworth and Zedner, 'Just Prevention' (n 22); Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) Journal of Law and Society 507; Lucia Zedner, 'Fixing the Future?' (n 20).

[25] Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalisation' (n 24); Ashworth and Zedner, 'Just Prevention' (n 22). Ashworth and Zedner also discuss the proliferation of semi-criminal preventive orders.

[26] Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 545.

In contrast to general inchoate offences and offences defined in the inchoate mode, preparatory offences criminalise conduct at an earlier stage than traditional inchoate offences.[27] They represent *ad hoc* extensions of the law in the name of prevention.[28] Crimes of possession are listed by Ashworth and Zedner as a separate preventive offence category. This category encompasses both simple possession offences, which require mere possession of a prohibited item, and compound possession offences, which require proof an intention to commit some further crime.[29] I have, however, categorised compound possession offences as a species of preparatory offence, given their similarity in structure. Ashworth and Zedner also identify crimes of membership as preventive in focus, being aimed at groups that are considered to be likely to commit criminal acts.[30] Finally, while there is no general offence of endangerment in England and Wales, Ashworth and Zedner identify a number of specific offences that target endangerment. These criminalise the creation of unacceptable risks of harm.[31]

To make progress in understanding the justification of preventive offences it is necessary to move from general accounts of preventive offences to a specific consideration of particular offence types. There are necessarily similarities in the questions that must be addressed when considering the justification of all preventive offences. However, self-evidently, there will be different issues that arise when evaluating, for example, crimes of membership as opposed to preparatory crimes, or simple possession crimes. This thesis will build upon existing theoretical accounts by

[27] Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 545.

[28] *Ibid*.

[29] *Ibid* 546.

[30] *Ibid*.

[31] *Ibid*.

focussing on preparatory offences, teasing out and addressing in more detail the precise theoretical questions that these offences raise.

Preparatory offences have been selected because of their inclusion of an ulterior intent element. This is interesting in three principle ways. First, by providing a clear normative connection between the conduct criminalised and the harm the offence is designed to prevent, inclusion of an intent requirement brackets out some difficult questions of imputation; that is, when a person can be liable for an increased risk that a certain harm will occur. Where an intention to cause that harm is present, there is a firm basis for imputation.[32] This removes one variable which can impact significantly on the justifiability of a preventive offence. Accordingly, preparatory offences 'bring most sharply into focus… [the] question of how far back into what might be called a 'possible crime history' one can legitimately extend the reach of the criminal law.'[33] Addressing this question directly, without the distraction of the varying mental elements in different offences, will provide insight into the farthest possible limits of the criminal law along one axis. It will help us to consider just how minimal the act requirement of an offense can be, when it is paired with a strong mental element in the form of an ulterior intent.

Second, there is an argument present in the current literature that the inclusion of an ulterior intent element in a preventive offence all but secures its justifiability. For example, in Husak's highly influential book 'Overcriminalization', he bemoans the overextension of offences targeting the creation of risk of harm. His preferred approach to limiting the overuse of such offences is to require the inclusion of an ulterior intent element, thus turning them into preparatory offences. In such circumstances, he concludes

[32] See: von Hirsch, 'Extending the Harm Principle' (n 24); Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 59-88.

[33] Jeremy Horder, 'Crimes of Ulterior Intent' in A.P Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford University Press 1996) 168.

'[e]ven though many of these defendants will not succeed in causing harm, there is a good reason to think that each of them deserves to be punished.'[34] Similarly, the England and Wales Law Commission has made the following observation:

> The Parliament's second approach to preparation, with its requirement that the prosecution prove that D was acting with the intention to commit a more serious offence, is far less likely to give rise to any legitimate concerns as to the scope of the criminal law. The requirement of intention ensures that D will incur criminal liability only if he takes steps towards giving effect to a morally culpable purpose; and prosecutions will be brought only in cases where there is cogent evidence of that purpose (perhaps because they have gone far enough in their preparations that an attempt to commit the intended offence was imminent).[35]

The counter-point to this view is that when the principal ingredient of preparatory offences becomes the intent, this brings into play all the arguments against criminalising mere thoughts.[36] Such offences are seen as going too far in restricting the autonomy of subjects, transgressing into the private realm, and requiring enforcement mechanisms that are too intrusive.[37] This thesis intends to examine critically the claim that an ulterior intent element can carry significant weight when justifying preparatory offences, and conversely that a focus on intent poses a particular threat to the liberty of the subject. This will add to the existing theoretical debate, by providing a closer consideration of the role of intent in justifying preventive offences.

Finally, the presence of an ulterior intent element in preparatory offences makes possible the particular methodology of this thesis. Preparatory offences share this feature

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[34] Husak, *Overcriminalization* (n 21) 174.

[35] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (Law Com Consultation Paper No 183, September 2007) §14.63.

[36] Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' (n 20) 89. The civil liberties organisation Liberty objected to the proposed grooming offence now embodied in section 15 of the Sexual Offences Act 2003 on the basis that the government was effectively creating a thought crime: Liberty, 'Liberty's Second Reading Briefing on the Sex Offences Bill in the House of Lords' (February 2003) <http://liberty-human-rights.org.uk/pdfs/policy03/sex-offences-bill-2nd-reading-lords.pdf> accessed 8 January 2019, §18.

[37] Simester, 'Prophylactic Crimes' (n 20) 65. See also: Herbert Morris, *On Guilt and Innocence* (University of California Press 1976) 1-31.

with the general inchoate offences of attempt and conspiracy. There exists a considerable literature addressing the justifiable scope of each of these general inchoate offences. In addition, there already exists a body of work considering compound possession offences. This literature, therefore, represents a rich source from which insights applicable to an evaluation of preparatory offences can be mined. This thesis will augment the existing theory on preventive offences by addressing the literature relating to attempts, conspiracy and compound possession offences in turn.

2. The Structure of this Thesis

Chapter Two sets out a liberal account of the criminal law. It identifies the relevance of both utilitarian and retributivist considerations in the justification of criminal offences and sets out classic accounts of the harm principle and the requirement that criminal offences target morally wrongful conduct. It canvasses the difficulties experienced in applying these principles to preparatory offences. Chapter Two then provides an overview of recent contributions to the criminalisation debate, which build upon classic liberal accounts and seek to address their shortcomings. It delineates a number of key constraints on the criminal law which represent the theoretical starting point of this thesis.

Chapter Three considers the law of attempts and the theories underpinning it. It explains more fully the methodology of this thesis and sets out the current law of attempts in England and Wales. It then addresses a critical debate in criminal law theory which is of particular significance when considering the law of attempts and preparatory offences: whether the criminal law should take an objectivist or subjectivist approach to culpability assessments. This thesis argues for an objectivist approach. It sets out and critiques the dominant objectivist account of attempts: Duff's attack account. It further explores critical claims made by Duff about the importance of respect for autonomy and what this entails when drawing the boundaries of attempts law and preparatory offences. It surveys the debate surrounding Duff's account of autonomy, before offering a new defence of his position, drawing on the recent critical work of Carvalho and Ramsay. Finally, it concludes by endorsing the England and Wales Law Commission's proposals as to the appropriate scope of attempts liability.

Chapter Four addresses the general offence of conspiracy. It sets out the current scope of conspiracy in England and Wales, demonstrating that it permits the criminal law to intervene far earlier in a criminal enterprise than attempts law. It addresses the nature of the intention element in conspiracy liability, foregrounding ambiguities which have significant implications for the reach of the criminal law. It sets out concerns about the breadth of the conspiracy offence and its historical misuse to target politically unpopular groups. Chapter Four canvasses possible justifications for the conspiracy offence, addressing both the wrongfulness and harmfulness of conspiring to commit an offence. It concludes that the current scope of the conspiracy offence is over-inclusive, capturing instances of conspiracy that are not dangerous enough to warrant criminalisation. It then explores when an over-inclusive offence may nevertheless be justifiable, considering attempts law, driving offences and weapon possession offences. It demonstrates that the logic that justifies over-inclusive offences in these other contexts cannot apply to the conspiracy offence and suggests that, accordingly, the conspiracy offence should be reformed. It proposes a new requirement be added to the conspiracy offence: proof of an overt act that is strongly corroborative of the conspirator's firm intent to commit the crime.

Chapter Five considers compound possession offences, another instance of a preventive offence that intervenes earlier than attempts liability. It explores the complaint that possession offences fall foul of the act requirement in the criminal law because they criminalise a state of affairs rather than an act. It concludes that the act requirement should be replaced by a control requirement, and direct consideration of the issues of respect for autonomy and privacy. On this basis, not all possession offences are problematic. It then considers the justifiability of compound possession offences and their relationship to harm. It develops a taxonomy of objects that may be possessed: dangerous objects, specialist items and innocent objects. It concludes that possession of dangerous and specialist objects with intent to commit a crime can be justifiably criminalised. However, possession of innocent objects with a criminal intent should not, without more, be criminalised: proof of an overt act strongly corroborative of the person's firm intent to commit the crime should be required. Chapter Five also sets out arguments that possession offences effectively target dangerous people, rather than dangerous acts or states of affairs. In so doing, possession offences focus on the defendant's character. It explores the implications of a focus on character for the scope of the criminal law, concluding that it cannot justify an extension of preparatory liability.

Chapter Six draws together the insights gained from the critical examination of attempts, conspiracy and compound possession offences in Chapters Three to Five. These insights are used to further refine and augment the key constraints on the criminal law identified in Chapter Two. Chapter Six highlights the contribution of this thesis in showing how theoretical constraints on the criminal law should be applied to specific offences. This thesis thus moves the debate from the abstract discussion of constraints to concrete examples of their application, in a field where application has been fraught with difficulty. Chapter Six also commends the methodology of this thesis. The methodology has allowed for progress to be made in considering preparatory offences specifically. It can and should be deployed to consider other preventive offences and their justifiable limits.

II

Current Liberal Accounts of the Limits of the Criminal Law

There is a long history of liberal accounts of punishment and the criminal law, and a more recent history of theorising criminalisation specifically. In order to locate the contribution of this thesis within the existing literature, it is necessary to survey these accounts. This chapter will first set out an orthodox liberal account of the limits of the criminal law. It will identify the key deficiencies in this account when considering the legitimacy of preparatory offences. It will then set out key contributions that have recently been made to develop criminal law theory to specifically address preventively focussed offences. This chapter will show that this work carries us further toward identifying the appropriate limits of preparatory offences, however, critical, and seemingly intractable, questions remain unanswered.[38] This chapter will conclude with a proposed methodology for tackling these difficult outstanding issues, which will be pursued in the remainder of this thesis.

[38] For some theorists, the perceived deficiencies of liberal theories of criminal law have lead them to propose alternative theories. These include, for example, Pettit's Republican theory, Ramsay's democratic theory, and Farmer's institutional theory: Philip Pettit, 'Criminalization in Republican Theory' in Antony Duff and others (eds), *Criminalization: the Political Morality of the Criminal law* (Oxford University Press 2014); Peter Ramsay, 'Democratic Limits to Preventive Criminal Law' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press 2016). For a recent and rich critique of the internal contradictions within liberal theory see: Carvalho, *The Preventive Turn in Criminal Law* (n 20). Other important critical contributions include: Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 Modern Law Review 621; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edition, Cambridge University Press 2014). Nevertheless, I have confidence that, despite the limitations of a liberal theory of criminal law, such theorising still has potential to aid in a discussion of what the law ought to be. Further, such an approach takes seriously the concepts and ideas in terms of which the law presents itself: see Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 7. The benefit of such an approach is that, if reasoned limitations can be generated from the law's own logic, these may have greater traction than accounts that are more critical of the overarching project of the criminal law.

1. Principled and Pragmatic Limits on the Criminal Law

There are broadly speaking two types of limits on the criminal law: principled limits which are based on normative claims about the proper scope of the criminal law, and pragmatic limits that seek to ensure the effective implementation of the criminal law. There may, in principle, be good reasons for the state to criminalise certain conduct. Nevertheless, criminalisation may be inappropriate if this would be ineffective in achieving the purposes of the criminal law, whether they be retributivist or preventive, or would produce undesirable side-effects.[39] Pragmatic limits are thus those limits on the use of the criminal law that recognise that difficulties with implementation may make it inappropriate to employ the criminal law. This thesis will focus predominantly on principled limits on the use of the criminal law. Whether something can in-principle be criminalised is necessarily the first question to be answered when considering whether to employ the criminal law: pragmatic concerns should play a secondary role in limiting the scope of the criminal law. It should be determined whether it is normatively right to criminalise conduct, before asking whether that decision can be implemented effectively.[40] Further, generally speaking, practical concerns should be addressed with practical solutions wherever possible.[41] For example, consider a possible objection to preparatory offences: that an offence's reliance on proof of intention could lead to the

[39] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 189, 209-210; Gerald Dworkin, 'The Limits of the Criminal Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 4.

[40] The same approach of considering principles first is endorsed by Duff and Green: Antony Duff and Stuart Green, 'Introduction: The Special Part and Its Problems' in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 4.

[41] Andrew Ashworth, 'Attempts' in John Deigh and David Dolinko (eds) *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 135; Andrew Ashworth, *Principles of Criminal Law* (6th edition, Oxford University Press 2009) 447.

wrongful conviction of 'innocent fools' who lack intent, but nevertheless behave in socially unacceptable ways which alarm a jury.[42] If it is the case that there are wrongful convictions for preparatory offences, because juries wrongfully infer intention when there is none, this is *prima facie* a pragmatic reason to limit the scope of these offences. However, the current rules of evidence applicable to confessions, propensity evidence, and hearsay paired with adequate jury direction as to the standard of proof may be sufficient to ensure convictions for preparatory offences are safe. If these due process measures are sufficient to allay concerns about the safety of convictions, then the scope of the law need not be limited on the basis of such fears. If they are not sufficient, further due process measures should be considered before the law is narrowed for pragmatic reasons. This thesis will, therefore, focus first and foremost on drawing a 'principled line between those actions that may be legitimately restricted by a democratic state and those that citizens must be left free to commit without fear of criminal sanctions.'[43]

Nevertheless, it is acknowledged that principled and pragmatic limitations inevitably overlap and interact. It is impossible to firmly categorise all limitations under one descriptive heading or the other. Furthermore, some of the best criminal law theory is good precisely because it seeks so explore the interactions between principles and policy.[44] Therefore, this thesis will engage with some of the most pertinent pragmatic critiques of preventive offences, for example, their discriminatory application. The problem of discriminatory enforcement of the criminal law seems intractable. Pragmatic solutions to this problem are unlikely to be found in the foreseeable future. Given this, a

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[42] See Baroness Noakes' objections to what became section 15 of the Sexual Offences Act 2003, at HL Deb 13 February 2013, vol 644, cols 777-8.

[43] Dworkin, 'The Limits of the Criminal Law' (n 39) 4.

[44] See, for example, Nicola Lacey, 'Principles, Policies and Politics of Criminal Law' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012).

good reason for objecting to a criminal offence might be that it is extremely likely to be implemented in a discriminatory fashion. Therefore, while this thesis will not engage with all the practical issues arising in relation to preventive offences, it will consider some of the most important pragmatic concerns.[45]

2. An Orthodox Liberal Account of the Criminal Law

Most modern accounts of the criminal law are 'mixed theories', drawing on both utilitarian and retributivist resources to explain the role and identifying the limits of the criminal law.[46] Most retributivist theorists acknowledge that desert cannot provide a full justification of criminalisation and punishment. They recognise the necessary role of prevention in an account of the criminal law.[47] Similarly, non-retributivist theorists acknowledge that central to the criminal law is the concept of culpability. This entails that utilitarian concerns cannot be all that animate an account of the criminal law.[48] Accordingly, mixed accounts claim that the state is justified in prohibiting, convicting and punishing via the criminal law in pursuit of harm prevention. However, this pursuit

[45] Another difficulty with preparatory offences, which will not be explored in depth in this thesis, is the greater potential for injustice created by broadly defined offences. See, for example: Tadros, 'Crimes and Security' (n 23) 950: 'We can expect… that the greater the range of conduct to which a criminal offence applies the greater the quantity of injustice that we will find in its application.' This is because some of the wrong people will be investigated and prosecuted for, and convicted of, a broadly defined offence.

[46] John Deigh, 'Responsibility' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 211; David Dolinko, 'Punishment' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 421.

[47] Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 543; Ashworth and Zedner, 'Just Prevention' (n 22) 291; Cf. Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press 1997). For a discussion of the role of prevention in leading retributivist von Hirsch's desert theory of criminalisation and punishment see: Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State' in A.P. Simester, Antje Du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014).

[48] Ashworth and Zedner, 'Just Prevention' (n 22) 281-2.

is limited by a retributive concern that only those who deserve to be convicted and punished may be subjected to the machinery of the criminal law, and that punishment must be proportionate to the degree of wrongdoing.[49] There have been numerous attempts to provide a synthesis of the best features of retributivism and utilitarianism, most famously that offered by Hart.[50] Arguably, no mixed theory has succeeded in this synthesis,[51] leaving questions unanswered about the relative role and priority of retributivist and utilitarian considerations in an account of the criminal law. Can utilitarian concerns for harm prevention ever trump the retributive requirement that conduct be wrongful? Can conduct be criminalised in order to condemn it as wrongful, where the use of the criminal law is not required to prevent harm?[52] For now, it suffices to recognize

[49] Deigh, 'Responsibility' (n 46) 211; Dolinko, 'Punishment' (n 46) 421; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 554; Heidi Mork Lomell,'Punishing the Uncommitted Crime: Prevention, Pre-Emption, Precaution and the Transformation of the Criminal Law' in Synnøve Ugelvik and Barbara Hudson (eds), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law* (Routledge 2012) 89; Cf Matt Matravers, 'Political Theory and the Criminal Law' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011): Matravers, building upon the political philosophy of Rawls, argues for an account of the criminal law which is not based on desert, but instead on the overall good achieved by a system of criminal law. I take the orthodox liberal position to be that moral wrongdoing is a necessary condition for criminal liability, but not the object of criminal liability. It is a constraint on criminalisation, not a positive reason for imposing the criminal law. For the most prominent modern defence of the latter legal moralist position see: Moore, *Placing Blame* (n 47). Duff adopts a version of legal moralism. He argued that the primary reason for criminalising immorality is to ensure that those who commit it are called to answer for it in a criminal court and punished for it if they have no adequately exculpatory answer: Duff, *Answering for Crime* (n 38).

[50] Hart argued that the overarching justification of the criminal law was utilitarian, preventing crime through deterrence and other means, but that retributivist principles governed the distribution of criminal punishment. Only someone who deserved punishment could be subjected to it: HLA Hart, *Punishment and Responsibility* (2nd edition, Oxford University Press 2008). For an example of a recent 'mixed theory' see: Victor Tadros, *Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011). However, it is not accurate to describe Tadros's 'duty view' of punishment as a mixture of retributivism and utilitarianism. Tadros rejects retributivism, instead drawing on a Kantian respect for others and the associated 'means principle' as the source of the non-consequentialist limitations in his mixed theory.

[51] For criticism of Hart's attempt, see the 'Introduction' to the most recent edition by John Gardner: Hart, *Punishment and Responsibility* (n 50) xiii-liv. For criticism of Tadros's attempt, see: Hamish Stewart, 'Criminal Punishment as Private Morality: Victor Tadros's The Ends of Harm' (2015) 9 Criminal Law and Philosophy 21.

[52] See, for example, Simester and von Hirsch's discussion of 'harm-independent wrongs': Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes' (n 24) 104; Cf. Husak, *Overcriminalization* (n 21) 66, 160.

that there is general agreement that in central, if not all, cases of justifiable criminalisation the offence should be concerned both with preventing harm and condemning wrongful conduct.[53]

Thus, mixed theories highlight both the censuring and harm prevention roles of the criminal law. These theories entail certain principled limits on the criminal law's use. In accordance with retributivist principles, in order for a person to be convicted of and punished for a crime they must deserve such treatment. A person does not deserve to be convicted and punished if she has done nothing wrong.[54] Therefore, the criminal law should only prohibit conduct that is wrong, and only convict those who are wrongdoers.[55] The utilitarian underpinnings of the criminal law entail another constraint on its use. The criminal law's prohibitions should be aimed at preventing harm, to be secured via deterrence and incapacitation. Without gains in harm prevention, the costs of the criminal law (in terms of the loss of autonomy due to prohibition, the expense of administering the criminal justice system, and the intentional infliction of hard treatment in the form of punishment) cannot be justified. Therefore, the state has good reason to criminalise conduct only when this conduct causes or risks harm to others.[56] These constraints on the

[53] Those who take a compromise position between retributivism and utilitarianism may continue to disagree about the details: they may disagree about whether the prevention of harm need always accompany the prevention of immorality. Perhaps this is at most a sensible rule of thumb: James Edwards and Andrew Simester, 'What's Public About Crime?' (2017) 37 Oxford Journal of Legal Studies 105, 106. Answers to the questions identified are critical for any complete theory of criminalisation. Nevertheless, as I am focussed on preparatory offences with an ulterior intent, I need not resolve these difficult questions. All offences including an intention to commit a serious crime criminalise wrongdoing (as described below). Further, the main rationale provided for these offences is the prevention of harm. Therefore, I am not considering offences which might generate great preventive gains, but which do not target wrongful conduct, such as the many strict liability offences on the books which have no fault requirement. Neither am I considering offences which target heinous wrongs but make no preventive gains.

[54] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 19-20; Husak, *Overcriminalization* (n 21) 82, 94.

[55] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 4, 11-2, 19; Dworkin, 'The Limits of the Criminal Law' (n 39) 7.

[56] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 35.

criminal law are familiar: the criminal law should only apply to activity that is wrong and causes or risks harm.[57]

2.1 *The Wrongfulness Constraint*

This thesis is concerned with offences that target wrongful conduct: conduct that is *mala in se*. While the *actus reus* of preparatory offences may be morally ambiguous, when paired with a *mens rea* of an intention to commit a serious offence, the conduct is wrongful. For example, consider section 15 of the Sexual Offences Act 2003: the offence of meeting a child following sexual grooming. This offence requires proof of communication with a child and travelling with intention to meet that child. This conduct is morally ambiguous; it could be done for innocent or illicit reasons. However, the offence also requires proof of an intention to commit a sexual offence against that child. Sexually assaulting a child is unambiguously wrong. Given this, it is a wrong—although a less grave one—to intend to sexually assault a child, and, *a fortiori*, it is a wrong to take steps toward perpetrating a sexual assault, such as communicating with and travelling to meet a child. This is because 'it is wrong to connect oneself as an agent to the commission of a wrong.'[58] One may do so by intending, planning or preparing to do a wrong.[59] In this way, the grooming offence satisfies the wrongfulness constraint: it targets wrongful activity, in the form of preparatory actions paired with an intent to commit a wrong. The same logic applies to other preparatory offences because they include a *mens rea* element

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[57] Husak, *Overcriminalization* (n 21) 55.

[58] Antony Duff, 'Risks, Culpability and Criminal Liability' in G.R. Sullivan and I.H. Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012) 135-6; Cf. Larry Alexander and Kimberly Ferzan, 'Danger: The Ethics of Preemptive Action' (2012) 9 Ohio State Journal of Criminal Law 637.

[59] Duff, 'Risks, Culpability and Criminal Liability' (n 58) 135. For an account of moral culpability in the context of preparatory actions, see: Daniel Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (2007) Canadian Journal of Law and Jurisprudence 113.

of intention to commit a serious offence. Therefore, the offences with which this thesis are concerned satisfy the wrongfulness constraint.

This, however, should not be the end of our consideration of the wrongfulness constraint. The relative degree of wrongdoing captured by an offence clearly has implications when determining the degree of censure deserved by a perpetrator of that offence. It will therefore be necessary, when considering the limits of the criminal law, to understand more about how to assess the relative wrongfulness of conduct. The more wrongful conduct is, the stronger the case that it should be criminalised.

2.2 *The Harm Constraint*

The most famous statement of the harm constraint was set out by Mill in *On Liberty*:

> The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[60]

This negative constraint was reworked into a positive ground for prohibition by Feinberg in *Harm to Others*. According to Mill, if harm is not risked or caused then state intervention is precluded. For Feinberg:

> [i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor... and there is no other means that is equally effective at no greater cost to other values.[61]

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[60] J.S. Mill, *On Liberty* (Parker 1859) chapter 1 [9].

[61] J. Feinberg, *The Moral Limits of the Criminal Law vol. 1: Harm to Others* (Oxford University Press 1984) 26.

This positive formulation of the harm principle is a welcome development, providing an alternative to positive retributivist claims that the punishment of wrongdoers is always a good reason in support of penal legislation. This thesis does not support a positive retributivist account. Feinberg also provided an account of 'harm', something which Mill had failed to offer. For Feinberg a harm is a ‘thwarting, setting back, or defeating of an interest.’[62] One's interests ‘consist of all those things in which one has a stake’; the ‘distinguishable components of a person's well-being.’[63] A harm is therefore, roughly put, a ‘diminution of the kinds of things that make life go well.’[64]

A final aspect of Feinberg's account is the balancing of interests, embodied in the requirement that ‘there is no other means that is equally effective at no greater cost to other values’.[65] A good reason for criminalisation is provided when conduct considered for prohibition causes or risks harm, but other reasons also bear on this decision. The extent and likelihood of harm must be weighed against the implications of criminalisation.[66] Included in this balancing will be a consideration of the value—to the actor and to others—of the conduct considered for prohibition. This balancing process has been described as the ‘Standard Harms Analysis’, and was usefully summarised in schematic form by von Hirsch:

> [T]he Standard Harms Analysis involves the following steps for deciding whether a given type of risk satisfies the requirements of the harm principle:
> *Step 1:* Consider the gravity of the eventual harm, and its likelihood. The greater the gravity and likelihood, the stronger the case for criminalisation.
> *Step 2:* Weigh against the forgoing the social value of the conduct, and the degree

[62] Feinberg, *The Moral Limits of the Criminal Law vol. 1* (n 61) 34.

[63] *Ibid.*

[64] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 36.

[65] Feinberg, *The Moral Limits of the Criminal Law vol. 1* (n 61) 26.

[66] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 45; Feinberg, *The Moral Limits of the Criminal Law vol. 1* (n 61) 216.

> of intrusion upon actors' choices that criminalization would involve. The more valuable the conduct is, or the more the prohibition would limit liberty, the stronger the countervailing case would be.
> *Step 3:* Observe certain side-constraints that would preclude criminalization. The prohibition should not, for example, infringe rights of privacy or free expression.[67]

The Standard Harms Analysis makes clear that prospective harm may be caused by offenders and by the state in intervening to regulate conduct. Any decision about prohibition of conduct must weigh the costs of intrusion upon liberty against the gains in harm prevention.[68] This utilitarian approach accurately identifies a number of the core considerations that are relevant in determining whether to employ the criminal law.

There are two key critiques of Feinberg's account of the harm constraint: that it is simultaneously under- and over-inclusive.[69] The first charge of under-inclusiveness is levelled at Feinberg's account of harm. The argument runs that it is not possible to identify fully or accurately harms suffered without reference to whether they are caused by a wrong. The very nature of certain harms, such as rape and murder, are at least in part constituted by the wrongful attack they involve.[70] Feinberg's account does not provide for this interplay between the concepts of harm and wrong, instead presenting the harm constraint as a non-moral means of identifying the kinds of wrongs that properly concern the criminal law.[71] Critics like Duff contend that any attempt to rectify this under-

[67] von Hirsch, 'Extending the Harm Principle' (n 24) 261.

[68] This is similar to Ashworth and Zedner's argument that '[i]n determining whether there are sufficient reasons for criminalizing particular conduct, the costs and risks of criminalization should be taken into account, as well as the harm that is sought to be prevented. In particular, any probably and unwarranted erosion of the security of the individual from state interference should be avoided': Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 551-2. For a thorough survey and critique of the different instantiations of the harm principle in the philosophical literature, see: James Edwards, 'Harm Principles' (2014) 20 Legal Theory 253.

[69] Edwards argues that one version of the harm principle is not touched by these criticisms: Edwards, 'Harm Principles' (n 68) 253.

[70] Duff, *Answering for Crime* (n 38) 128.

[71] *Ibid* 127-8.

inclusiveness renders the concept of harm 'something close to vacuous.'[72] That is, if the concept of harm is altered to recognise that wrongs are constitutive of harm, the distinction between harm and wrong collapses, and the harm constraint adds nothing to the wrong constraint after all. All wrongs will cause a harm, and therefore their criminalisation will not be precluded by the harm constraint. Duff is correct that it is not possible to disentangle harmfulness from wrongfulness. Therefore, the harm constraint cannot function as a morally neutral limit on the criminal law, giving a clear binary answer to whether the criminal law should apply. Nevertheless, on the Standard Harms Analysis, the fact that conduct is wrongful and harmful does not immediately justify its criminalisation. The Standard Harms Analysis goes beyond asking merely whether conduct is harmful or not, providing a broader framework within which to assess the strength of the case for criminalisation of that conduct. It is therefore still useful.

Another critique of the harm constraint is that it is over-inclusive. The harm constraint allows for prohibition of conduct if this will prevent harm to others. The harm constraint, therefore, does not limit criminalisation to conduct that always causes harm. The prohibition of conduct that causes a risk of harm may prevent harm to others, and therefore satisfies the harm constraint.[73] Accordingly the constraint, as formulated by Feinberg, does not require that the prohibited conduct itself be harmful.[74] However, this

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[72] Duff, *Answering for Crime* (n 38) 127. See also 130, 135.

[73] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 44; Husak, *Overcriminalization* (n 21) 71.

[74] Simester, 'Prophylactic Crimes' (n 20) 61-2. This aligns with Gardner's account of the harm principle: 'It is no objection under the harm principle that a harmless action was criminalized, nor even that an action with no tendency to cause harm was criminalized. It is enough to meet the demands of the harm principle that, if the action were not criminalised, that would be harmful': John Gardner, 'The Wrongness of Rape', *Offences and Defences* (Oxford University Press 2007) 29. This account is rightly rejected by Ashworth and Zedner for two reasons. The first is that this generates difficult empirical problems in determining whether or not harm would in fact occur if certain conduct were not criminalised. The second is that this account of the harm principle is no longer concerned with the harm done by the person who will be convicted of the proposed criminal offence. This risks treating individuals merely as means to achieving general harm reduction, as opposed to ends. That is, this approach loses sight of concerns for individual justice: Ashworth and Zedner, *Preventive Justice* (n 24) 107-9. A possible response to this lies in the literature on *mala prohibitum* offences. Nevertheless,

recognition undercuts the ability of the harm constraint to provide a meaningful limit on state power.[75] Almost anything a person may do can be characterised as risking some future harm, such that its curtailment would prevent harm and so arguably warrant criminalisation.[76] If the harm constraint permits criminalisation whenever they contribute to the prevention of harm, few crimes will be precluded.[77] The theoretical challenge is to provide an account that enables us to separate valid from invalid offences of risk creation.[78] Without such an account, there is potential for 'the scope of state power [to expand] exponentially', severely undermining liberty.[79]

Arguably, the Standard Harms Analysis provides us with the tools necessary to determine when prevention of future harm might warrant criminalisation. According to the Standard Harms Analysis, the likelihood harm will occur if the conduct in question is not prohibited and the likely gravity of this harm will bear on the strength of the case for criminalisation. The more remote the conduct is from the harm sought to be prevented, the less clear it will be that the prohibited conduct increases the risk of harm, and the weaker the case for criminalisation. The reasons in favour of criminalisation are, in turn, to be balanced against the costs of such prohibition. In many cases the costs to liberty of

I accept Ashworth and Zedner's conclusion that Gardner's account of the harm principle is too permissive, failing to take account of the dangers of state interference which such a broad interpretation could justify.

[75] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 53; Duff, *Answering for Crime* (n 38) 137.

[76] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 54, 71; A.P. Simester and Andreas von Hirsch, 'Remote Harms and Non-constitutive Crimes' (n 24) 90; Simester, 'Prophylactic Crimes' (n 20) 62.

[77] Duff, *Answering for Crime* (n 38) 137; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 548-9.

[78] Husak, *Overcriminalization* (n 21) 39.

[79] *Ibid* 160; Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes' (n 24) 71; Duff, *Answering for Crime* (n 38) 136. Mill himself was alive to the danger that the preventive function of the criminal law was liable to be abused: Mill, *On Liberty* (n 60) 106.

criminalising conduct remote from harm will weigh against prohibition and outweigh the case for criminalisation. In this way, the Standard Harms Analysis arguably provides an effective limit on the scope of the criminal law.[80] However, while balancing is mandated, no guidance is given as to how the critical weighing of competing considerations should be resolved. In particular, it is unclear how much weight ought to be attached to the prevention of harms that are remote from the conduct considered for prohibition. While the Standard Harms Analysis recognises the importance of liberty, it tells us no more about the weight to be attached to it.[81] The decision is ultimately one of degree.[82]

Perhaps further progress can be made in addressing this concern by applying Feinberg's requirement that, for penal legislation to be justified, there be 'no other means that is equally effective at no greater cost to other values.'[83] This suggests that the coercive mechanisms of the criminal law should only be deployed if other measures, that are less intrusive, cannot achieve the preventive gains sought. However, this leads immediately to another question: what sort of preventive gain, unachievable by other means, can justify the infringement of liberty, and other core values? It is not realistic for a state to eliminate the risk of certain harms entirely; therefore, at best, prevention must be concerned with the reduction of risk.[84] But will any reduction of risk, however slight, justify impingement upon liberty if no other means would bring about this reduction? Or, in other words, what

[80] Duff reproduces this argument in order to rebut it: Duff, *Answering for Crime* (n 38) 137-8. Simester and von Hirsch recognise that Feinberg himself thought that the Standard Harms Analysis could deal adequately with cases of remote harm, but disagree: Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 56.

[81] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 56; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 549.

[82] Simester, 'Prophylactic Crimes' (n 20) 6; Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 219-220.

[83] Feinberg, *The Moral Limits of the Criminal Law vol. 1* (n 61) 26.

[84] Ashworth and Zedner, *Preventive Justice* (n 24) 5.

level of protection from harms do we expect, and what level of state coercion are we willing to countenance to achieve this protection?[85] We again find ourselves facing a question of degree.

The Standard Harm Analysis is inadequate in one further way. It does not provide for consideration of the important question of imputation: why a person who creates a risk of future harm should be held responsible for that risk. It is not clear that in all instances a person who unleashes risk should be held responsible for it. This issue is particularly pertinent in what are termed ‘mediating intervention cases’: those cases where the conduct to be proscribed is not in itself harmful but creates a risk that further conduct will be engaged in (by the same person, or a third party) which will cause harm.[86] An example of this is the sale of a gun: if this sale increases the chance harm will occur, because it equips a potentially dangerous purchaser with an effective means of doing harm, should the seller be responsible for creating this risk? The answer is not obvious. Even more complex issues arise in cases where a person does an act which makes it more likely she will later engage in conduct that causes harm. All preparatory offences are examples of the latter type of mediating intervention case. For example, consider again the section 15 offence of meeting a child following grooming. A person who has an intention to sexually offend against a child and takes steps that make it more likely she will do so, has created a risk of harm. However, no harm will come about unless she engages in further conduct. Should she be held responsible for creating a risk that she will later choose to do harm? The Standard Harms Analysis contains no principles with which

[85] Zedner, ‘Securing Liberty in the Face of Terror’ (n 24).

[86] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 58.

to grapple with the questions that mediating intervention cases generally, and preparatory offences specifically, raise.[87]

We, therefore, find in the harmfulness constraint, as with the wrongfulness constraint, grave deficiencies when it comes to considering the justifiability of preparatory offences.

3. Developments in Criminal Law Theory

A number of eminent criminal law academics have recognised these grave difficulties, developing in response more nuanced theories of the limits of the criminal law.[88] While, unsurprisingly, there are differences between the accounts offered, key themes emerge.

3.1 *The Wrongfulness Constraint*

There is general consensus that the criminal law should not be applied unless the defendant's conduct is (in some sense) wrongful.[89] As Duff argues, this a logical corollary of the nature of the system of criminal law: what distinguishes criminal law from other systems of regulation is that a criminal conviction and punishment not merely penalises

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[87] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 56; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 556.

[88] See: Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24); von Hirsch, 'Extending the Harm Principle' (n 24); Simester and von Hirsch, 'Remote Harms and Non-constitutive crimes' (n 24); Simester, 'Prophylactic Crimes' (n 20); Husak, *Overcriminalization* (n 21); Husak, 'The Nature and Justifiability of Nonconsummate Offenses' (n 24); Ashworth and Zedner, *Preventive Justice* (n 24); Ashworth and Zedner, 'Prevention and Criminalisation' (n 24); Ashworth and Zedner, 'Just Prevention' (n 22); Zedner, 'Securing Liberty in the Face of Terror' (n 24); Lucia Zedner, 'Fixing the Future?' (n 20).

[89] Husak, *Overcriminalization* (n 21) 66; Husak, 'The Nature and Justifiability of Nonconsummate Offences' (n 24) 155; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 21; Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 90; Simester, 'Prophylactic Crimes' (n 20) 62; Ashworth and Zedner, *Preventive Justice* (n 24) 106.

conduct but condemns it.[90] There have been some attempts to specify more narrowly the types of wrongs that the criminal law should be concerned with. Ashworth and Zedner suggest that, given the connection of the criminal law to censure and punishment, there is a strong case for restricting criminalisation to 'serious' moral wrongs. They leave open the question of when a wrong will be 'sufficiently serious'.[91]

One possible variant on the wrongfulness constraint is to stipulate that only wrongs that are in some sense 'public wrongs' can be properly criminalised. According to Marshall and Duff, if conduct amounts to a 'public wrong' this gives us a positive reason for criminalising that conduct.[92] For others, such as Husak, the concept of 'public wrong' forms a negative constraint: whatever reasons there are for criminalising conduct, that conduct cannot be criminalised if it is not a public wrong.[93] The core question is what amounts to a 'public wrong'. Differing accounts have been provided.

The simplest accounts argue that a wrong is public if it has a harmful or wrongful impact on the public, for example, by creating social volatility,[94] or by undermining trust.[95] However, these accounts have been rightly dismissed by Duff, Edwards and Simester for marginalising the central wrongfulness of criminal offences. For example,

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[90] Duff, *Answering for Crime* (n 38) 81.

[91] Ashworth and Zedner, *Preventive Justice* (n 24) 106. Another critical area of debate, beyond the scope of this thesis, is the criminalisation of conduct that is not wrong pre-legally, but whose wrongfulness is partly constituted by the very enactment of the criminal prohibition. That is, *mala prohibitum* offences. See for example, the following discussions: Duff, *Answering for Crime* (n 38) 89-93, 166-174; Husak, *Overcriminalization* (n 21) Chapter 2. Section IV; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 24-29. See also: John Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1.

[92] See, for example: S.E. Marshall and Antony Duff, 'Criminalization and Sharing Wrongs' (1998) 11 The Canadian Journal of Law and Jurisprudence 7.

[93] Husak calls this the 'substantial state interest' requirement: Husak, *Overcriminalization* (n 21) 132-146.

[94] Lawrence C. Becker, 'Criminal Attempts and the Theory of the Law of Crimes' (1974) 3 Philosophy and Public Affairs 262.

[95] Susan Dimock, 'Retributivism and Trust' (1997) 16 Law and Philosophy 27.

even if a rapist creates, through their crime, social volatility or undermines trust, it is not this impact on the public that is the true wrong at which the offence of rape is targeted. The core wrong is the infringement of the victim's sexual autonomy, and any associated harm.[96] Nevertheless, these accounts maintain that wrongs warrant public condemnation through the criminal law only by dint of their impact on the broader public. This has rightly been rejected as a distortion of what is wrong about criminal offending.[97]

A more nuanced and plausible account of public wrongs is provided by Marshall and Duff.[98] A public wrong is not a wrong that injures the public, but one that properly concerns the public, that is, the polity as a whole. Another way of putting this is that public wrongs are wrongs that should concern us all as citizens, as members of a political community.[99] The starting point is that most political communities are structured by a set of defining aims and values. For members of political communities, taking those values seriously means taking grave breaches of those values seriously, by publicly condemning them.[100] The mechanism for this public condemnation is the criminal law.[101] Therefore, a wrong is 'public', concerning the political community and so warranting public

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[96] Gardner, 'The Wrongness of Rape' (n 74).

[97] Duff, *Answering for Crime* (n 38) 141; Edwards and Simester, 'What's Public About Crime?' (n 53) 109. Other accounts not fully explored here include: Grant Lamond, 'What Is a Crime?' (2007) 27 Oxford Journal of Legal Studies 609; Ambrose Lee, 'Public Wrongs and the Criminal Law' (2015) 9 Criminal Law and Philosophy 155. Both of these accounts have been critiqued by Edwards and Simester on the ground that they attach the label 'public wrong' to a category of wrongs that is identified through the use of other principles. That is, the idea of 'public wrong' is only a conclusion, rather than a premise in the argument for or against criminalisation: Edwards and Simester, 'What's Public About Crime?' (n 53) 108.

[98] Marshall and Duff, 'Criminalization and Sharing Wrongs' (n 92).

[99] Duff, *Answering for Crime* (n 38) 141.

[100] *Ibid* 88.

[101] Although Duff recognises that not all breaches of shared values warrant condemnation via the criminal law. It will be necessary to argue that the violation is such as to require or demand public condemnation. Whether this is so will often depend on the importance of the value in question and the seriousness of the violation: Duff, *Answering for Crime* (n 38) 143.

condemnation, if it breaches the defining values of the political community.[102] If it does not, then the wrong is not a candidate for criminalisation.

There are, however, a number of reasons to reject even this more nuanced account of public wrongs. The most obvious concern is with the presumption that political communities are characterised by a set of shared values. This is a highly dubious claim, given the diversity of contemporary society. Despite this, the whole account of 'public wrong' rests on being able to identify some consensus concerning the shared aims and values of, for example, the United Kingdom.[103] Even if we allow that this is possible, there are other problems with the account. One concern arises from its framing of criminal offending as a threat to the values that define and bind a community together. There is clear potential, in this logic, for those in a community that do not align with, or in some way challenge, consensus values to be treated as outsiders threatening the very existence of the community.[104] By identifying ways of living that are not compatible with supposedly shared values as 'public wrongs', they can be suppressed.[105] This highlights the central illiberalism of this account of 'public wrongs', in that it is premised on upholding community values; values that may be at odds with individual conceptions of the good life. Edwards and Simester put it well when they argue that laws are justified,

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[102] Duff, *Answering for Crime* (n 38) 143.

[103] Edwards and Simester, 'What's Public About Crime?' (n 53), 130-1.

[104] This is the concern illuminating the growing literature on 'outsider jurisprudence'. See, for example: Eric S. Janus, 'The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence' (2004) 40 Criminal Law Bulletin 576; Mork Lomell,'Punishing the Uncommitted Crime' (n 49) 92; Ramsay's discussion of 'Enemy criminal law' in Ramsay (n 22) 191-3; Alan Norrie, 'Citizenship, Authoritarianism and the Changing Shape of the Criminal Law' in Bernadette McSherry, Simon Bronitt and Alan Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2008) 31-2.

[105] Moore critiques the approach taken by Duff and Marshall on the basis that it is 'in danger of returning us to the conventionalist and relativist ethics that made Devlin's brand of legal moralism so distasteful': Michael Moore, 'Liberty's Constraints on What Should Be Made Criminal' in Antony Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 198-9.

inter alia, not because 'they help implement a moral consensus' but because 'they enable people to live harmoniously in its absence.'[106]

A final concern is that, like the earlier accounts of public wrong discussed, this account distorts the wrong at the core of criminal offending. *Prima facie*, Duff and Marshall's account avoids this objection: after all, what the account demands is public condemnation of the wrong that has been committed by breaching a shared value. Therefore, a rapist will be publicly condemned for breaching the shared value of respect for sexual autonomy; the focus appears to be squarely on the core wrong suffered by the victim. Nevertheless, what ultimately motivates the use of the criminal law in this account is not the wrong suffered by the victim itself, but instead a concern with reinforcing shared values and maintaining the political community. Without these communitarian concerns, there would be no reason for the criminal law to be involved. This is again a distortion, albeit a subtler one. What should be central to an account of the criminal law, responding to and preventing wrongdoing that damages people's lives, is rendered peripheral.[107] Given these difficulties with fleshing out a concept of 'public wrong', I join with

[106] Edwards and Simester, 'What's Public About Crime?' (n 53) 131.

[107] This is a rough thumbnail sketch of a more nuanced argument made by Edwards and Simester: Edwards and Simester, 'What's Public About Crime?' (n 53) 115-8. This argument could be critiqued on the basis that it focuses unduly on individual justice, and so downplays a key role of the criminal law in a liberal polity: maintaining social order. The very function of the state is to protect and preserve the liberty of citizens, and it does so by maintaining the social order necessary for the enjoyment of liberty. A failure to recognise this central paradox in the liberal project – the use of coercive structures that impinge on liberty in order to provide the necessary conditions for liberty – is arguably a key shortcoming in much liberal criminal law theorising. See: Carvalho, *The Preventive Turn in Criminal Law* (n 20). For an alternative account of criminal wrongs as offences against political self-determination see: Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38).

Edwards, Simester,[108] Moore[109] and Tadros[110] in doubting the utility of the concept in a theory of criminalisation.[111]

3.2 *The Harm Constraint*

Despite the difficulties facing the harm constraint in providing a meaningful limit on the use of the criminal law, it still plays a role in many modern accounts of the criminal law.[112] What differs between theorists is the level of reliance on the harm constraint; how much work it does in their theory of criminalisation. For example, Simester and von Hirsch, while recognising its shortcomings, still argue that the Standard Harms Analysis plays an important role in determining the limits of the criminal law.[113] Ashworth and Zedner adopt a similar approach, stating that the costs and risks of criminalisation should be taken into account, as well as the gravity of harm sought to be prevented.[114] The more remote the conduct criminalised is from the harm to be prevented, and the less grave the harm, the weaker the case for criminalisation.[115] The reasonableness of the defendant's conduct, and its social utility should also be taken into account.[116]

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[108] Edwards and Simester, 'What's Public About Crime?' (n 53).

[109] Moore, 'Liberty's Constraints on What Should Be Made Criminal' (n 105) 198-9.

[110] Tadros, *Ends of Harm* (n 50) 321.

[111] Notably, however, having rejected the concept of a 'public wrong', It is necessary for a theorist to provide an alternative explanation of the state's role in meting out condemnation and punishment for criminal wrongs. For an attempt see: Edward and Simester, 'What's Public About Crime?' (n 53) 125-9.

[112] An exception is Duff. See Duff, *Answering for Crime* (n 38).

[113] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 29; Simester, 'Prophylactic Crimes' (n 20) 66; von Hirsch, 'Extending the Harm Principle' (n 24) 261. For a discussion of the side-constraint of privacy, see Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 190-2.

[114] Ashworth and Zedner, *Preventive Justice* (n 24) 109.

[115] *Ibid* 113, 256. See also Ashworth and Zedner, 'Just Prevention' (n 22) 290-1.

[116] Ashworth and Zedner, 'Just Prevention' (n 22) 291.

In contrast, Husak purports to place much less weight on the harm constraint in his account of the limits of the criminal law.[117] He argues that criminal liability may not be imposed unless the prohibition is designed to prevent 'nontrivial harm or evil'.[118] He does not attempt to provide any further detail of what may qualify as harm, evil, or how the two concepts differ, considering this to be relatively unimportant to his overall thesis.[119] Nevertheless, he recognises the potential of Feinberg's account of harm, if further developed, to limit the reach of the criminal law.[120] Moreover, later in his analysis Husak argues that the government must have a 'substantial interest' in enacting a criminal offence for it to be justified.[121] Considering the application of this requirement in the context of inchoate offences, Husak concludes that these offences must be designed to reduce a 'substantial risk' in order to be justified.[122]

Simester and von Hirsch, responding to Husak, reworded this requirement, arguing that the question should be whether the risk is 'sufficiently serious', as opposed to 'substantial'. They suggest that this formulation ensures that, in line with the Standard Harms Analysis, the likelihood and magnitude of the risk is taken into account.[123] Ashworth and Zedner have also, previously, written of the creation of 'serious risk of significant harm', taking into account the magnitude of the harm should it occur and the probability of the harm occurring.[124] We see a convergence in thinking that suggests

[117] Husak, *Overcriminalization* (n 21) 61, 72.

[118] *Ibid* 66, 68.

[119] *Ibid* 70-72.

[120] *Ibid* 72.

[121] *Ibid* 128-9.

[122] *Ibid* 161-2.

[123] Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 91.

[124] Ashworth and Zedner, 'Just Prevention' (n 22) 290-1.

minimal risks of harm are going to be insufficient to warrant the intervention of the criminal law. The Standard Harms Analysis still seems to have some value. Beyond this, there is still much left unresolved in the application of the harm constraint. Particularly, in the context of preparatory offences, we are left with questions about the application of the harm constraint to a low risk of catastrophic or life-changing harm occurring, such as a terrorist attack or the sexual abuse of a child.

Furthermore, a particular complication is identified by Ashworth and Zedner, when it comes to applying the Standard Harms Analysis in the preventive context. This is to highlight that it is not as simple as weighing of the risk to be prevented, against the social value of the conduct to be prohibited and the intrusion into autonomy that its prohibition will involve. In the preventive context, while we can relatively clearly state what the cost of a criminal prohibition will be; when it comes to stating the risk that will thus be prevented, the matter is much more uncertain. It is hard to assess how much risk is actually posed by any given conduct, and it is hard to assess how effective an offence will be in reducing this risk. Therefore, in applying the Standard Harms Analysis in a preventive context, we are balancing 'known interests' against 'future uncertainties'.[125] Precisely how this uncertainty should be accounted for in deliberations is unclear. However, the burden of proof constraint, discussed below, would suggest that, generally speaking, uncertainty should count against those seeking to justify criminalisation.

3.3 *The Direct Proscription Constraint*

The direct proscription constraint provides that a preparatory act committed with an ulterior intent to cause some future harm cannot be criminalised, unless it is justifiable

[125] Zedner, 'Securing Liberty in the Face of Terror' (n 24) 512-3, 516.

to criminalise the immediate and wrongful causation of that same harm.[126] If it is not justifiable to criminalise a person actually causing the harm wrongfully, then it cannot be justifiable to criminalise that person wrongfully risking the same harm. There is some minor disagreement about the precise formulation of this constraint: Husak argues that the state must be justified in prohibiting the *intentional* direct causation of the same harm for the constraint to be satisfied.[127] Von Hirsch and Simester argue that it would be sufficient if the state can justifiably prohibit the *wrongful* direct causation of that harm, whether that be intentionally, or otherwise.[128] This distinction potentially has significance if we are considering the legitimacy of preventive inchoate offences that do not contain an ulterior intent requirement, for example, the offense of drug possession.[129] It is, however, of much less significance in relation to preparatory offences, with which this thesis is concerned. Preparatory offences contain an ulterior intent and so satisfy both possible formulations of the direct proscription constraint.

3.4 *The Fair Imputation Constraint*

According to the fair imputation constraint, a person may not be held criminally liable for acts he has done, merely on the basis that they increase the chance that he will do something harmful in the future. The fact that the defendant's having done X increases the chance that he will later do Y, which is directly harmful and wrong, is insufficient to

[126] Husak, *Overcriminalization* (n 21) 165-6; Husak, 'The Nature and Justifiability of Nonconsummate Offences' (n 24) 17; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 55, 73. Cf. Jeremy Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' in G.R. Sullivan and I.H. Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012) 81-2.

[127] Husak, *Overcriminalization* (n 21) 165-6.

[128] Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 91-2.

[129] Misuse of Drugs Act 1971, s 5.

justify criminalisation of X. The most developed account of when a defendant can be held responsible for increasing the chance of Y occurring is provided by Simester and von Hirsch. On their account, an actor cannot be held responsible for increasing the risk she will do Y unless, at the time of doing X, she evidences sufficient 'normative involvement' in her subsequent choice to do Y. To be normatively involved she must have, in some sense, affirmed or underwritten her subsequent choice to do Y. There is no clearer case of normative involvement than when she intends, in doing the immediate act X, to facilitate her later doing the harmful act Y.[130] Therefore, if the defendant, in doing X, intends to facilitate their doing Y in the future, it will be fair to hold them responsible for any increased risk that Y will occur.[131]

There is some debate about whether anything short of an ulterior intention to do Y will satisfy the fair imputation constraint. Husak has previously suggested that a defendant must at least be negligent about whether his current act X will lead him to commit a subsequent harmful act Y, for imputation to be fair.[132] In more recent work he has argued that the defendant must have a 'high degree of culpability' in relation to the harm the offence aims to prevent. He notes that intention to cause that harm will suffice, but whether a lesser mental state will do is questionable.[133] For Ashworth and Zedner, intention is required.[134] It is unnecessary, given the focus of this thesis on crimes of

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[130] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 81; Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 99. *Mala prohibitum* crimes may be an exception to this fair imputation requirement, but given my focus on preparatory offences of ulterior intent, it is not necessary to explore this further in this thesis.

[131] An alternative way of understanding preparatory offences is that offenders directly contribute to increased societal insecurity, in that they, along with other offenders, increase the fear of crime. Different principles govern the fair imputation of cumulative contributions to a harm: see Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 86. This alternative understanding will be discussed and dismissed in Chapter III.

[132] Husak, *Overcriminalization* (n 21) 173-5.

[133] Husak, 'The Nature and Justifiability of Nonconsummate Offences' (n 24) 171.

[134] Ashworth and Zedner, *Preventive Justice* (n 24) 112; Ashworth and Zedner, 'Prevention and

ulterior intent, to explore whether a lesser mental state would satisfy the fair imputation constraint. For our purposes, it is enough to note that where the defendant does X, with the intention that this facilitate his later doing Y, he can fairly be held responsible for the risk that Y will occur.

3.5 *The Least Restrictive Approach Constraint*

A common argument is that the criminal law should only be used as a last resort, when other modes of state intervention are incapable of adequately preventing the wrongful harm in question from occurring. This will necessarily involve a consideration of alternative methods of preventing the harm targeted. The motivation for the sparing use of the criminal law is a concern to prevent unjustified attribution of criminal liability. Further, it is recognised that the criminal justice system is very expensive to run and maintain and, most troubling, involves the intentional infliction of suffering through punishment.[135] However, modern theory has developed beyond a blunt assertion that the criminal law should be a last resort to a more nuanced and realistic position: that the criminal law should not be used unless it is the most appropriate method of regulation for the preventive task at hand.[136] For example, Ashworth and Zedner argue, in the context of discussing preventive criminal law, that there should be a strong preference for situational crime prevention measures and social crime prevention measures, then for

Criminalisation' (n 24) 556.

[135] Tadros defends the position that the criminal law is 'loosely speaking, a last resort' on this basis: Tadros, *Ends of Harm* (n 50) 40, 321-2. Cf. Tadros,'Crimes and Security' (n 23) 948, fn 24: 'That is not to say that criminal law should always be considered a last resort.'

[136] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 189, 193-8; Ashworth and Zedner, *Preventive Justice* (n 24) 74, 109; Husak, *Overcriminalization* (n 21) 128-9, 154; Douglas Husak, 'The Criminal Law as Last Resort' (2004) Oxford Journal of Legal Studies 207. See also Pettit's 'presumption of parsimony': Pettit, 'Criminalization in Republican Theory' (n 38) 143-4. Cf. Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (n 126) 91.

civil prevention techniques, and then, only if these other methods are not appropriate, should the criminal law be used.[137] A key principle identified by Ashworth and Zedner in the criminal law literature is that 'the least restrictive approach that is likely to achieve an acceptable level of prevention should be adopted'.[138] A similar approach is taken by Simester and von Hirsch. They state that '[a]s a general rule, if some other form of state intervention falling short of criminalisation would be effective to regulate the conduct at issue, that alternative should be preferred.'[139]

An important development in modern criminal law theory has been the recognition that the appropriateness or efficacy of a form of regulation in responding to particular conduct extends beyond the question of prevention. It is not always the case that the criminal law will be precluded because another form of state intervention could be as effective at preventing the target conduct in question. As Simester and von Hirsch argue, along with the disadvantages of using the criminal law, there are also advantages. While the criminal law is the most coercive measure available to the state, it has the unique role of providing for public condemnation of conduct. Public condemnation is sometimes a necessary response, for example, to heinous wrongdoing. Given this censuring function, the criminal law may, in certain cases, be the appropriate method of regulation, even if other, less coercive methods would achieve similar preventive outcomes. This will particularly be the case in relation to serious wrongs, such as murder. For this reason, Simester and von Hirsch reject the principle that the criminal law should only be used as a last resort. Instead, it should be used where it is the only effective mode

[137] Ashworth and Zedner, *Preventive Justice* (n 24) 74.

[138] *Ibid* 109.

[139] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 193.

of regulating the conduct, and this assessment must include both preventive and condemnatory considerations.[140]

A similar point is made by Husak. He argues that a criminal offence must be enacted to achieve a substantial government interest, that it should directly advance the government's objective, and that it should be no more extensive than required for this purpose.[141] We have seen previously that the substantial government interest at stake in preventive inchoate offences, according to Husak, is the reduction of a substantial risk of harm.[142] Any preventive inchoate offence must directly advance this interest of harm reduction. In the context of inchoate offences, this means that there must be some evidence the offence will actually decrease the likelihood that harm will occur, although the precise quality of evidence required remains open for discussion.[143] In addition, the offence must be no more extensive than is required to achieve this reduction in risk. This entails that there is no alternative that is equally effective, which is less extensive than the offence in question.[144] Husak, like Simester and von Hirsch, is careful to clarify that this does not amount to a last resort requirement.[145] He notes that there may be cases where the important expressive function of the criminal law makes its use appropriate, even where a less intrusive method would achieve the same or better levels of prevention.[146]

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[140] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 197-8.

[141] Husak, *Overcriminalization* (n 21) 128.

[142] *Ibid* 161.

[143] *Ibid* 145, 162. Concerning the lack of evidence of the efficacy of preventive measures in the terrorist context, see: Tim Legrand and Teneile Elliott, 'A New Preventive Justice Framework for Assessing Counter-Terrorism Law and Policy: Integrating Effectiveness and Legitimacy' in Tamara Tulich and others (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge 2016).

[144] Husak, *Overcriminalization* (n 21) 129, 154.

[145] *Ibid* 157.

[146] *Ibid* 158. See also Duff, *Answering for Crime* (n 38) 88.

This seems intuitively correct. Even if it were possible to reduce the incidence of rape to the same, or a greater extent, than the criminal law via other state interventions, the criminal law should still be deployed. There would be something problematic about not publicly acknowledging and condemning the grave wrong that has been committed against the victim in such circumstances.[147]

The least restrictive approach constraint thus, properly understood, opens the door to considering both the censuring role of a proposed offence, and the preventive efficacy of that offence. The latter is to be assessed taking into account the practical reality of the enforcement of the criminal law.[148] This means that it must be possible to detect the proposed crime. If detection will necessarily involve invasive methods of surveillance, then this must be considered when assessing the intrusiveness of the criminal offence being proposed.[149] The possible negative effects of the criminal law must also be considered. Criminalisation might have undesirable side effects, such that the proposed law might ultimately do more harm than good. This can occur where, for example, criminalisation drives certain conduct underground, where it persists but in more dangerous circumstances.[150] Another potential difficulty is the risk of discriminatory enforcement practices with the result that criminalisation may unfairly burden ethnic, religious or other minorities.[151] Furthermore, an offence may have an unintended chilling

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147 This is the intuition captured by communicative theories of punishment, such as Duff's: see Duff, *Answering for Crime* (n 38).

148 On effectiveness as a possible limitation on preventive justice measures, see: Legrand and Elliott, 'A New Preventive Justice Framework for Assessing Counter-Terrorism Law and Policy' (n 143).

149 Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 209-10. See also, Ashworth and Zedner, *Preventive Justice* (n 24) 109; Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 218.

150 Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 209.

151 See Chapters IV and V for discussion of the discriminatory enforcement of the conspiracy offence and compound possession offences.

effect on desirable conduct, because people may fear that innocent conduct will be misinterpreted by authorities. For example, people may be wary of interacting with children, for fear of being accused of grooming. Similarly, freedom of speech may be curtailed, due to fears that expressing non-conformist views may attract suspicion of extremism and terrorist plotting.[152] In assessing the efficacy of a proposed offence, and its relative intrusiveness, these practical realities must be borne in mind.

To summarise, the least restrictive approach constraint entails that to justify a criminal offence, it is necessary to first consider other, less intrusive modes of regulation. This includes consideration of non-criminal measures, as well as more narrowly defined criminal offences. It is not necessary to establish that all other possible modes of regulation will fail, such that the criminal law is a last resort. However, it must be shown that the offence proposed is the least restrictive means of achieving an *appropriate* response to the conduct in question. In assessing what is appropriate, both the extent of harm prevention achieved and whether public censure is required must be considered. Patently, there remains a significant evaluative element to this constraint; namely, what is an *appropriate* level of regulation for the conduct in question. How much must the risk of harm be reduced, how important is public censure of this conduct, and how great a use of coercive state power are we willing to countenance in order to secure these gains?[153]

[152] Ashworth and Zedner, *Preventive Justice* (n 24) 105; Simester, 'Prophylactic Crimes' (n 20) 72. For a taxonomy of ways in which a criminal offence may fail to be effective, including by producing 'confounding outcomes', 'ambiguous outcomes', 'unintended consequences' and 'perverse incentives' see Legrand and Elliott, 'A New Preventive Justice Framework for Assessing Counter-Terrorism Law and Policy' (n 143).

[153] See Mork Lomell,'Punishing the Uncommitted Crime' (n 49) 96.

3.6 *The Burden of Proof Constraint*

A closely related constraint is that the burden of proof should be placed on those who favour the creation of a criminal offence; they must show that it is justified. This is because criminalisation and criminal punishment infringe important rights, and these infringements must be justified.[154] However, as already averted to, a particular difficulty in the context of preventive measures generally, and preparatory offences more specifically, is the quality of evidence available. As von Hirsch has argued, 'estimates of the gravity and likelihood of harm tend to become progressively more indeterminate, when the envisioned harm becomes more remote.'[155] Further, Zedner observes, 'predicting human behaviour is necessarily an uncertain business. Determining who poses a risk and who does not tests the limits of predictive capacity'.[156] Simply put, '[t]he legislator may simply be wrong in assuming that the criminalized conduct increases the risk of harm.'[157] There is also bound to be uncertainty in predicting the impact that criminalisation of conduct will have, both in terms of preventive efficacy and undesired side-effects.

How, then, can the constraint, that those who favour creation of a criminal offence carry the burden to justify it, be applied? A key concern in answering this question is the apparent creep of 'precautionary' logic into the realm of the criminal law.[158] The

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154 Husak, *Overcriminalization* (n 21) 100; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 30; Pettit 'Criminalization in Republican Theory' (n 38) 143.

155 von Hirsch, 'Extending the Harm Principle' (n 24) 274.

156 Zedner, 'Fixing the Future' (n 20) 35.

157 Petter Asp, 'Preventionism and Criminalization of Nonconsummate Offences' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 33.

158 See, for example, Zedner, 'Fixing the Future' (n 20); Peter Ramsay, 'Imprisonment Under the Precautionary Principle' in G.R. Sullivan and I.H.Dennis (eds) *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart 2012); Jessica Stern and Jonathan Wiener, 'Precaution Against Terrorism' (2006) 9 Journal of Risk Research 393; Mork Lomell, 'Punishing the Uncommitted Crime'

'precautionary principle' is highly influential in the context of environmental regulation. There is no unitary definition of this principle, but two highly influential statements are set out in the United Nation's Rio Declaration on Environment and Development [159] and the Wingspread Statement on the Precautionary Principle.[160] The Rio Declaration states:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The Wingspread Statement provides a stronger version of the principle:

> Where an activity raises threats of harm to the environment or human health, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.

Applied in the criminalisation context, the precautionary principle would suggest that uncertainty as to the level of risk that preparatory conduct poses, and the likely impact of criminalising it, should not count against criminalising that conduct. This amounts to a radical reversal of the conventional logic of the criminal justice system, focused as it is on the offender's individual moral responsibility. The criminal justice system, through the presumption of innocence, proportionality in sentencing, and other measures, has traditionally let uncertainty weigh against conviction and punishment.[161]

The precautionary principle was developed in the context of responding to potentially catastrophic and irreversible harms to the environment. Further, in the

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(n 49); Jocelyn Stacey, 'Preventive Justice, the Precautionary Principle and the Rule of Law' in Tamara Tulich and others (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge 2016).

[159] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (14 June 1992) <www.unesco.org/education/pdf/RIO_E.PDF> accessed 8 January 2019.

[160] The Wingspread Statement of the Precautionary Principle (16 January 1998) <www.gdrc.org/u-gov/precaution-3.html> accessed 8 January 2019.

[161] Ramsay, 'Imprisonment Under the Precautionary Principle' (n 158) 204.

environmental context, uncertainty was commonly used as an excuse by policy-makers for failing to intervene.[162] Comparing this with the criminal justice context, Ramsay argues there is a clear distinction. While the consequences of failing to act in the context of environmental regulation could lead to 'widespread or even global catastrophe', a similar failure in the criminal justice context could lead to individual victimisation or localised harm to a particular nation state.[163] While it is true that the harms caused by terrorism and sexual offending against children, for example, are extremely grave, they are not in the same category as potential harms to the global environment. Furthermore, as Stacey notes, in the criminal justice context there has been no lack of political will to respond to terrorist, and other, threats which needs to be overcome by the implementation of such a principle.[164] Given these significant contextual differences, it is 'a mistake to think that the precautionary principle can be transposed from the environmental context to the national security context'[165] and the criminal justice context more generally.

Moreover, there are strong reasons for resisting precautionary logic in the context of the criminal law. Transplanted into the domain of the criminal law, there is real concern that 'the precautionary principle may license arbitrary and unfounded decision-making with serious adverse consequences for individual liberties'.[166] Where precautionary logic is relied upon to justify a criminal offence, this creates the potential for 'false positives': that is, criminalisation and punishment of those who in fact do not present great risk of

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[162] Stacey, 'Preventive Justice, the Precautionary Principle and the Rule of Law' (n 158) §10.16.

[163] Ramsay, 'Imprisonment Under the Precautionary Principle' (n 158) 203.

[164] Stacey, 'Preventive Justice, the Precautionary Principle and the Rule of Law' (n 158) §10.16. Stacey criticises the general scepticism shown by criminal law theorists towards the precautionary principle, defending its appropriateness in the context of environmental law. However, she agrees that it is misplaced in the criminal law context.

[165] *Ibid*.

[166] Ashworth and Zedner, *Preventive Justice* (n 24) 120.

harm.[167] Furthermore, precautionary logic encourages overly broad offences, which fall foul of rule of law considerations, which will be discussed below.[168] Ultimately, then, uncertainty ought properly to act as a 'heavy restraint upon our willingness to erode rights'[169] through the use of the criminal law. Those who favour the creation of a criminal offence must show that it is justified.[170]

3.7 *The Rule of Law Constraint*

Conventional rule of law considerations generate constraints on how criminal offences are framed. Citizens living under the rule of law should be able to guide their conduct with reference to the law, so that they can avoid falling foul of its prohibitions.[171] This is the principle of 'fair warning' and it entails that offences must be drafted with sufficient clarity such that citizens can guide their conduct with reference to them.[172] The law should be 'understandable, predictable, and not vague.'[173] This is particularly

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[167] In contrast, allowing uncertainty to weigh against criminalising conduct will create the potential for 'fake negatives': that is, a failure to criminalise and punish those who do in fact present a great risk of harm. In some instances, this may result in the harm being realised. See also: Mork Lomell, 'Punishing the Uncommitted Crime' (n 49) 95; Ramsay, 'Imprisonment Under the Precautionary Principle' (n 158) 203-4.

[168] Zedner, 'Fixing the Future' (n 20) 51.

[169] Zedner, 'Securing Liberty in the Face of Terror' (n 24) 512-3.

[170] This is not to suggest that no uncertainty can be tolerated; that would be too strict an approach. Nevertheless, this constraint requires legislators to conduct a thorough, and as far as possible evidence-based, assessment of the risks posed by preparatory conduct, and the harms caused and risks posed by its criminalisation.

[171] This is a key purpose of the criminal law; by guiding potential offenders away from defined behaviour it thus helps to reduce its overall incidence: James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 Oxford Journal of Legal Studies 725, 727.

[172] Ashworth and Zedner, *Preventive Justice* (n 24) 114, 256; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 559-560; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 198-208; Zedner, 'Fixing the Future' (n 20) 50-1.

[173] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 199.

important in limiting the expansion of preventive offences, which have a tendency to be defined in very open-ended terms, in order to maximize their utility. Another principle of the rule of law is 'fair labelling'. This entails that, to ensure that justice is seen to be done, each offence must be 'labelled and defined in such a way that it conveys to citizens an accurate moral picture of the prohibited conduct'.[174] A clear offence definition is necessary to ensure that when a person is convicted of the offence, the wrong they have committed is effectively identified and communicated.[175]

An appropriately drafted offence will also ensure that the court, in applying the offence, adjudicates on the particular wrong targeted, rather than on some broader criteria.[176] This is also a particularly important limitation in the context of preparatory offenses. It is arguable that many of these offences capture a much broader range of conduct than that which the state actually wishes to target.[177] Drafting an offence broadly, so as to include both those who commit the target conduct and those who do not, makes it easier to arrest and convict those who commit the target conduct, thus advancing the preventive cause.[178] But this comes at a cost. Consider an example identified by Edwards: section 13 of the Sexual Offences Act 2003. This criminalises, *inter alia*, all sexual

[174] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 204.

[175] Ashworth and Zedner, *Preventive Justice* (n 24) 114, 256.

[176] *Ibid* 114, 256; Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 560.

[177] It will be argued that this is precisely how the current formulation of the conspiracy offence functions and so too most preparatory offence. These offences differ from those which are the primary concern of Edwards. Conspiracy and preparatory offences are over-inclusive relative to the wrongful conduct they aim to capture. Nevertheless, unlike the offences that concern Edwards, it is still intended that these offences will guide citizens such that they will not engage in any form of conspiracy or preparation which the offence captures. Edwards notes that the conviction and punishment of offenders who are captured by this form of overly broad offence, despite not having committed the target wrong, is thought to be justified by the effect that this will have in reducing the target wrong: Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (n 171) 729. I will be arguing against this. However, this argument must wait until I have demonstrated the way in which the conspiracy offence is overbroad: see Chapter IV.

[178] Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (n 171) 728.

touching of a person below the age of 16 committed by a person below the age of 18. Therefore, any sexual conduct between two under 16-year olds is captured by the offence. This is patently overbroad. The real mischief at which the offence is targeted is coercive sexual conduct with under 16-year olds. Nevertheless, this is not spelt out in the offence itself, and its sensible enforcement relies on the exercise of discretion by criminal justice officials.

The effect of this overly broad offence definition is that, when a defendant is tried for this offence, the fact-finder (court or jury) does not have the opportunity to consider whether the sexual conduct in question was coercive. This is not an element of the offence, and so is irrelevant to the fact-finder in determining if the offence was committed.[179] The assumption is that police and prosecutors can be trusted to identify those who should be appropriately sent to trial. However, this is deeply problematic. It prevents the defendant from being able to mount a defence at trial in relation to that critical element. It is no defence to a section 13 charge that the sexual conduct was not coercive. A defendant will not be entitled to give evidence on an issue that is legally irrelevant.[180] Further, it prevents the critical element of the offence from being determined to the criminal standard: beyond reasonable doubt. The fact-finder will not make a finding that the sexual conduct was coercive; this judgment will have been made, to a less stringent standard, by police and prosecutors.[181] This procedural laxness is likely to lead to more convictions of those who are innocent of the targeted wrongdoing than if that wrongdoing were incorporated into the offence definition. This is a grave wrong. It is far

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[179] Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (n 171) 724-5.

[180] David Perry and D.C. Ormerod, *Blackstone's Criminal Practice 2018* (Oxford University Press 2017) §F1.11.

[181] For critique of the enhanced role of law enforcement agents on rule of law grounds, see: Zedner, 'Fixing the Future' (n 20) 51, citing Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) South African Law Journal 62, 76.

graver than the alternative, of allowing those who deserve conviction to go free. A carefully defined offence will often make it more difficult to convict genuine wrongdoers who have committed the target conduct, because it will require prosecutors to satisfy a jury of more stringent requirements. But this should be preferred to an offence which generates a real risk of wrongful convictions.[182]

To summarise, the rule of law constraint requires that offences be drafted so as to provide maximum certainty of definition, fair warning, fair labelling, and to fairly capture the mischief at which the offence is targeted.[183]

3.8 *Discussion*

There are, therefore, a number of constraints that can be identified which, together, seek to provide principled limits on criminalisation. Nevertheless, much remains to be done to develop these constraints further, such that their application may generate relatively clear conclusions. The account provided to date represents only a rough sketch of what limitations on preparatory offences might look like.[184]

Very few of the constraints operate in a clear cut, 'yes' or 'no' fashion; only the fair imputation and direct proscription constraints can boast this feature. Unfortunately, in the context of preparatory offences, these constraints do little to limit the scope of the

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[182] A more thorough discussion is provided by Edwards. He also argues that the exclusion of the target wrongdoing from judicial consideration is unjust, independently of the impact of this on the accuracy of convictions. See: Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (n 171) 736-743.

[183] Further rule of law constraints exist: for example, due process, the right to a fair trial, equality of arms etc. However, these rule of law constraints are not the focus of this thesis, as they are not directly relevant to the question of criminalisation. See: T.R.S. Allan, 'The Rule of Law' in D. Dyzenhaus and M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016).

[184] This is acknowledged by key contributors to this literature: Ashworth and Zedner, *Preventive Justice* (n 24) 226-7; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 32; Husak, *Overcriminalization* (n 21) 121, 176-7.

criminal law. The fair imputation constraint is met in every offence of ulterior intent by virtue of the intent element. So too, most, if not all, offences of this type that have been enacted have had as their end the prevention of acts that are undoubtedly justifiably criminal, such as the prevention of terrorist attacks or child sex offending.

Most of the constraints that are of significance in determining the limits of preparatory offences depend instead upon evaluative exercises that are deeply contestable. For example, the particular nature and the gravity of wrongdoing in the case of a preparatory offence with ulterior intent is open to debate. So too is the appropriate balance to be struck in applying the Standard Harms Analysis, or in determining whether a sufficiently 'significant risk' is posed by the conduct in question. Both the wrongfulness constraint and the harm constraint, then, continue to prove profoundly difficult in application. Not least because, in the preventive context, the harm constraint is further complicated by questions of uncertainty.

The least restrictive approach constraint cannot readily be applied without a prior determination of what an appropriate level of risk reduction is, and how much autonomy should be sacrificed in pursuing this. Only then can it be determined if the criminal law, and a particular offence formulation, represents the least restrictive means of achieving this level of regulation. The rule of law constraint is also of limited use without a prior determination of what mischief the offence is designed to capture; that is, what level of wrongdoing and risk creation is to be targeted by the offence. Only then can questions of clear drafting and avoidance of over-inclusion arise. The burden of proof constraint is procedural in nature and does not aid in determining the substantive questions outstanding.

Therefore, a huge amount of very difficult work remains in determining how these constraints should be applied. At present, many of the constraints are so open-textured that two people might apply them to a given preparatory offence and come to opposite conclusions about whether the offence is justified. It is for this reason that Husak observes: '[c]ommentators can expect to flounder until they gain more experience applying a theory of criminalization.'[185] How then are we to provide content to these constraints, and to gain experience in applying them?

4. A Way Forward

My proposed approach to making headway in this difficult field is to consider the relatively familiar offences: attempt, conspiracy, and possession with intent offences. The general offences of attempt and conspiracy, and specific offences targeting possession of items with an ulterior intent, are long-standing features of Anglo-American criminal law. Their justifiability has been the subject of considerable debate already. These offences all share a structural similarity with the preparatory offences with which I am concerned: they comprise a minimal act or possession requirement and an intent to commit further crime. Because of this similarity, debates about the justifiability of these offences have generated nuanced discussions of the very issues that are pertinent in determining how to apply the identified constraints to preparatory offences. Therefore, careful consideration of these familiar offences will make it possible to gain insights into how these constraints might be applied. Furthermore, the application of the constraints to relatively uncontroversial, familiar offences will provide useful examples, which can be referred to by analogy when trying to apply the constraints in future to more contentious offences.

To this end, the following chapters will consider each offence in turn. They will first canvas the key debates pertaining to their justifiability and scope. They will reach

[185] Husak, *Overcriminalization* (n 21) 145.

conclusions as to how these debates ought to be resolved. In Chapter Six these insights will be linked to the constraints on preventive offences identified in this chapter, showing how the constraints might be refined or fleshed out, and how they should be applied. Consideration of the offences of attempt, conspiracy, and possession with ulterior intent will, in this way, generate significant insights into the content and application of the constraints to preparatory offences specifically, and preventive offences more generally.

III

Lessons from Attempts Law

This chapter will seek to develop further liberal criminalisation theory. It will do so by exploring the theory of attempts, arguing that key theoretical debates and conclusions in this context can inform discussion about the validity of preparatory offences. Debates in attempts theory provide insights into how the moral wrongfulness of an offence is to be determined, how relevant risk is to this assessment, and how important respect for autonomy may be in determining the appropriate scope of the criminal law.

This chapter begins by explaining why the theory of attempts is a useful resource upon which to draw. It will then map the routes taken by competing theories in determining why attempts should be criminalised, and how much a person with a criminal intent must have done to be liable for attempt. It will outline a central debate in the theory of attempts, which is whether culpability should be determined in subjectivist or objectivist terms. It will further demonstrate the complex interplay between objectivist and subjectivist accounts of culpability and other principles – such as respect for autonomy – in determining the scope of attempts law. It will argue for an objectivist account of culpability. Accordingly, it will set out and critique Duff's leading objectivist account of attempts. This critique will focus on two potential difficulties with Duff's account.

The first difficulty in Duff's account of attempts is his reliance on the concept of attack. This chapter will argue that this account does not adequately delineate the appropriate boundary between mere preparation and attempts. Instead, it will propose a 'manifest danger' test for this boundary. In doing so, it will engage with potential difficulties involved in objectively assessing danger. This leads to a consideration of an alternative account offered by Fletcher, which he argues overcomes the difficulties inherent in a manifest danger approach. This chapter will reject his alternative as an adequate account of attempts liability. Accordingly, it will argue that, despite some issues in implementing the manifest danger approach, it represents the best account of attempts law and its limits.

The second potential difficulty with Duff's approach concerns his explication of what 'respect for autonomy' requires of the criminal law. As this chapter will show, Duff's account of autonomy is central to his explanation of why the law of attempts should be drawn narrowly. However, Duff does not fully explain why respect for autonomy entails what he claims that it does. Further, other authors have contested his approach to autonomy and this chapter will canvas these debates. In order to resolve the question of what respect for autonomy entails for the purposes of the criminal law this chapter will draw on the work of two critical criminal law theorists, Ramsay and Carvalho. These theorists enable us to perceive a central ambivalence in the concept of autonomy as it is deployed in the criminal law. An understanding of this central ambivalence avoids oversimplified characterisations of autonomy, and what respect for autonomy demands. In light of this insight as to the nature of autonomy, the core question as to the appropriate scope of the criminal law can be reframed: the question to be addressed is not 'what is required to respect citizens as autonomous agents?' but rather 'what balance between trust and reassurance should the criminal law embody?' To answer this question, it is necessary to subscribe to a particular vision of political community. This chapter will provide preliminary reasons for thinking that the vision of political community embodied in a broad law of attempts is undesirable. On this account, a narrow law of attempts should be favoured. The chapter will ultimately conclude in favour of a law of attempts of the scope set out in the England and Wales Law Commission's proposals.[186]

1. Why Consider the Theory of Attempts?

The theory of attempts is relevant to the question of criminalisation of preparatory offences in two key ways. First, any account of the criminal law must explain why attempts are criminalised.[187] Given the structural similarity between attempts and preparatory offences the reasons deployed in support of criminalising attempts will cast light on the possible justification of preparatory offences. In England and Wales, a person is liable for attempting to commit an offence if, with the intention to commit an indictable offence, she performs an act that is more than merely preparatory to the commission of the offence.[188] Attempts are structurally analogous to preparatory offences in that, to be liable, the actor must have had an intention to commit a crime and have engaged in some act; however, this conduct need not have caused harm. This is true of preparatory offences as well, although critically preparatory offences intervene earlier in the defendant's criminal enterprise than attempts law. For example, consider section 15 of the Sexual Offences Act 2003. This requires the defendant to have met or communicated with a person under 16 and, at a minimum, arranged to meet that person, with the intention to commit a relevant offence against that person at some time in the future. There is, therefore, an intention to commit a further crime (a sex offence) paired with acts which

[186] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35).

[187] Douglas Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (2012) 6 Criminal Law and Philosophy 399, 399.

[188] Criminal Attempts Act 1981 s 1(1) and (4): The section applies to indictable offences generally, although there are some specific exceptions. For example, it is not a crime to attempt to conspire to commit a crime, even though conspiracy is an indictable offence.

need not themselves have caused harm (communication and an arrangement to meet). This preparatory offence, therefore, shares the same basic structure as attempts. In most legal systems it is assumed that where a wrong is justifiably criminalised, so too is an attempt thereof.[189] Criminalisation of an attempt is not considered on an offence by offence basis but is extended automatically to all indictable offences. It is the task of legal philosophers to explain why attempts are generally criminalised,[190] and their explanations may help to identify possible justifications for preparatory offences. That is, the justifications underpinning general attempts law might extend to justify specific preparatory offences. Alternatively, in explaining the limited scope of attempts liability, the explanations of legal philosophers may help to identify possible objections to preparatory offences which, although structurally similar, are broader in scope.

Second, an account of attempts must grapple with the difficult question of how early in a criminal enterprise conduct may be criminalised or how much an actor with a criminal intention must have done (if anything) to be justifiably subjected to criminal sanction.[191] The fixing of the conduct requirement in criminal attempts has proved contentious and has been the subject of a significant body of theory. Similarly, the

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[189] Ashworth, 'Attempts' (n 41) 126. Husak identifies a number of exceptions to this general assumption, but nevertheless concedes that it is generally true: Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 399-400. Ashworth and Zedner argue that this general assumption is not applicable when the substantive crime to which attempts liability attaches prohibits conduct that does not itself cause harm. As more and more substantive offences are defined in the inchoate mode, the legitimacy of a general law of attempts is undermined: Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 545-6; Ashworth and Zedner, 'Just Prevention' (n 22) 284-5. This is an important observation. Nevertheless, this thesis will not engage with the difficulties posed by double-inchoate liability. It will be constrained to considering whether preparatory offences are justifiable. It will not address the further question of whether an attempt (or conspiracy etc) to commit a preparatory offence should also attract liability, because this question does not arise until the legitimacy of the preparatory offence itself has first been established.

[190] Gideon Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (Oxford University Press 2010) 21; Antony Duff, *Criminal Attempts* (Clarendon Press 1996) 128; Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 401.

[191] Ashworth, 'Attempts' (n 41) 125.

minimal conduct requirement of many preparatory offences is a key basis on which they are criticised. For example, the conduct requirement of section 15 was deeply contested during the legislative process. Proponents of the offence argued that a minimal conduct requirement was necessary to enable early intervention. Detractors branded the offence a 'thought crime' because of its thin conduct requirement.[192] Debates in attempts theory therefore parallel debates relating to the validity of preparatory offences.

It is worth noting a possible objection: attempts theory is of limited applicability in the context of specific preparatory offences because it relates to an inchoate crime of general application. Attempt theorists are seeking to justify an offence which attaches automatically to most indictable offences, and therefore a conduct requirement which is appropriate for all attempts. In contrast, preparatory offences are stand-alone substantive inchoate offences, with specifically defined intent and conduct requirements. These requirements have been tailored to address particularly grave mischiefs specifically, whether that be child sex offending or terrorism. Indeed, attempt theorists readily acknowledge there might be good reasons for creating substantive inchoate offences that supplement attempts law.[193] If preparatory offences might be justified independently of the principles underpinning attempts, why consider the theory of attempts at all?

Most obviously, if a preparatory offence exists to supplement a supposedly inadequate attempts law, it is worth considering why the law of attempts is so limited in its application. Is this the approach the law of attempts should take? And, if not, would

[192] Liberty, 'Liberty's Second Reading Briefing on the Sex Offences Bill in the House of Lords' (n 36) §18.

[193] Duff, *Criminal Attempts* (n 190) 142; Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 307. The Law Commission also acknowledged the possibility of piecemeal legislative supplementation of a general law of attempts to address its perceived deficiencies: England and Wales Law Commission, 'Conspiracy and Attempts' (Law Com No 318, December 2009) [8.57-9], [8.68-9]. See fn 189 above for the difficult issues that substantive inchoate offences raise in relation to double-inchoate liability.

an appropriately defined law of attempts adequately address the concerns raised by the preparatory conduct in question? It will help to clarify whether any given preparatory offence covers conduct which attempts law ought to cover; or whether it is an offence intended to criminalise conduct at a point earlier than attempts liability.[194] If it is the latter, it is necessary to consider whether the reasons for limiting the scope of attempts liability militate against the preparatory offence.[195]

There are also broader reasons to consider attempts theory: 'criminal attempt involves the very foundations of criminal liability'.[196] Any consideration of attempts necessarily leads theorists deep into criminal law theory and, further, into philosophy of action, moral philosophy, and political philosophy.[197] Attempts theory, therefore, provides a rich resource, as theorists directly engage with questions of the underpinning rationale and limits of the criminal law. We should not be prevented from utilising this resource by an overly rigid insistence on the separation of the general and specific parts of the criminal law. Therefore, this thesis seeks to engage with the general theory of attempts liability in order to identify general principles which should inform debates on the limits of the criminal law. These general principles will then be applied to assess the justifiability of preparatory offences.

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194 Ashworth and Zedner, 'Prevention and Criminalisation' (n 24) 545.

195 This approach addresses Ashworth's complaint that 'the restraining principles identified in relation to the conduct element of attempts do not receive adequate weight in decisions to create new preparatory… offences': Ashworth, 'Attempts' (n 41) 142. Husak also suggests 'progress in retarding the pernicious trend toward overcriminalization is more easily achieved if we emphasize the similarities… between attempts and crimes of risk prevention': Husak, ''Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 402-3. Cf. Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in Bernadette McSherry and others (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2008) 153.

196 Jerome Hall, 'Criminal Attempt. A Study of Foundations of Criminal Liability' (1950) 49 The Yale Law Journal 789, 789.

197 Ashworth, 'Attempts' (n 41) 141.

2. An Overview of the Theory of Attempts

'The rationale for having inchoate offences must be closely connected to the rationale for the criminal law itself.'[198] Recalling the mixed theory of the criminal law, attempts liability must be justified on both utilitarian and retributivist grounds. In terms of prevention of harm, attempts liability arguably plays an important deterrent role. The threat of conviction and punishment for committing a crime is intended to deter would-be offenders. This deterrent effect would be weakened if there were no law of attempts.[199] In addition to gains in deterrence, attempts law also strengthens the preventive function of the law by enabling police to intervene before harm is fully realised.[200] Retributivist arguments for the law of attempts focus on the wrongfulness of trying to commit a crime. If those who complete crimes deserve the public censure of criminal conviction and punishment, then so too do those who have 'sufficiently committed themselves to the wrong, even though they have not yet caused it'.[201] This reflects a basic moral intuition that if it is wrong to perform an act, it is also wrong to try to perform that act.[202]

Beyond this very basic account, the foundations of attempts law are deeply contested. In attempts theory there is a critical disagreement between 'subjectivist' and

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[198] Ashworth, 'Attempts' (n 41) 129.

[199] *Ibid*; Antony Duff, *Criminal Attempts* (n 190) 133.

[200] Ashworth, 'Attempts' (n 41) 129.

[201] *Ibid* 130; Duff, *Criminal Attempts* (n 190) 134. Finkelstein makes the novel argument that putting others at risk is itself a harm, for which a person should be held responsible, see: Claire Finkelstein, 'Is Risk a Harm?' (2003) 151 University of Pennsylvania Law Review 963. For a convincing critique of Finkelstein's argument see: Ashworth and Zedner, 'Just Prevention' (n 22) 290.

[202] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 21. For a discussion of the rationale for attempts liability see also: Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) [12.16], [14.8].

'objectivist' theorists.[203] Both subjectivists and objectivists agree that a person should be criminally liable only for what can properly be ascribed to her as an agent but disagree about the proper criteria for ascribing actions.[204] Subjectivists and objectivists disagree as to how to determine what a person is responsible for. This chapter will evaluate subjectivist and objectivist accounts of the law of attempts, and the implications of each position in determining how much a person must have done to be liable for attempt and, in turn, the implications of each position for the validity of preparatory offences. It will then argue for an objectivist account of the law of attempts.

2.1 *A Subjectivist Account of Attempts*

Subjectivists argue that a person should only be held responsible in accordance with their mental state; that is, a person should be responsible for what they intend and believe. If they have acted then their responsibility for that action is also to be assessed subjectively.[205] Broadly speaking, the subjectivist position is committed to two principles: the intent principle and the belief principle. The intent principle states that 'actors should be liable according to what they intended to do, and not according to what actually did or did not occur.'[206] The belief principle states that 'actors should be judged on the basis of what they believed they were doing, not on the basis of the actual facts or circumstances'.[207] Taken together, these principles mean that a person will be responsible

[203] Prominent objectivists include Duff and Husak. Prominent subjectivists include Hart, Ashworth, Yaffe, Alexander and Ferzan.

[204] Duff, *Criminal Attempts* (n 190) 146.

[205] *Ibid*.

[206] Ashworth, 'Attempts' (n 41) 137.

[207] *Ibid* 137-8.

in accordance with her understanding of what she was doing, including her understanding of the risk of harm she was creating. The actual consequences of her actions in the world—whether they caused harm or a risk of harm—are not relevant to an assessment of her culpability.[208] The belief driving this theory is that people should only be responsible for things that they control.[209] The consequences of our actions, being beyond our control and subject to chance, are not appropriately considered when assessing culpability. Ashworth summarises this train of thought nicely:

> In a system of official censure such as the criminal law, the aim should be to draw a straight line through the vagaries of fortune and the vicissitudes of life, minimizing the influence of chance and keeping as close as possible to the actor's choice and control.[210]

Accordingly, a subjectivist would hold a person culpable for an attempt because of her 'willingness... to make and act on objectionable choices.'[211] By intending to commit a crime and taking action towards committing it, she behaves in a way which is (sometimes) worthy of criminalisation. It is irrelevant to our assessment of her culpability for attempt whether she causes any harm, or even whether she creates a risk of harm. Similarly, a subjectivist account of a preparatory offence would be that a person is culpable under this offence because she intended to commit a crime and took steps she

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208 This is a choice account of subjectivism. An alternate form of subjectivism focusses on character. An obvious critique of this approach is that, in judging an agent's character instead of her acts, the criminal law illegitimately regulates the moral or private domain. This thesis will limit discussion to choice accounts of subjectivism. For an authoritative critique of choice and character theories of culpability see: Jeremy Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 Law and Philosophy 193. See also Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 21, 30; Christopher Clarkson, 'Attempt: The Conduct Requirement' (2009) 29 Oxford Journal of Legal Studies 25, 37; Duff, *Criminal Attempts* (n 190) 147-8, 176-7.

209 Thomas Bittner, 'Punishment for Criminal Attempts: A Legal Perspective on the Problem of Moral Luck' (2008) 38 Canadian Journal of Philosophy 51, 62.

210 Ashworth, 'Attempts' (n 41) 138.

211 Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 274.

believed would enable her to do so. This culpability underpins preparatory offences, not any risk created by a person engaging in this conduct.[212]

This account of why attempts are criminalised has implications for determining the conduct requirement of attempts. For subjectivists, conduct is important because of 'what that conduct expresses about the agent's intention.'[213] It is possible for a subjectivist to argue that anyone with the intention to commit a crime is sufficiently culpable to be criminally liable. Conduct is required (if at all) only for the purposes of providing reliable evidence of this intention.[214] However, it is not necessary for subjectivists to adopt this position. Instead they might argue that a person is not sufficiently culpable to be criminally liable until they have started to act on their intention to commit a crime, or indeed until they have gone a considerable way toward commission of the offence. The law is still focussed on the mental state of the actor, but the relevant mental state involves a choice to act which is only present when an act is present too.[215] Subjectivism is thus consistent with requiring no conduct at all (if there is other reliable evidence of intent), a single act, or something more substantial.[216]

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[212] Fletcher argues that subjectivist accounts are thus concerned with dangerous people, as evidenced by their mental states, as opposed to an objectivist account which is concerned with dangerous acts. For Fletcher, this marks a dangerous step away from a traditional criminal law paradigm to an administrative paradigm more appropriate to the context of civil commitment: see George P Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 166-174. While a subjectivist account certainly makes a focus on the dangerousness of a person possible, it is not clear to me that it necessarily entails such an approach. As the next paragraph sets out, a subjectivist position can still be consistent with a focus on a criminal act.

[213] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 257.

[214] Duff, *Criminal Attempts* (n 190) 166-7; Fletcher, *Rethinking Criminal Law* (n 212) 138.

[215] Duff, *Criminal Attempts* (n 190) 166; Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 12-3.

[216] Cf. Fletcher, *Rethinking Criminal Law* (n 212) 138. Fletcher states that subjectivists tend to favour a maximalist approach to criminalisation of attempts. In practice, to determine what a person thought she was doing it is generally necessary to draw inferences from what she was actually doing. This suggests that the difference between subjectivism and objectivism is less stark in practice. Nevertheless, there will be cases where what a person actually did is shown to be at odds with what she thought she was doing. For example, a person may try to poison an enemy, but mistakenly add sugar instead of poison to her tea. There may be independent evidence of the intention to kill by

According to a subjectivist account of culpability, in assessing the legitimacy of a preparatory offence, a subjectivist would pose the following question: *prima facie*, is a person sufficiently culpable to be criminally liable if they intended to commit an offence and took steps they believed would enable them to do so? This culpability assessment would necessarily be balanced against principles such as freedom from state interference in determining whether criminalisation is warranted. Importantly, however, the risk actually caused by a person in committing the preparatory offence would not feature in assessing her culpability. All that would be relevant was the person's intention, and how confident she was that she would succeed in executing it.

2.2 *An Objectivist Account of Attempts*

Objectivists do not deny the relevance of subjective dimensions of action: what a person intended and believed remains crucial to any culpability assessment. They argue, however, that actions ascribed to people must also be described in objective terms.[217] A person is also responsible for the actual consequences of her actions, not only for what she thought she was doing.[218] Objectivists argue that this reflects our ordinary approach to actions and blame, and that we should not depart from it.[219] As a matter of course, we describe actions in terms of the consequences they cause. We differentiate between an

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adding poison to her tea, such as a diary entry. In these circumstances, a subjectivist account would dictate assessing the defendant's culpability with reference to what she thought she was doing, not what she actually did. In cases of mistake, such as these, the distinction between subjectivism and objectivism remains significant.

[217] Duff, *Criminal Attempts* (n 190) 146. Fletcher puts it another way. He states that the premise underlying objectivist theory is that no criminal liability should attach unless the defendant's conduct objectively conforms to criteria specified in advance, and his mental state should bear solely on his accountability for this act in violation of the law: Fletcher, *Rethinking Criminal Law* (n 212) 157.

[218] Duff, *Criminal Attempts* (n 190) 237. Objectivists may also consider what a reasonable person would have believed or expected in the circumstances: *Ibid* 194.

[219] *Ibid* 202-3.

actor who has tried to kill someone and an actor who has killed someone: we assess their culpability differently because of the different consequences their actions have wrought.[220] Subjectivists claim that this is irrational, and so ordinary meanings should not prevail.[221] Objectivists counter that, since ascription of responsibility for actions is a social response to actors, the social meaning of actions should be relevant in this process. '[B]lame, as a social response to wrongdoing is properly focused on... action as a whole, as engagement in and with the world.'[222] An objectivist account of attempts would, therefore, describe culpability in more complex terms than a subjectivist. The intentions and beliefs of a person who has attempted a crime are relevant to an assessment of her culpability, but so too is the effect she has had on the world. It is relevant whether she causes harm, or risks harm, or has some other objective effect of normative relevance.[223] She should be liable to a more severe punishment if she caused harm than if she did not. An objectivist account of a preparatory offence would describe the culpability of a person who commits that offence in terms of the intentions and beliefs she held, but it would also take into account the risk she created that the target offence would be committed in the future.

This account of attempts liability has implications for the conduct requirement of attempts. Objectivist accounts conceive of conduct as constitutive of liability and not

[220] Duff, *Criminal Attempts* (n 190) 341.

[221] Andrew Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (1987) 19 Rutgers Law Journal 725.

[222] Duff, *Criminal Attempts* (n 190) 345. See also Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 208).

[223] Alternatively, attempts can be understood as evidence of dangerousness on the part of the actor. An attempt suggests that the actor will either go on to complete a crime or has previously done so. However, this approach violates the presumption of innocence, by punishing people for past or future crimes that have not been proven: Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 27-8, 30.

merely as evidence of intention. This is because without an act an agent makes no impact on the real world which can be assessed in objectivist terms.[224] However, more than this, objectivist accounts justify the criminalisation of attempts in part with reference to the impact the attempt has had on the world; for example, the creation of a risk of harm. The conduct requirement will therefore be defined in terms of when sufficient risk has been created to warrant criminalisation.[225] Objectivism itself cannot tell us precisely what combination of mental states and risk of harm warrants criminalisation. There is nothing inherent in the objectivist account that tells us when a risk is serious enough to justify the intervention of the criminal law.[226] Nevertheless, the objectivist position does entail that the culpability of a person—assessed with reference to her mental state, her acts and the effect that she has on the world—is relevant in determining the conduct requirement of attempts. Therefore, in assessing the legitimacy of a preparatory offence, an objectivist would ask: *prima facie* is a person sufficiently culpable to be criminally liable if they intended to commit an offence, took steps toward achieving this, and created a risk that the intended offence would take place?[227] Again, this culpability assessment would be weighed against principles such as freedom from state interference to reach an ultimate decision on criminalisation.

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[224] Duff, *Criminal Attempts* (n 190) 316; Fletcher, *Rethinking Criminal Law* (n 212) 138.

[225] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 94.

[226] Although, as Fletcher notes, objectivist theory implies that not any act will do. The act must objectively conform to some criteria specified in advance, and not merely evidence intention: Fletcher, *Rethinking Criminal Law* (n 212) 157-8. Nevertheless, the question of what sort of act is sufficient is still one that must be answered with reference to other principles.

[227] Assuming for now that, in accordance with common sense, such a risk is created. See: Husak, 'Why Punish Attempts At All? Yaffe on "The Transfer Principle"' (n 187), 402. This claim is not uncontroversial and will be explored in more depth later in this chapter.

2.3 *Additional Principles Relevant to Attempts Theory*

As already noted, neither subjectivist nor objectivist accounts of attempts liability automatically generate a particular conduct requirement for attempts. Each account commends different approaches to assessing the culpability of an offender. This is significant, but culpability represents only one factor amongst many in determining the scope of attempts liability, and so too in determining the validity of preparatory offences. It is quite possible for a person to adopt the subjectivist position that holding an intention to commit a crime is so culpable that it *prima facie* warrants criminalisation, but nevertheless to conclude that the need to respect individual rights and freedoms from state interference militates against criminalising intention *per se*. A theorist may consistently hold that moral assessments of culpability should be made on a subjectivist basis, but that it is not appropriate for the state to respond via the criminal law where there is no significant impact of the person's conduct on the world. For example, Ashworth—a subjectivist—advocates for a robust conduct requirement in the law of attempts, citing the principle of state respect for autonomy as his justification.[228]

Duff acknowledges this complexity, although he does so by drawing a distinction between what he terms 'intrinsic' and 'extrinsic objectivists'. Intrinsic objectivists, such as Duff himself, are those who insist on consideration of objective factors because of their moral theory of culpability. Extrinsic objectivists, such as Ashworth, have a subjective theory of moral culpability, but for reasons flowing from political philosophy, adopt an objectivist position in relation to legal culpability.[229] Although Duff captures the same basic insight here, his nomenclature risks confusion. It is not entirely accurate to describe

[228] Ashworth, 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' (n 221) 750-1.

[229] Duff, *Criminal Attempts* (n 190) 196.

a moral subjectivist who has recognised constraints on his subjectivism in the legal context as an 'objectivist'. For example, even though Ashworth may argue for a conduct requirement similar to that an objectivist might support, he maintains that sentencing levels for attempts should be set in accordance with subjectivist principles. Therefore, this thesis will use the labels objectivism and subjectivism to refer to approaches to assessing moral culpability. It will consider separately other factors, such as respect for autonomy, which affect how these moral positions are carried over into the criminal law.

3. In Favour of an Objectivist Account of Attempts

Intuitively, we adopt an objectivist approach to moral assessment: it is consistent with the way in which we describe actions and ascribe responsibility.[230] Nevertheless, subjectivists argue that we ought not trust our intuitions. Our natural tendency to consider the consequences of a person's actions in assessing her culpability means that we consider things over which she had no control. This is unfair. The subjectivist argument is not persuasive. There are positive reasons for an objectivist account, and there are reasons to doubt the intelligibility of a subjectivist account.[231]

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[230] Duff, *Criminal Attempts* (n 190) 202-3, 347.

[231] One strategy for deciding between the two accounts which I will not pursue is considering their implications in cases of 'impossible' attempts. Some theorists have turned to consider these unusual cases, and the different conclusions that subjectivist and objectivist approaches dictate, as means of determining which approach fits our moral intuitions: see, for example, Fletcher, *Rethinking Criminal Law* (n 212) 146-155, 174-183; Duff, *Criminal Attempts* (n 190) 154-165, 206-233. Nevertheless, I do not consider this the best way forward. Intuitions as to the appropriate response in cases of impossible attempt vary too greatly for them to be relied upon. Nor is it out of the question to adopt an objectivist or subjectivist position, but to carve out exceptions on some other basis to address the question of impossible attempts if this is considered necessary.

3.1 *Arguments in Favour of Objectivism*

A key argument offered in favour of an objectivist account is its intuitiveness.[232] In the legal context, there are good reasons not to depart from the 'natural' approach taken to assessing responsibility, in order to ensure that the law is viewed by the public as legitimate and is accurately applied by juries.[233] Furthermore, it is arguable that a social understanding of action, as opposed to a subjectivist understanding, is particularly apt in the context of moral culpability assessments because placing blame is an essentially social activity.[234] A social understanding of action views actions as taking their meaning in part from their interaction with the social and material world. On this account, we understand our own and other's agency with reference to the effects they have on the world.[235]

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[232] Duff, *Criminal Attempts* (n 190) 202-3; Nils Jareborg, 'Criminal Attempts and Moral Luck' (1993) 27 Israel Law Review 213, 222.

[233] Lacey, 'Principles, Policies and Politics of Criminal Law' (n 44) 13; Thomas Nadelhoffer, 'Attempts: In Ordinary Language and the Criminal Law: A Commentary' (2012) 3 Jurisprudence 475. While ultimately arguing for an objectivist approach to moral culpability, Bittner acknowledges the possibility of adopting a subjectivist approach to moral culpability but nevertheless believing that it would be a mistake to try to make our legal policies conform to this account: Bittner, 'Punishment for Criminal Attempts' (n 209) 57. Concerns about legitimacy and jury application of the law could underpin such a belief.

[234] Duff, *Criminal Attempts* (n 190) 344-5. Further to this, Jareborg argues that a subjectivist account is not appropriate for social morality. He points to the connection between subjectivist accounts and religious morality, arguing that this approach suggests the most important aspect of morality is the relation to God, not the relation to other persons. He further questions whether a subjectivist approach is practicable in 'large, anonymous moral communities' where there may not be time for deep investigations to be carried out in our every-day moral judgments. Further, he argues that as the criminal law is primarily designed to prevent different sorts of harm, this makes an objectivist approach a 'natural' fit in the criminal law: Jareborg, 'Criminal Attempts and Moral Luck' (n 232) 225-6. However, none of these arguments are persuasive. There is nothing about a subjectivist approach that is incompatible with being held to account by a community, regardless of the supposed religious connotations of such an approach. Further, it is not clear that an objectivist account makes every-day moral judgements simpler, as the mental state of the person is still relevant on such an account. Finally, Jareborg's characterisation of the criminal law is contentious. The criminal law could be described as primarily designed to punish wrongdoing and then it is not at all clear that an objectivist approach is a 'natural' fit. A variant on Jareborg's first two arguments is provided by Bayles. He argues that to adopt a subjectivist approach is to 'usurp God's role in a fantasy world of perfectly apportioned… desert. The law is a human concern, and human beings lack the knowledge and power to assure that... moral worth [is] perfectly apportioned': Michael Bayles, 'Punishment for Attempts' (1982) 8 Social Theory and Practice 19, 25.

[235] Duff, *Criminal Attempts* (n 190) 294; Cf. Larry Alexander, 'Duff on Attempts' in Rowan Cruft and others (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011).

Nevertheless, some theorists, such as Ashworth, disagree with the claim that objectivist assessments of blame are 'natural': there are some offences defined in accordance with subjectivist principles which do not jar our intuitions or cause problems in application. He argues that we cannot sustain a claim that objectivism is 'natural' when a substantial minority of offences are defined in accordance with subjectivist principles. However, Ashworth does concede that we have strong objectivist intuitions in relation to offences of violence.[236] Most preparatory offences are concerned with potential future offences of violence. For example, consider section 15 of the Sexual Offences Act 2003, the offence of meeting a child following sexual grooming. It is uncontroversial that in the case of child sex offending, our intuitive approach to culpability assessments takes into account whether a child has in fact been victimised. Similarly, in the case of section 5 of the Terrorism Act 2006, the offence of preparation of terrorist acts. Our intuitive approach to culpability assessments when considering terrorist offending will take into account whether or not a terrorist attack actually occurred, and whether it resulted in physical harm or death. Therefore, at least in the context of preparatory acts directed toward future offences of violence, there seems a strong *prima facie* case for an objectivist account of culpability. Accordingly, in assessing the culpability of an offender under a preparatory offence, it will be relevant that their conduct has not yet culminated in the target offence.

3.2 *Arguments Against Subjectivism*

There are good reasons to believe that the subjectivist account is unintelligible. This can be demonstrated by challenging the dichotomies upon which the account

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[236] Andrew Ashworth, 'The Criminal Law's Ambivalence About Outcomes' in Rowan Cruft and others (eds) *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2011) 170.

depends. Arguably, it is not possible to distinguish meaningfully between objective and subjective aspects of actions, therefore we cannot describe actions in purely subjective terms, as the subjectivists insist we do.[237] Further, we cannot draw a clear line between control and chance, undermining subjectivist claims that we should exclude matters of chance from culpability assessments.[238] Another argument that is made against the subjectivist account is that many subjectivists seem uncomfortable accepting the radical implications of their own subjectivist principles. For example, consider the case of a person who sleeps with someone she mistakenly believes to be under 16 years old; her sexual partner is in fact 16. According to a subjectivist account she should be liable for sexual activity with a child. But this seems problematic and even subjectivists shy away from this conclusion. Critics, such as Duff, suggest that this indicates that subjectivists too are moved by objectivist intuitions.[239] Nevertheless, this final argument does not carry much force, as there may be philosophically respectable reasons for recognizing exceptions to a subjectivist approach, which are consistent with generally endorsing a subjectivist account.[240]

Duff mounts an effective challenge to the dichotomy between objective and subjective aspects of actions. He begins by extensively critiquing subjectivist accounts of action. He considers and dismisses accounts which variously identify action with bodily movement, with volition, and with trying, arguing that each ultimately fails to reveal to us what action is.[241] Duff concludes that reductivist approaches 'estrange us from action'

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[237] Duff, *Criminal Attempts* (n 190) 206, 238.

[238] *Ibid* 206, 238; Thomas Bittner, 'Punishment for Criminal Attempts' (n 209) 70-79.

[239] Duff, *Criminal Attempts* (n 190) 145-6, 154, 163, 165, 399; Cf. Alexander accepts liability being imposed in such a case: Alexander, 'Duff on Attempts' (n 235) 221-2.

[240] Ashworth, 'Attempts' (n 41) 140.

[241] Duff, *Criminal Attempts* (n 190) 239-290.

instead of bringing us closer to an understanding of it.[242] He argues that what subjectivists overlook is the essential social dimension of action. Duff uses a painting analogy to reinforce this argument:

> [A]lthough natural science can tell us much about the physiological mechanisms involved in action, it cannot tell us 'what action is', any more than a scientific account of the physical materials and structure of paintings can tell us 'what painting is' as a social, aesthetic enterprise.[243]

Duff therefore argues for an objectivist philosophy of action. This argument is bolstered by his already familiar claim that the law should map onto the 'natural' or intuitive meaning of concepts. As the criminal law is concerned with apportioning blame, and apportioning blame is a social activity, the law should adopt a social understanding of actions and culpability.

Duff and Bittner effectively challenge the distinction between control and chance. This distinction underpins the subjectivist argument that culpability assessments should 'draw a straight line through the vagaries of fortune, … keeping as close as possible to the actor's choice and control.'[244] Bittner challenges the subjectivist claim that we are in control of our intentions and beliefs, such that we can be responsible for them, but we are not in control of the consequences of our actions. He argues that '[w]e can never completely insulate those parts of ourselves that we care about most from contingency no matter how far away from the world and into the subject we withdraw.'[245] Bittner provides the example of a person who is angered by a companion; she is on the cusp of forming

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[242] Duff, *Criminal Attempts* (n 190) 294.

[243] *Ibid* 246. See also Horder, 'Criminal Culpability: The Possibility of a General Theory' (n 208).

[244] Ashworth, 'Attempts' (n 41) 138.

[245] Bittner, 'Punishment for Criminal Attempts' (n 209) 76.

the intention to strike her companion. Just at that moment, a speck of dust causes her to have a sneezing fit, or a loud noise distracts her. When this distraction has passed she finds her temper has cooled enough that she no longer has the impetus to form the intention to strike her companion. Is it not partly a matter of luck that she did not form a violent intention in these circumstances? In this way Bittner effectively illustrates that it is not sustainable to see our intentions as totally within our control, as the subjectivists suggest. Instead, he argues that we should concede that every part of our lives is touched by luck, to some extent.[246] This is persuasive.

Duff's objection highlights the role of situational and constitutional luck in our actions.[247] The concern raised by situational luck is that the circumstances a person find themselves in—some of which are more conducive to law-abiding behaviour than others—are, at least to a degree, a matter of luck. Constitutive luck refers to the claim that it is a matter of luck how a person's characters is formed—for better or worse—in terms of her genes and upbringing. Subjectivist accounts assume that a person has control over her choices. However, a person's constitution and circumstance will undoubtedly influence her choices. If a person's constitution and circumstance are subject to the 'vagaries of fortune', then choice becomes an inadequate basis upon which to assess culpability in subjective terms. To avoid this difficulty, subjectivists need to show that choices are made freely; or at least that the presence of situational and constitutional luck does not make culpability assessments based on choice unfair.[248]

Prominent subjectivist Ashworth adopts the strategy of acknowledging situational and constitutional luck, while maintaining that this luck does not deprive individuals of

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[246] Bittner, 'Punishment for Criminal Attempts' (n 209) 78.

[247] Duff, *Criminal Attempts* (n 190) 150.

[248] *Ibid* 150.

(a degree of) freedom of choice. Therefore, a person can be held responsible for her choices.[249] The adequacy of this argument can only be assessed by engaging with the vexed question of free will. Nevertheless, at first blush the subjectivist position seems hypocritical: subjectivists reject our 'natural' tendency to consider the outcomes of our actions but endorse our 'natural' tendency to consider ourselves as free agents. In order to justify such a position, the onus is firmly on subjectivists to provide an adequate account of free will. Perhaps a compatibilist account would suffice. Compatibilism aims to show that free will and responsibility are compatible with the fact that our characters and actions are completely caused by states of affairs that we could not possibly be responsible for. Compatibilism is the most common defence of free will and responsibility and is widely accepted amongst philosophers. Nevertheless, there remains a question about whether this conception of free will is compatible not just with responsibility, but with moral desert. As Tadros has observed, many philosophers do not think that a compatibilist account can support findings of moral desert, which are necessary to underpin a system of criminalisation and punishment. Tadros is optimistic that a robust compatibilist account of blame can be developed but is as yet unable to offer or point to one.[250] Subjectivists thus run into difficulties in providing an account of free will in support of their position.

The strength of the objectivist position is that it need not provide a philosophical account of free will at all. Objectivists argue that the law should map onto our intuitive conceptions of free will: we generally consider ourselves to have free will, despite the role of chance in our genes and upbringing and the circumstances we find ourselves in. Situational and constitutional luck may not be an insurmountable obstacle for subjectivist

[249] Ashworth, 'The Criminal Law's Ambivalence About Outcomes' (n 236) 159.

[250] Tadros, *Ends of Harm* (n 50) 62-6.

theorists, but these additional forms of luck do greatly complicate the simple picture they seek to present, undermining its persuasive force.[251]

In challenging the control-chance dichotomy, Duff and Bittner additionally call into question the subjectivist claim that we lack control over the outcomes of our enterprises. It is this claim that subjectivists rely on to justify the exclusion of objective results from culpability assessments. Duff concedes that we can never be completely certain we will achieve the effect we intend. He argues, nevertheless, that it is unduly sceptical to conclude on this basis that we can never control the outcomes of our actions.[252] Indeed, our natural conception of control distinguishes between outcomes we control, and outcomes that are a matter of luck. Relevant to this distinction are the skills and competencies of the actor in question.[253] For example, a very skilled billiards player may legitimately claim to have sunk a ball. It was no matter of luck that the ball moved into the table pocket, but a matter of her skill; she had control over the outcome. In contrast, a new billiard player who sinks a particularly difficult shot will be described as having 'beginner's luck'. In accordance with our ordinary conception of control, Duff argues that we should understand the omnipresent vulnerability of our actions to failure as follows: when actions sometimes fail to bring about the desired and expected result this is due to a loss of control that we generally have.[254] It is not the case that we lack

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[251] Another possible subjectivist response is outlined by Matravers. He argues that the criminal law is not underpinned by desert but instead a social contract which recognises the social good of maintaining a system of law. This is the social contract which we would agree to if we knew that situational and constitutional luck existed but did not know who would have good or bad luck. Matravers argues that it is not unfair to make culpability assessments based on choice, even though situational and constitutional luck exist, because the social contract would provide for this: Matravers, 'Political Theory and the Criminal Law' (n 49). However, such an account is deeply controversial and Matravers himself recognises the potential for his account to lead to the unpalatable conclusion that responsibility is irrelevant to justice.

[252] Duff, *Criminal Attempts* (n 190) 332.

[253] *Ibid* 330.

[254] *Ibid* 333. See also: Duff, *Answering for Crime* (n 38) 63.

control of all the outcomes of our actions. Therefore, we may rightly be held responsible for the outcomes we do control. This claim is, again, convincing to the extent that Duff's reliance on natural concepts convincing.

Bittner makes a very similar argument. He critiques subjectivist accounts of control as being overly simplistic, treating control as being either an all-or-nothing condition. The subjectivist claim that we do not control the consequences of our actions seems to depend on the assumption that whenever factors outside our knowledge or control have *any* influence at all on an outcome, this outcome is outside of our control. For an agent to have control, the outcome must be entirely uninfluenced by such factors. Bittner argues that this is an extreme and unrealistic account of what 'control' means.[255] Like Duff, he points to our ordinary understandings of 'control' and 'luck'. We might treat rolling a three in a game of dice as lucky, but we would not treat it as luck if a skilled marksman killed an enemy by shooting at them.[256] Our ordinary understandings of control and luck recognise that there is always an element of unpredictability in all aspects of life, and that control is a matter of degree.[257] A person has a very low level of control over a dice roll, and the outcome is appropriately described as lucky. We attribute to luck events and circumstances that are unpredictable or inexplicable, or that cannot be reliably produced or prevented.[258] On the other hand, while it is possible that a good marksman may fail to kill a person she shoots at, she does have a relatively a high degree of control over whether her enemy is killed. If she kills them, this would not appropriately be described as lucky simply because it was possible that some unknown factor could have

[255] Bittner, 'Punishment for Criminal Attempts' (n 209) 70.

[256] *Ibid* 72.

[257] *Ibid* 73.

[258] *Ibid* 74.

intervened to prevent this. This account of control and luck seems correct. Recognition that control of the outcomes of our actions may be imperfect, but still sufficient to ground culpability, further undermines the subjectivist response to the constitutive and situational luck difficulty. Recall that Ashworth argued that constitutional and situational luck do not deprive individuals of *a degree of* control over their intentions and beliefs. Similarly, the role of a degree of luck in determining the outcome of our actions does not deprive a person of a degree of control over that outcome. To suggest that constitutional and situational luck should be treated differently than outcome luck seems difficult to sustain.

These arguments do not completely refute moral subjectivism, but its credibility has been seriously undermined. Subjectivist accounts do not provide an adequate description of action or control and have difficulty addressing the problems of constitutional and situational luck. There is no good reason to depart from—and in fact there are good reasons to favour—our ordinary, objectivist understandings of action and blame.[259] Accordingly the culpability of a person who engages in conduct preparatory to a target offence should be assessed not just in terms of her intentions and beliefs, but also in terms of the impact that she has on the real world. It is not sufficient to justify criminalisation of this conduct that a person has an intention to commit a target offence. It remains to be considered whether and in what circumstances a person who takes preparatory steps has an impact on the world that is sufficient to justify criminalisation.

[259] Duff, *Criminal Attempts* (n 190) 347.

4. An Objectivist Account of Attempts:

4.1 *Duff's Attack Account of Attempts*

The most influential objectivist account of attempts is undoubtedly that provided by Antony Duff.[260] This is the obvious starting point when exploring the implications of an objectivist approach to attempts law. This section will set out Duff's account and then evaluate it. Duff understands attempts to be criminalised on both retributivist and utilitarian grounds. Where an agent has intentionally directed her conduct toward criminal harm, considerations of desert and prevention justify convicting her of an inchoate offence.[261] According to Duff, the point of the law of attempts is to penalise attacks on protected interests, whether or not they create a risk of harm.[262] Duff's account of attack is, roughly, that a person is attacking another's interests if a reasonable observer would view the action the person immediately intends as a possibly effective means of carrying out their broader criminal intention.[263] For example, if a person intends to kill her enemy, an attack would commence when she is about to act in a way which a reasonable observer considers a possibly effective means of killing her enemy. Duff favours a focus on attack, instead of risk, as this enables him to address difficult cases of 'impossible attempt'.[264] In these cases, an attack on another's interests may not increase the risk of harm, but we may nevertheless intuitively consider the conduct to be criminal. A focus on attack, instead of risk, explains and supports these intuitions. Accordingly, Duff argues that the fact of

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[260] Duff, *Criminal Attempts* (n 190).

[261] *Ibid* 138-9.

[262] This is very similar to Fletcher's manifest criminality account of attempts. See: Fletcher, *Rethinking Criminal Law* (n 212) 141-152.

[263] Alexander, 'Duff on Attempts' (n 235) 227.

[264] Duff, *Criminal Attempts* (n 190) 72.

embarking on an attack is normatively significant: it is at this point that the actor gives her criminal intention a sufficiently concrete presence in the material and social world to warrant criminalisation.[265]

For Duff, the fault element of attempt is an intention which, if carried out, would lead to the commission of an offence.[266] But intent alone is not sufficient to ground liability.[267] Duff sees conduct, as well as intention, as constitutive of an attempt. Duff describes the conduct requirement of attempts in objective terms: attempts warrant censure and ought to be prevented because they are attacks on protected interests. This account of attempts translates into an extensive act requirement, with liability only arising once an agent has committed acts that amount to an attack. Duff ultimately concludes that the point at which an attack is commenced aligns with the current conduct requirement, as set out in the Criminal Attempts Act 1981 and interpreted by the Court of Appeal in *R v Gullefer*.[268] That is, an agent is attacking another's interests when they have engaged in 'more than preparatory conduct';[269] when the agent 'is in the process of committing' or 'has embarked on' the offence itself.[270] The conduct criminalised by preparatory offences is precisely that which is not more than merely preparatory. Given this, the justifications offered by Duff for criminalising attempts could not justify criminalising preparatory offences.

In addition to arguing for moral objectivism, Duff provides reasons why state

[265] Duff, *Criminal Attempts* (n 190) 387; Antony Duff, 'Guiding Commitments and Criminal Liability for Attempts' (2012) Criminal Law and Philosophy 411, 415.

[266] Duff, *Criminal Attempts* (n 190) 349.

[267] *Ibid* 33.

[268] [1990] 1 WLR 1063.

[269] Criminal Attempts Act 1981 s 1(1).

[270] *Gullefer* (n 268) 1065.

intervention via the criminal law should target objectively defined conduct.[271] He recognises that the state has a relationship with its subjects that is different from the relationship we have with one another as moral agents. There are additional considerations at play, beyond questions of moral philosophy, which determine the appropriate role of the state. Duff claims that any conception of a liberal state should respect the distinction between the public and private spheres, concerning itself only with the external relationships of one person to another.[272] The business of the criminal law is to regulate public life.[273] The law's aim is 'to declare, and to seek our obedience and allegiance to, those fairly minimal standards of behaviour which are necessary for social life, and to protect important rights and interests from infringement'.[274] Accordingly, in order to be the appropriate focus of criminal liability, wrongdoing must involve 'some active engagement with the shared social and material world'.[275] On this approach, thought crimes are unjustifiable: thoughts do not impinge on the world.[276] The law must focus on wrongful actions.[277] Preparatory offences meet this requirement as they do not criminalise an intention to commit a an offence *per se*, but rather criminalise this intention when paired with preparatory acts.

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[271] Duff, *Criminal Attempts* (n 190) 37, 200-1, 313-5, 347, 350, 387-9; Duff, 'Guiding Commitments and Criminal Liability for Attempts' (n 265) 415.

[272] Duff, *Criminal Attempts* (n 190) 200-1, 350.

[273] *Ibid* 313-5; See also: Husak, *Overcriminalization* (n 21) 199-200.

[274] Duff, *Criminal Attempts* (n 190) 201. Accepting this minimal account of the 'public' focus of the criminal law is consistent with rejecting Duff's more ambitious argument that the criminal law should only focus on 'public wrongs'.

[275] *Ibid* 415.

[276] *Ibid* 313-5. Liability for thoughts is further discussed in Chapter V.

[277] *Ibid* 201: Although Duff acknowledges at this point that all he has established is that the law should focus on actions. Those actions might be subjectively or objectively described, and he must provide further reasons for favouring an objective description. See also: Herbert Morris, 'Punishment for Thoughts' in *On Guilt and Innocence* (n 37) 25-6.

Furthermore, according to Duff, 'a system of law must treat citizens as autonomous agents';[278] as 'rational and responsible'.[279] The role of the law is to offer citizens reasons to accept the standard of behaviour required for social life; to rationally dissuade them from wrongful conduct.[280] It is not to intervene pre-emptively and coercively constrain those who are considered dangerous. Simester and von Hirsch make a similar point, arguing that the criminal law should provide subjects with reasons and incentives for obedience, rather than making decisions for them.[281] While the criminal law is coercive in the sense that it threatens to punish those who are disobedient, this does not fail to treat people as rational agents. The threat offers people a prudential reason not to commit a crime but, crucially, it does not override the capacity of people to make their own choice.[282] In contrast, when the law intervenes early—as it does with preparatory offences—it fails to treat a person as autonomous because it denies them the opportunity to change their mind. It does this in one of two ways: either, it relies upon the assumption that this person is 'destined' to commit an offence and so denies the existence of her freedom to choose; or it recognises the person still has a choice to make but removes that choice from her. Therefore, by pre-emptively regulating conduct, the criminal law exhibits the state’s lack of trust and respect.

This view of the law's function has important implications for the law of attempts: Duff argues that to intervene too early in a person's criminal enterprise denies her the freedom to decide whether to desist. In doing so the law fails to respect her as a

[278] Duff, *Criminal Attempts* (n 190) 37. See also: 200-1, 350.

[279] *Ibid* 350. See also: Duff, ‘Risks, Culpability and Criminal Liability’ (n 58) 139-40.

[280] Duff, *Criminal Attempts* (n 190) 201.

[281] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 6-8.

[282] *Ibid* 16. See also: Duff, *Answering for Crime* (n 38) 105.

responsible, autonomous agent.[283] This claim is central to Duff's argument for a narrow law of attempts. Indeed, his emphasis on autonomy seems to suggest that an agent should only be liable for an attempt once she has completed the last act in her criminal enterprise, as prior to this last act she can still change her mind. This is the radical position endorsed by Alexander and Ferzan.[284] For example, to be liable for an attempt to rape a child, on their account, it would not be sufficient if a man met a child, removed the child's clothes, and put on a condom. Liability for attempt would only arise once penetration was actually attempted.[285] Alexander and Ferzan's approach is not persuasive: it places far too much emphasis on the retributive role of the criminal law, precluding from consideration the need for effective prevention of harm.[286]

Duff, however, retreats from this unpalatable position by arguing it is possible to intervene earlier than the last act of a criminal enterprise while still respecting the autonomy of the person involved. He does so by drawing a parallel between justifiable acts of self-defence and attempts liability.[287] Duff argues that the use of defensive violence against a person who has embarked upon a wrongful attack does not fail to respect her as an autonomous agent. Once an attack has commenced, a victim is justified

[283] Duff, *Answering for Crime* (n 38) 105; Duff, *Criminal Attempts* (n 190) 37, 388-9.

[284] See: Larry Alexander and Kimberly Ferzan, *Crime and Culpability* (Cambridge University Press 2009); Alexander, 'Duff on Attempts' (n 235); Larry Alexander and Kimberly Ferzan, 'Risk and Inchoate Crimes: Retribution or Prevention?' in G. Sullivan and I. Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing 2012).

[285] See Sexual Offences Act 2003 s 5.

[286] Fletcher, *Rethinking Criminal Law* (n 212) 136, 189. 'The consensus now favors some criminalization of conduct that falls short of the "last step" attempt': 140.

[287] Duff, *Criminal Attempts* (n 190) 389-90. In this way, Duff's analysis is very similar to Fletcher's manifest criminality conception of attempts. Fletcher argues that criminal conduct that is unnerving to the community is sufficient to justify private or official intervention. Private intervention takes the form of defensive force; official intervention takes the form of criminalisation: Fletcher, *Rethinking Criminal Law* (n 212), 141-152. Duff's analogy with self-defence does not fall into the same difficulties as accounts seeking to justify all punishment with reference to self-defence. This is because attempts liability, unlike punishment, is pre-emptive in nature. See: Dolinko, 'Punishment' (n 46) 424.

in using reasonable force to repel that attack. The attacker cannot complain that, in having her attack repelled, her autonomy has been violated. In society it is necessary that each person's autonomy has its limit, one limit being that it cannot be exercised to attack another's protected interests.[288] Therefore, once a person commences an attack she cannot complain that state intervention to prevent this infringes her autonomy. A person can be held liable for attempt when she attacks another person without this liability unjustifiably infringing her autonomy. Importantly, this logic does not apply to pre-emptive violence. A victim who fears for her safety at the hands of another is not justified in pre-emptively harming that other. So too, *prima facie* the law is not justified in pre-emptively intervening to prevent feared harm when an attack has not commenced. This entails a narrow law of attempts and precludes criminalisation of preparatory conduct falling short of attempts.[289]

4.2 *Difficulties with Duff's Attack Account of Attempts*

The first difficulty with Duff's account is that it entails an overly narrow attempts liability. Duff's account is that a person is attacking another's interests if a reasonable observer would view the action the person immediately intends as a possibly effective means of carrying out their broader criminal intention.[290] In the context of child sex offending, this would seem to preclude liability in the case of *R v Geddes*.[291] Although Geddes was hiding in the boys' toilets waiting for a child to abduct, he had not yet

[288] See: Simester, 'Prophylactic Crimes' (n 20) 77.

[289] Duff, *Criminal Attempts* (n 190) 389-91.

[290] Alexander, 'Duff on Attempts' (n 235) 227.

[291] (1996) 160 JP 697.

mounted an attack on a child. If the law were to intervene to prevent Geddes' going further, this would be akin to pre-emptive violence, not self-defence. Therefore, Duff's theory seems to entail that Geddes should not be liable. This was, notoriously, also the conclusion of the court. Duff might protest this application of his account, as he considers his approach to be consistent with the test in *Gullefer*. That is, liability arises once a person 'is in the process of committing' or 'has embarked on' the offence itself.[292] Arguably, Geddes had embarked on the offence itself by lying in wait for a victim.[293] However, if we stay true to Duff's analogy with self-defence, self-defence would not yet have been justified in *Geddes*, and so too attempts liability would not be justified. Duff is perhaps mistaken, then, in thinking his account accords with the approach in *Gullefer.*

The narrowness of Duff's account, when interpreted in line with his self-defence analogy, is therefore a cause for concern. The Law Commission argued that *Geddes* should have been liable for attempt and criticized the Court of Appeal's decision to the contrary for failing to give adequate weight to the policy underpinning attempts liability, including the goal of harm prevention.[294] This is correct: a law of attempts that does not capture someone who has gone as far as Geddes invites incredulity. Duff acknowledges that his approach, even when equated with *Gullefer,* may have unpalatable implications. In some circumstances it seems morally problematic to insist on leaving intending criminals a chance to change their mind, given the cost to potential victims. Duff insists that if we criminalise conduct prior to an attack, we must recognise that this comes at serious moral cost: we compromise on the important principle that people should be

[292] Duff, *Criminal Attempts* (n 190) 398; *Gullefer* (n 268) 1063, 1065.

[293] This would be consistent with the Law Commission's interpretation of *Gullefer*: Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) [12.39].

[294] Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) [1.72-4], [14.16-7]. See also: Clarkson, 'Attempt: The Conduct Requirement' (n 208) 26-8.

treated by the state as autonomous, rational agents.[295] Nevertheless, Duff's attack account, when applied with the underpinning self-defence rationale in mind, does seem to draw the law of attempts too narrowly, failing to give adequate weight to preventive concerns.[296]

Duff's endorsement of *Gullefer* should be reinterpreted. State intervention is permissible once a person has gone so far that the victim would be justified in using self-defence against that person. In some instances, a person may have embarked on an offence, but not come to a point where self-defence would be warranted. The state should be able to intervene in order to prevent harm in these circumstances as well. Although this comes at the cost of respecting the offender as an autonomous agent, this is outweighed by considerations of harm prevention and is consistent with recognition of the offender's culpability for embarking on the offence. Therefore, Duff's language of 'attack' is potentially misleading and should be discarded. Attempts law should instead focus simply on the formulation from *Gullefer*. This is unfortunate, as a key appeal of

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[295] Duff*, Criminal Attempts* (n 190) 392.

[296] Another concern might be that self-defence only extends to instances of attacks on persons, not on property. How then might Duff's account apply to cases of attempted property crime? However, this objection can be met. Section 3 of the Criminal Law Act 1967 provides that a person may use such force as is reasonable in the circumstances in the prevention of crime. If this provision is considered justifiable, then it permits of use of force to prevent property offences. An attack on property interests could thus be repelled and, likewise, an attempted property crime can be prevented without this impinging unduly on the autonomy of the defendant. Nevertheless, we might have doubts about the justifiability of this provision. Moreover, we might think that the degree of force that can be used to repel an attack on property is much less than in the case of an attack on a person. This might cause difficulties for justifying an undifferentiated account of attempts, which purports to apply to violent and property offences alike. This would not, however, be a difficulty unique to Duff's account. It is difficult for any theory of attempts to justify this general approach, if it is accepted that harm to persons is more serious than harms to property. As Ashworth has noted, it is arguable that the reach of inchoate offences should stretch further against crimes of violence than against mere property offences: Ashworth, *Principles of Criminal Law* (n 41) 469. See also: Fletcher, *Rethinking Criminal Law* (n 212) 141: 'Is it possible to formulate a test for obtaining property by false pretences that would apply to killing by poison?... [A] sensible approach requires some attention to be paid to the problems characteristic of different offenses.' Fletcher later discusses the difficulties of applying a manifest criminality approach, which can be seen as akin to Duff's attack account, where the intended offence is itself inchoate and does not directly cause harm: 155-6. This, however, is arguably a reason to reject an application of the offence of attempts to substantive offences defined in the inchoate mode, rather than a problem with a manifest criminality approach to attempts law.

Duff's approach was that the concept of 'attack' – in parallel with an understanding of self-defence – provides a conceptually simple way of drawing the line between an attempt and merely preparatory conduct.[297] Nevertheless, this conceptual simplicity came at the cost of an overly narrow law of attempts. In drawing a broader law of attempts, it is necessary to engage directly with the difficult question of how to balance harm prevention with respect for a defendant's autonomy.

A further difficulty with abandoning Duff's concept of 'attack' is that this involves abandoning Duff's response to a common argument against objectivist accounts of attempt. The argument is that attempts cannot be culpable because they risk the completed crime, or because of their objective harmfulness.[298] This is because many attempts that are rightly censured do not increase the risk—or create only a small risk—of a completed crime. Take for example an impossible attempt. C intends to kill her enemy. She breaks into his room and fires her gun at his bed where she thinks he is sleeping. In fact, in the bed is a dummy and her enemy, forewarned of the attack, is elsewhere. In this instance, C's shooting did not increase the risk of her enemy's death at all, but we would rightly censure her for attempted murder.[299] Take another example of an unlucky attempt. D intends to kill her enemy. She fires her gun at her enemy but misses. Unknown to her the circumstances were such that it was very unlikely she would hit her enemy: the wind was high and D's aim was poor. Again, even though her act did not

[297] This is why Fletcher thought his manifest criminality account of attempts was superior to an account that focussed on the degree of dangerousness of the act. An account focussed on attack provides a clear criterion for assessing whether a particular act is sufficient. In contrast, any account that relies on an act being 'sufficiently dangerous' to warrant liability necessarily raises the difficult question of when the level of danger will be sufficient for the law of attempts to bite: Fletcher, *Rethinking Criminal Law* (n 212) 141, 144. As Fletcher correctly states: 'Once objectivist theorists break from the moorings of the "last step", it proves harder than expected to find a secure anchor in the ebb and flow of events leading from preparation to consummation': *Ibid* 140.

[298] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 7, 27.

[299] Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 407.

significantly increase the risk of her enemy's death, we would rightly censure her for attempting murder.[300] These examples show that our culpability assessments do not, and ought not, track risk creation. Therefore, arguably an objectivist account of attempts should be rejected.[301]

Duff seeks to avoid this difficulty using his account of 'attack'. He does not claim that attempts are culpable because they always increase the risk of harm but because they amount to an attack on another's protected interests.[302] To determine if a person's action amounts to an attack, Duff posits a reasonable observer and asks whether they would view the action the person immediately intends as a possibly effective means of carrying out their broader criminal intention.[303] Duff's attack account is very similar to alternative accounts of risk assessment, designed to meet the difficulties raised by impossible attempts. Husak argues that our ordinary approach to risk assessment involves us assessing C and D, from the previous examples, as engaging in risky conduct even though they did not, in one sense of the term, increase the risk of harm. This is because C and D both performed an act most of us would regard as dangerous.[304] In accordance with our intuitions, Husak argues that we should assess risk from the perspective of a reasonable person observing the conduct in question.[305] Fletcher's account of what he calls manifest criminality adopts a similar approach. He argues that an attempt can be understood as an

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[300] Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 405-6; Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 28-9.

[301] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 28-9.

[302] In his introduction Yaffe claims to refute this alternative objectivist approach but does not substantiate this claim: *Ibid* 7.

[303] This is very similar to Fletcher's account of manifest criminality and his concept of 'apt attempts': Fletcher, *Rethinking Criminal Law* (n 212) 141-153.

[304] Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 408.

[305] *Ibid* 408-9. Interestingly, this account of risk bears a striking resemblance to Duff's approach to attack: Duff, *Criminal Attempts* (n 190) 227.

act that manifests danger to the community. To determine if an act does so, we must consider whether the act is a token of a type of conduct that would, in the long run, produce harm. That is, even if this instance of the act proves to be harmless, would this act if repeated over a period of time generally be harmful? In order to apply this approach, it is necessary to provide a description of the type of act engaged in by the defendant. The test for whether facts should be incorporated into this description, according to Fletcher, is whether the fact is likely to be known by an objective observer to the event.[306] The similarity between these accounts of risk and Duff's concept of attack suggests that it is possible to jettison the concept of attack while retaining an account of risk that meets subjectivist objections. Nevertheless, this account of risk is not without its difficulties.

Alexander and Westen have criticized this manifest danger approach to risk on the basis that it is impossible to determine, in a non-arbitrary manner, the knowledge and reasoning abilities that a 'reasonable' observer would possess.[307] Fletcher himself admits that 'the problem with this mode of analysis is there is no rigorous way of defending a classification of events.'[308] Husak attempts to resist this criticism of indeterminacy by arguing that his concept of risk—including the idea of a reasonable observer—is intuitively appealing, being grounded in common sense.[309] Perhaps, as Fletcher suggests, intuition rather than firm principles is the best we can expect in this context.[310] Further,

[306] Fletcher, *Rethinking Criminal Law* (n 212) 150-3. Fletcher does develop this test in the context of an account similar to Duff's, which focuses on whether the conduct in question, objectively assessed, is sufficient to warrant self-defence. However, Fletcher's approach can be used as a basis for assessing how dangerous conduct is, without reference to the idea of an 'attack'.

[307] Alexander, 'Duff on Attempts' (n 235) 234; Peter Westen, 'The Ontological Problem of "Risk" and Endangerment in Criminal Law' in Antony Duff and Stuart Green (eds) *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 321.

[308] Fletcher, *Rethinking Criminal Law* (n 212) 153.

[309] Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 409.

[310] Fletcher, *Rethinking Criminal Law* (n 212) 154.

if the sceptical account of risk creation were preferred, this would cast doubt on the legitimacy of a whole host of offences which are generally considered legitimate, such as driving while drunk.[311] There are good reasons to accept this admittedly imperfect method of assessing the dangerousness of an attempt. Nevertheless, if an alternative objectivist approach can be offered, that does not face these difficulties, it might be preferable. Fletcher claims to offer such an alternative.

4.3 *Fletcher's Rational Motivation Account of Attempts*

Fletcher aims to offer an objectivist account of attempts that avoids assessments of how dangerous acts are. He proposes that the objective conduct element of attempts liability should be defined with reference to what ordinary people mean by 'attempting' or 'trying'.[312] On this account, the attempt offence will consist of two elements: an act of attempting, and intent that renders the actor responsible for her act of attempting.[313] Fletcher argues that the way ordinary people understand 'attempting' or 'trying' accords with a rational motivation account. In formulating his view, Fletcher is also concerned with impossible attempts. Recall the example of C who, intending to kill, shoots at what she believes to be her enemy, when in fact she is shooting at a dummy. Fletcher posits that in order to determine whether C attempted to kill her enemy or not, we must apply

[311] Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187) 407. For a discussion of endangerment offences consistent with Husak's approach to risks see: Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 75-9. Husak's account is similar to, but preferable to, Westen's which unhelpfully utilises the language of 'fear': Westen, 'The Ontological Problem of "Risk" and Endangerment in Criminal Law' (n 307). For a critique of Westen see: Gideon Yaffe, 'More Attempts: A Reply to Duff, Husak, Mele and Walen' (2012) 6 Criminal Law and Philosophy 429, 438-9. Cf. Alexander, Ferzan and Broersen who argue risk should be assessed from the viewpoint of the person trying to commit an offence: Alexander and Ferzan, 'Risk and Inchoate Crimes: Retribution or Prevention?' (n 284); Jan Broersen, 'Three Points of Disagreement with Gideon Yaffe on Attempts' (2012) 3 Jurisprudence 465.

[312] Fletcher, *Rethinking Criminal Law* (n 212) 161.

[313] *Ibid* 158.

the rational motivation test. The test is a way of determining whether a mistaken belief is relevant to the description of what a person is trying to do. Should C be described as trying to shoot at her enemy, or as trying to shoot at a dummy? On a subjectivist approach, C's own intentions and beliefs would be decisive, and she would be described as trying to shoot her enemy. On the objectivist view sketched above, C's action would be described in accordance with what a reasonable observer would perceive, and this assessment would turn on how obvious it was that C's target was a dummy. On Fletcher's rational motivation approach, we must ask whether C would have changed her course of conduct if her mistaken belief was corrected. If C was told that she was shooting at a dummy and she nevertheless persisted, then we can say that C was trying to shoot a dummy. If C would have changed her course of conduct upon this revelation, this would show that C was trying to shoot her enemy.[314] Fletcher argues that this account of attempts avoids the difficulties that arise when seeking to assess the dangerousness of an act with an objective observer. Nevertheless, the account remains objectivist because it does not turn entirely on what the defendant actually believed or intended.[315]

4.4 *Difficulties with Fletcher's Rational Motivation Account of Attempts*

Is Fletcher's alternative account a success? The immediate difficulty with the account is that it does not, in its current form, tell us anything about when a person can be said to have started trying or attempting to do something. Instead, it begins from an assumption that we know someone is trying to do something, and the only question is

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[314] Fletcher, *Rethinking Criminal Law* (n 212) 161-4.

[315] *Ibid* 163-4. Nevertheless, Fletcher does think that his rational motivation account generates some implausible outcomes in certain impossibility cases. He therefore seems to argue for retaining a manifest criminality approach in relation to some exceptional cases: *Ibid* 165-6.

how to describe what they are trying to do. Therefore, Fletcher's account does not tell us when conduct amounts to an attempt, and when conduct is insufficient to do so. This, however, is not a knock-down objection. It would be possible to develop his account by exploring further what we mean when we say someone is trying to do something. A fuller understanding of trying would generate an account of when a person begins to try.

This is the approach taken by Yaffe, who argues that his Guiding Commitment View of trying can explain the 'more than merely preparatory' threshold in attempts law. Yaffe's account of attempts may be summarised roughly as follows: a person is liable for attempt if they try to commit a crime. A person tries to commit a crime if they have an intention to complete the crime and are guided by that intention. They are guided by that intention if it is true that, given the ability and opportunity, and if they did not change their mind, they would complete the intended crime. The only reliable evidence for the truth of this statement—that they will complete the crime given the right circumstances—is an act undertaken by the person that is more than merely preparatory. Therefore, to be liable for an attempt a person must have an intention to commit a crime and do an act that is more than merely preparatory. Notably, however, his account of trying is subjectivist. Yaffe nevertheless acknowledges there are alternative objectivist accounts of trying.[316]

Nevertheless, Fletcher's rational motivation account faces a greater difficulty. It begins by asking what we ordinarily mean by trying or attempting. It then proposes to use this account to provide the detail we need to define the offence of attempts. At no point in the account, however, is there an explanation of why we criminalise attempts. Fletcher begins from the assumption that attempts are justifiably criminalised, focussing his attention on how to define an attempt. There is nothing in the account to explain why the

[316] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190).

criminal law should be employed. The objectivist accounts that Fletcher rejects in favour of the rational motivation approach provide us with insight into this question. A focus on the dangerousness of the conduct, according to Fletcher, 'brings home the importance of thinking of attempts as relational events, signalling the breakdown of order and the eruption of a threat to the victim.'[317] Alternatively, an account of attempts as involving an attack on core interests protected by the criminal law provides a justification of the law's involvement by way of an analogy with self-defence.[318] In contrast, Fletcher's rational motivation account of attempts lacks the resources to justify the criminalisation of attempts. Further, it seems impossible to augment the account to provide such a justification without returning to a discussion of the culpability of attempts and the danger that they cause.[319]

Yaffe's account of attempts liability suffers from the same deficit. He seeks to justify the criminalisation of attempts without engaging in broader debates about risk of harm and autonomy. Yaffe claims that a type of conduct is justifiably criminalised if tokens of that conduct are always worthy of censure and sometimes worthy of sanction. He argues, in accordance with his moral account, that attempts are always worthy of censure. He does not provide an account of when sanction is warranted. But he argues that at least some attempts must be worthy of sanction: for example, where a person does everything within their power to kill their enemy but fails they are un-controversially worthy of sanction. Therefore, as all attempts are worthy of censure and some of sanction,

[317] Fletcher, *Rethinking Criminal Law* (n 212) 141.

[318] *Ibid* 141-153.

[319] Fletcher could arguably be read as having maintained an account of the scope and justification of attempts liability based on a concept of attack, while utilising the rational motivation account to separately address impossibility cases. Fitted within a broader account, the rational motivation account could be valuable for borderline cases: *Ibid* 165

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attempts should be criminalised.[320] Yaffe's modest account of criminalisation has rightly been subject to sustained criticism. It is not possible to justify, as Yaffe seeks to, a blanket criminalisation of attempts without discussing the reasons why attempts warrant sanction and censure.[321]

Accordingly, Fletcher's Rational Motivation Account of attempts and Yaffe's Guiding Commitment View of attempts should be rejected. Instead, an account of attempts focussing on the dangerousness of the conduct, assessed from the perspective of the reasonable observer, should be favoured.

4.5 *Tentatively Endorsing a Variant of Duff's Account of Attempts*

Prima facie, Duff's account of attempts should be accepted, subject to some important alterations. As an objectivist, Duff claims that in assessing the culpability of a person, we should consider their intentions, beliefs, and the effect they have on the world. Duff further argues that the state, acting via the criminal law, must respect the autonomy of citizens. He concludes that people should be subject to attempts liability only once they have mounted an attack on another's interests. However, a strict adherence to Duff's account would entail an overly narrow law of attempts. Therefore, some sacrifice of respect for autonomy should be made in order to expand slightly the scope of attempts

[320] Yaffe, *Attempts in the Philosophy of Action and the Criminal Law* (n 190) 21, 26, 32. Yaffe does revise this argument subsequently, but for our purposes the subtle tweaks he makes are not relevant. See: Yaffe, 'More Attempts: A Reply to Duff, Husak, Mele and Walen' (n 311).

[321] See: Alec Walen, 'Potholes on the Path to Purity: Gideon Yaffe's Overly Ambitious Attempt to Account for Criminal Attempts' (2012) 6 Criminal Law and Philosophy 383; Husak, 'Why Punish Attempts at All? Yaffe on "The Transfer Principle"' (n 187); Broersen, 'Three Points of Disagreement with Gideon Yaffe on Attempts' (n 311); Steven Sverdlik, 'Attempts, Intentions, and Tryings' (2012) 3 Jurisprudence 483. The limitations of an approach to attempt focussed on the concept of 'trying' has also been noted by the England and Wales Law Commission. Such a focus can lead to too little regard being paid to the underlying rationale of the offence: England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) [12.15], [14.30].

liability. Attempts law should cover instances where a person has embarked upon the crime but have not yet mounted an attack. This is because such conduct is sufficiently dangerous and culpable to warrant intervention, where dangerousness is assessed by a reasonable observer.[322]

Despite this initial endorsement, a central aspect of Duff's account has yet to be critically evaluated: namely, his claims about what respect for the autonomy of those subject to the criminal law requires. His claims are not uncontroversial and must be further explored.

5. Respect for Autonomy

5.1 *An Overview of the Debate Surrounding Duff's Account of Autonomy*

A central plank in Duff's account of attempts is that the state cannot intervene early where a person intends to commit a crime and poses a risk of doing so. This is because such early intervention removes the possibility that she will, of her own volition, change her mind and desist. To intervene early manifests a lack of respect for her as an autonomous agent: either, it relies upon the assumption that she is 'destined' to commit an offence and so denies the existence of her freedom to choose; or it recognises she still has a choice to make but removes that choice from her. By pre-emptively regulating conduct, the criminal law exhibits the state's lack of trust and respect. This is unacceptable: respect for autonomy requires that the state seek to dissuade her from wrongdoing by providing reasons to desist, not through pre-emptive coercion. The state must treat citizens as responsible agents who can be guided by reasons.[323] Waldron encapsulates this argument

[322] See also Morris, who endorses a similar approach: Morris, *On Guilt and Innocence* (n 37) 11-2.

[323] Duff, *Answering for Crime* (n 38) 104.

in vivid terms: when the law coerces people 'they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated as bodies to be manipulated.'[324]

Various theorists have made similar arguments, in subtly different terms. Simester and von Hirsch argue that intervening early treats a person 'as one might a child: as someone who lacks the insight or self-control to resist… later temptation.'[325] Asp argues that offences that intervene early reflect 'a legal ideology under which citizens are not addressed as citizens with the ability to choose good, but rather viewed as enemies or threats to the interests protected by the criminal law.'[326] Alexander and Ferzan point out the apparent contradiction involved in early intervention, namely the 'uneasy tension between treating him legally as if he possesses free choice and is the author of his destiny… and treating him legally as if his future choices are predictable.'[327] That is, they recognise that central to the modern justifications of criminal punishment is that people have free choice and so can be held responsible when they exercise that choice to commit a crime. Early intervention either denies this free choice exists or removes it on the basis of prediction. For Alexander and Ferzan, this is deeply problematic because they are doubtful that 'even he, much less the law, can clearly distinguish in terms of risks already present between what he intends on the one hand and his mere wishes or fantasies on the other.'[328] Even when a person intends an act, and believes she might go through with it,

[324] Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 Columbia Law Review 1681, 1727; quoted in Simester 'Prophylactic Crimes' (n 20) 70.

[325] Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 45. See also: Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes' (n 24) 98-9.

[326] Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 35.

[327] Larry Alexander and Kimberly Ferzan, 'Mens Rea and Inchoate Crime' (1997) 87 The Journal of Criminal Law and Criminology 1138.

[328] Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1169, 1172.

she cannot know that she will until she actually embarks on committing the offence.[329] In accordance with the predictive logic of preparatory offences, Ramsay argues that the state is not required to prove any connection to the target offence stronger than the possible. It is irrelevant whether the preparatory offender would have gone on to attempt or commit the target offence. He argues that 'this amounts to a substantive abandonment of the burden of proof and the presumption of innocence without a formal abandonment of it.'[330] Therefore, there is substantial support for Duff's approach to respect for autonomy. Nevertheless, it is not without its critics.

A common thread in the criticism levelled at this account is its lack of realism, as it relies on an account of citizens as responsible agents who can be guided by reasons and should be trusted to do so. As Ohana argues, even though it is true that a person who intends to commit a crime *may* change their mind at any time up until the last act, the prospect of this occurring will generally decrease as she proceeds with her plan towards commission of the offence. Where a person has persisted in her preparations, at each moment choosing again to reaffirm the intention of committing the target offence, and where she has invested time, money and energy in the process, it is much less likely that she will have a sudden change of heart.[331] Why is it illegitimate for the state to take this

[329] Alexander and Ferzan, 'Danger: The Ethics of Preemptive Action' (n 58) 656.

[330] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 216. See also: Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 228-9. Ramsay, however, does offer an alternative basis on which preparatory offences might be justified: cumulative contribution to the harm of insecurity. This, and his critique of the account of autonomy offered by Duff, will be explored later in this chapter.

[331] Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (n 59) 122. Alexander and Ferzan counter that it is always rational for a person to reconsider a criminal intention, regardless of how many steps have been taken and how much cost has been sunk into the enterprise: Alexander and Ferzan, 'Danger: The Ethics of Preemptive Action' (n 58) 645; Larry Alexander, 'Culpability' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 234. However, this response misses the core of Ohana's objection: he is not concerned with what a rational agent might do, but with what in reality a person in those circumstances might do.

into account? Duff's account presumes that a person who has carried out multiple preparatory acts, and has shown ongoing commitment to perpetrating an offence, is nevertheless to be treated in the same way as law-abiding citizens. In contrast, Ohana argues that it is not disrespectful for this presumption to dissipate as the person moves forward in the implementation of her unlawful plan.[332] 'Taking normative account of the deterioration in the moral condition of the actor in such cases need not be interpreted as an unjustified violation of his status as a morally autonomous agent.'[333] There is an intuitive appeal to these arguments as they seem to reflect more accurately the reality of human conduct.

Tadros adopts a similar approach, questioning why treating a person with respect requires us to disregard predictive judgments.[334] Assume we can predict with some accuracy that a person who has an intention to commit Y and who does X is more likely to then go on to commit Y. Acting on this prediction, according to Tadros, does not show disrespect. This is because in doing so the state is not presuming that she has no capacity to change her mind, nor that she will choose Y. The state is recognising that she might lack that capacity, or that she might choose Y. That is, the state is simply recognising that she is a fallible person, subject to 'ordinary human weaknesses, temptations and bad motivations'.[335] If we predict that a person who does X is more likely to do Y, then it is hard to see why this recognition is unwarranted.[336] Further, Tadros dismisses the argument

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332 Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (n 59) 124-5.

333 *Ibid* 125.

334 So does Slobogin who, in the context of preventive detention, acknowledges the possible argument that 'preventive detention does not deny the free will of the detainee, but instead says that the detainee is predicted to exercise that free will in the wrong direction': Christopher Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 Northwestern University Law Review 1, 28.

335 Victor Tadros, 'Controlling Risk' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press 2013) 145.

336 Tadros, 'Controlling Risk' (n 335) 146.

that to treat a person as fallible in this way is to treat her as a child. This is because our predictions are based on what adults do: that an adult who does X is more likely to do Y. Therefore, when we rely on such predictions we treat that person as we would treat any other adult. We would only be treating a person as a child if our assessment of them relied on predictions of what a child who did X would go on to do.[337]

Another troubling aspect of this account of respect for autonomy can be drawn out by considering more carefully the arguments of Simester and von Hirsch. They begin their discussion of 'fair imputation' with examples involving two people. They are concerned with when it is fair to hold one person liable for acting in a way that increases the chance that another person will commit a crime. Having concluded this discussion, they then move to consider a single-actor case, treating it as raising analogous considerations. They conclude:

> In any liberal conception of the state, people have a fundamental right to be treated as separate individuals, as autonomous moral agents who are distinctively responsible for their own actions. [A]'s act does not become wrong because of [B]'s freely chosen act – let alone by reason of the mere risk of [B]'s act. Analogous objections hold where it is [A] herself who makes a separate, subsequent choice. Unless and until done or attempted by [A] herself, the mere potential that a person might [Y] is an unsuitable basis for the censuring response of the criminal law.[338]

This seems odd. There is a fundamental difference between the two cases: the first involves two autonomous moral agents, the second only one. The approach taken by Simester and von Hirsch seems to suggest that A at the time of doing X (T1) is a moral person who is distinct from A at the time of doing Y/not doing Y (T2). This accords with the idea that A can, at any given moment, change her mind: the fact that A at T1 had an

[337] Tadros, 'Controlling Risk' (n 335) 145.

[338] Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes' (n 24) 98.

intention to do Y is irrelevant to whether A at T2 will still hold that intention. However, this conception of autonomy seems focussed unduly on the freedom of an agent's choice from moment to moment. It is at odds with how we perceive ourselves, and also with a temporally extended conception of autonomy.

As Bratman argues, 'in acting I do not see myself, the agent of the act, as simply a time-slice agent. I see my action at the time as the action of the same agent as he who has acted in the past and (it is to be hoped) will act in the future.'[339] A common way of describing a person having meaningful autonomy is that they are the author of their own lives.[340] Bratman refers to this central aspect of autonomy as 'self-governance'.[341] In order to self-govern or to author our lives, we must perceive of our agency as temporally extended. This is necessary for us to develop a sense of identity,[342] and also to our pursuit of complex life goals.[343] For Bratman, intentions play a key role in enabling us to structure our lives across time; to pursue temporally extended and coordinated activities and projects.[344] Therefore, intentions play a key role in the realisation of our autonomy. Given this, could it not be argued that we respect an agent's autonomy when we take her intentions seriously? That is, by intervening early when a person is preparing to commit a crime, we do not manifest disrespect for her autonomy. Instead, we take seriously her intention to commit the crime, and the core role that that intention plays in her ability to

[339] Michael Bratman, *Structures of Agency* (Oxford University Press 2007) 28-9.

[340] For a highly influential discussion of autonomy which uses these terms, see: Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

[341] Michael Bratman, *Structures of Agency* (n 339) 4.

[342] *Ibid* 5.

[343] *Ibid* 10. See also: Farmer, *Making the Modern Criminal Law* (n 38) 168: The continuity of persons in time is necessary both for an understanding of intentionality, or the capacity to plan action over time, and for a sense of self-identity.

[344] See Michael Bratman, 'Intention, Practical Rationality, and Self-Governance' (2009) 110 Ethics 411.

be author of her own life and form her own character over time. Why should we prefer the time-slice account of autonomy that Duff provides, with its apparent tendency to fracture the identity of persons?

Allied to these arguments about the nature of autonomy is the concern that Duff's account fails to take seriously 'the compelling claim that some form of preventive intervention is needed to counter adequately the threat posed by an actor who, emboldened by a firm purpose, starts down the path to committing a crime.'[345] As argued forcefully by Horder, someone might ask:

> what kind of harm-prevention system insists that we are on the right path to inspiring faith in our collective commitments, including a commitment to live in a culture respectful of human rights under the rule of law, if we must wait for, say, murders, rapes, thefts and so forth, to actually be committed (or, for that matter, attempted) before invoking the criminal law to achieve legitimate deterrent objectives?[346]

I am left in agreement with Slobogin, who said that '[e]ven as someone who thinks [the autonomy value] important, I am only half persuaded by the [failure to respect] objection in the abstract, precisely because of its abstractness.'[347] In failing to map on to our experience of how people actually behave this account of autonomy does not seem to give credit to how dangerous people can actually be or give due weight to the preventive needs of the criminal law.

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[345] Daniel Ohana, 'Responding to Acts Preparatory to the Commission of a Crime: Criminalization or Prevention?' (2006) Criminal Justice Ethics 23, 32.

[346] Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (n 126) 84.

[347] Slobogin, 'A Jurisprudence of Dangerousness' (n 334) 28.

5.2 *A New Perspective on What Respect for Autonomy Entails*

What this discussion has shown is that there are competing conceptions of autonomy deployed by different theorists. For Duff, and those who adhere to a similar account of autonomy, autonomy is conceived of in idealised terms: an autonomous agent is rational, guided by reasons, and can thus generally be trusted to conform with the law. I will call this 'ideal autonomy'. For Tadros and Ohana, their conception of autonomy is grounded in lived experience: an autonomous agent has free choice, is responsive to reasons, but is fallible, and thus cannot always be trusted to conform with the law. I will call this 'dangerous autonomy'. Which account are we to prefer? Drawing on the critical work of Ramsay[348] and Carvalho[349] this section will argue that it is not plausible to reject either conception of autonomy. Instead, it will agree with Carvalho that this ambivalence as to the nature of autonomy is deeply embedded in the liberal criminal law:[350] both conceptions of autonomy have their place. The critical question for a criminal law theorist is instead how these competing conceptions of autonomy are to be balanced. Should the state generally treat citizens as rational, guided by reasons and trustworthy, or as fallible and untrustworthy?[351]

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[348] Ramsay, *The Insecurity State* (n 22).

[349] Carvalho, *The Preventive Turn in Criminal Law* (n 20).

[350] *Ibid* 20-1.

[351] There is a parallel here to 'the criminal law of the enemy' (*Feindstrafecht*) account provided by G. Jakobs, 'Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart (Kommentar)' in A.Eser, W. Hassemer, and B. Burkhardt (eds), *Die Deutsche Strafrechtswissenschaft vor den Jahrtausendwende* (Beck 2000) 47. As summarised by Ohana, Jakobs draws a distinction between citizen criminal law and enemy criminal law. Under citizen criminal law, the law addresses the individual as a citizen who is bound by the law and who unconditionally embraces the duties and role of a responsible member of the polity. The law expects that the citizen will diligently run his life. The law thus institutes the freedom of the citizen, constituting him as a self-governing subject who cultivates law-abidingness on his own. In contrast under enemy criminal law, the law relates to the individual as a source of potential danger. Threats of painful consequence or more direct coercion are required to ensure the law is obeyed. Jakobs argues that the correct way forward in criminal law theory is not to reject enemy criminal law outright, but to clearly demarcate when enemy criminal law can be deployed: Daniel Ohana, 'Trust, Distrust and Reassurance: Diversion and Preventive Orders

To answer that question, it is necessary to engage with political philosophy. This section provides only a brief sketch of such an answer. It does so by endorsing Ramsay's argument that it is self-defeating for a state to treat citizens as fallible and untrustworthy. In seeking to provide citizens with a sense of security from crime through the use of more extensive criminal offences, the state instead reinforces the vulnerability of citizens and reifies fears of criminal victimisation. Further, adopting broad criminal offences undermines representative democracy, as it empowers intrusive state surveillance, potentially stifling free political speech and association. In reaching this conclusion, this section will build on the critical work of Carvalho and Ramsay to argue for ideal autonomy to be adopted as the starting point in debates about criminalisation. This is not, perhaps, what these theorists had in mind, given that they both argue for a shift in focus away from liberal principles and toward other sources in debating the limits of criminalisation. Nevertheless, this section contends that Carvalho and Ramsay's work, by identifying central tensions in the liberal project of statehood and the impact of these on the criminal law, can usefully contribute to debates about how liberal principles should be understood.[352] Specifically, their insights lead to the conclusion that Duff's relatively inflexible approach to respect for ideal autonomy cannot be sustained. Instead, more leeway is required to recognise the fallibility of citizens, and the risks they pose. But this leeway should be limited, to ensure that the criminal law does not become self-defeating and does not compromise representative democracy.

Through the Prism of Feindstrafrecht' (2010) 73 Modern Law Review 721, 721-727.

[352] Nicola Lacey argues that our conceptual framework will be of more utility if it can build in a recognition that ideas such as responsibility, personhood and agency are modulated over time, and are shaped both by the legitimation and coordination needs and capacities of the social order and by other institutional factors: Nicola Lacey, 'Institutionalising Responsibility: Implications for Jurisprudence' (2013) 4 Jurisprudence 1, 8.

5.2.1 *A Central Ambivalence in Liberal Criminal Law*

Carvalho's central argument is that liberal criminal law has, at its core, two normative conceptions of 'criminal subjectivity'.[353] That is, two ways in which it perceives of those who are subject to the criminal law. The first conception is of 'responsible subjectivity'. Responsible subjects live their lives according to their own plans and reasons.[354] Respecting responsible subjectivity involves allowing subjects to do so, and trusting them to make good decisions and behave responsibly.[355] This conception underpins liberal justifications for criminal punishment: it is only where a person has rationally chosen to commit a crime that they can be held responsible.[356] Further, responsible subjectivity foregrounds the importance of individual justice,[357] and views criminal conduct as the exception, not the rule.[358] Carvalho's 'responsible subjectivity' thus maps closely onto ideal autonomy.

The second conception of criminal subjectivity identified by Carvalho is that of inherent dangerousness.[359] This conception is linked to the role of the criminal law in providing for social order, as opposed to individual justice. As Carvalho argues:

While individuals in political society are supposed to behave as responsible legal

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[353] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 20-1. Matravers similarly explores uncertainty in our understanding of agency: Matravers, 'On Preventive Justice' (n 20). There are also similarities between the two forms of autonomy recognised by Carvalho and the two perspectives that Horder identifies as playing roles in the criminal law, namely, the minimalist harm-done perspective and the anticipatory perspective: Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (n 126).

[354] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 2.

[355] *Ibid* 15-6.

[356] *Ibid* 18.

[357] *Ibid* 5.

[358] *Ibid* 18.

[359] *Ibid* 20-1.

> subjects, restraining their liberty to the limits of the law, they are all in fact, or at least potentially, natural subjects who may, out of self-interest, become dangerous to the prospect of political society.[360]

This is a more developed account of dangerous autonomy. This conception aligns with the preventive function of the criminal law and recognises the pervasiveness of criminal law and criminal offending within contemporary liberal societies.[361] In his reference to 'natural subjects', Carvalho is drawing on the philosophy of Hobbes.[362] Ramsay deftly summarises the key insight from Hobbes's work pertinent to the present discussion:

> One reason to have criminal laws is that they make us feel more secure. Hobbes thought that without obligations to the sovereign to desist from violating others' interest we would all feel vulnerable to the predation of others. The existence of obligations contained in the criminal law allows us to believe that our interests are to some extent secure. We do not normally need to pre-empt the danger represented by others with coercion of our own, and a commonwealth is made possible. We do not have to accept all of Hobbes's political theory to grasp the truth that it contains on this point.[363]

This excerpt highlights the key role of the criminal law in providing for social order, such that a shared life is possible.[364] It is through the criminal law that the state makes it possible for its subjects to develop plans for their life and to execute them. Herein lies the

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[360] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 74.

[361] *Ibid* 18.

[362] See: *Ibid* Chapter 3. Carvalho draws heavily on Hobbes' highly influential book Leviathan: T. Hobbes, *Leviathan* (Oxford University Press 1996). The footnotes to Chapter 3 also identify a number of Hobbes' other works that are relevant and useful secondary literature discussing Hobbes.

[363] Ramsay, *The Insecurity State* (n 22) 1.

[364] The role of the criminal law in providing for social order is highlighted by a number of theorists. See: Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) Chapter 12; Malcolm Thorburn, 'Constitutionalism and the Limits of the Criminal Law' in Antony Duff and others (eds), *The Structures of Criminal Law* (Oxford University Press 2011); Anthony Bottoms, 'Civil Peace and Criminalization' in Antony Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014); Lindsay Farmer, 'Criminal Law as an Institution' in Antony Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014); Farmer, *Making the Modern Criminal Law* (n 38).

paradox. The state's primary function is to promote and preserve ideal autonomy, but it can only achieve this through the repression and coercion of dangerous autonomy.[365] This paradox has been noted by other theorists, albeit in different terms. For example, Ashworth and Zedner recognise a paradox of liberty: that the major justification for employing preventive powers is to secure the liberty of individuals, but those very same powers deprive some individuals of their liberty.[366] Similarly, Ashworth has identified core tensions and yet also interdependence between what he terms the 'principle of autonomy' and the 'principle of community welfare'.[367]

It is thus apparent that both ideal autonomy and dangerous autonomy play a role in the liberal criminal law. The state seeks to repress dangerous autonomy, so as to make a shared social order possible. In this way the state provides the conditions in which citizens can enjoy ideal autonomy. Given this, it is not possible simply to argue that either ideal or dangerous autonomy should be adopted in our discussions of attempts law, or criminalisation more generally. Both have a role to play in a liberal society. It is more honest and fruitful to think, instead, in terms of the relative roles that these two conceptions of autonomy should play in any theory of statehood and, in turn, in any theory of criminalisation.

5.2.2 *Shifts in the Balance Between Ideal and Dangerous Autonomy*

When considering what the roles of ideal and dangerous autonomy should be in a

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[365] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 75.

[366] Ashworth and Zedner, *Preventive Justice* (n 24) 257. It should be noted that Ashworth and Zedner's discussion concerns preventive measures generally, and so is not limited to the use of the criminal law in its preventive capacity.

[367] Ashworth, *Principles of Criminal Law* (n 41) 26-7.

theory of criminalisation, the work of Ramsay is an excellent starting point. Ramsay focuses particularly on the 'reassurance' function of the criminal law. That is, the role of the criminal law in enabling citizens to feel protected from the violence of others; to feel that their interests are to some extent secure.[368] Ramsay argues that historically the reassurance function of the criminal law was achieved indirectly, through the criminalisation and punishment of attacks on the interests of others.[369] The creation and enforcement of these offences enabled citizens to feel relatively secure in the knowledge that anyone who attacked their interests would be punished. This provided a basis on which citizens could expect others to behave in accordance with the law, even if the risk of offending was not eliminated.[370] In the terms I have deployed, it can be said that this approach to criminalisation maintained a certain balance between ideal and dangerous autonomy. In order for a person to be criminally liable, she would have to choose to attack another's interests. In carrying out an attack, she would have caused an objective danger or harm in the world. This combination of culpability and harm would provide the basis for holding her criminally responsible, while still respecting her ideal autonomy. In turn, the existence and enforcement of the offence would reassure citizens in general that they were secure from such attacks.[371] In this way the criminal law was seen as adequately controlling the risk posed by dangerous autonomy.

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[368] In this way the criminal law is said to protect citizens' 'subjective security': that is, how secure people feel. This is to be contrasted with 'objective security': how secure people actually are. See: Tadros, 'Crimes and Security' (n 23); Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 205-6.

[369] Ramsay, *The Insecurity State* (n 22) 2. This focus on our immediate history is not to ignore the longer history of the criminal law, which shows an ebb and flow of competing conceptions of autonomy at different historical moments: see Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press 2016).

[370] Ramsay, *The Insecurity State* (n 22) 1; Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 207-8. See also: MacCormick, *Institutions of Law* (n 364) 207-8; Dimock, 'Retributivism and Trust' (n 95) 44-6, 52-4; Ohana, 'Trust, Distrust and Reassurance' (n 351) 732.

[371] Ramsay, *The Insecurity State* (n 22) 1.

The continued dominance of this approach to criminalisation depended upon there being 'a high degree of public political confidence in the law's effectiveness.'[372] The central position of ideal autonomy, and the trust in others it entailed, could only be sustained in certain structural conditions.[373] When those conditions ceased to be present, this balance between ideal and dangerous autonomy underpinning the historical approach to offences was threatened.[374] Ramsay argues that structural changes have indeed caused the traditional balance between ideal and dangerous autonomy to be displaced. In contrast to the historical approach of criminalising attacks and thereby reassuring citizens of their security indirectly, many modern offences seek to reassure citizens of their security directly.[375] That is, modern offences seek to provide greater reassurance by targeting not only attacks, but also by targeting conduct which makes us fearful of attacks. According to Ramsay, many modern offences can only be understood as punishing the wrong of causing insecurity.[376] This is a valuable insight.

Specifically, Ramsay argues that preparatory offences are best understood as criminalising conduct which contributes to citizens feeling insecure. This is the wrong that these offences target, as opposed to the wrong of risking commission of an attack in the future. The connection between preparatory conduct and increasing feelings of insecurity is direct. A person who commits a preparatory offence contributes to a general

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[372] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 208. See also: MacCormick, *Institutions of Law* (n 364) 208: A collective sense of security and solidarity requires 'a degree of confidence that efforts will be made to detect wrongdoing, and then to bring detected wrongdoers to trial, with an adequate punishment meted out in the case of a conviction after due process of law.'

[373] Bottoms, 'Civil Peace and Criminalization' (n 364) 234, citing MacCormick, *Institutions of Law* (n 364) 221.

[374] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 39.

[375] Ramsay, *The Insecurity State* (n 22) 2.

[376] *Ibid*.

feeling of insecurity.[377] Of course the public will not be aware of every preparatory act, as they are generally carried out in secret. Nevertheless, if the public is aware that some people have committed preparatory offences, their feelings of security may be diminished. If a portion of the public feels insecure because they know that future crimes are being prepared, that is enough to conclude that a person preparing to commit an offence contributes to feelings of insecurity,[378] whether or not the person later changes their mind. Therefore, while their act may not on its own cause feelings of insecurity, it does so in combination with other preparatory acts carried out by others. It is fair to hold a person responsible for their contribution to this insecurity.[379]

Ramsay's characterisation of preparatory offences as targeting conduct that contributes to insecurity is controversial. Cornford points out that the justifications publicly offered for creating preparatory offences are not framed in terms of reducing public feelings of insecurity. Instead, the rationale is to enable the police to intervene early in suspected criminal plots and thus protect the public from first order harms. Further, Ramsay's account overlooks the wrongfulness of preparing to commit such harm. Cornford argues that preparatory offences are not primarily concerned with addressing feelings of insecurity, even if such insecurity has contributed to a rise in the use of such offences.[380] Similarly, Ohana distinguishes preparatory offences from

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[377] Ramsay, *The Insecurity State* (n 22) 144-5.

[378] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 212-3.

[379] *Ibid* 212-4. This draws on Simester and von Hirsch's principle of fair imputation in circumstances of cumulative harm. It is fair to impute culpability where the proscribed act is a token of the type of conduct that cumulatively does harm, and the actor cannot draw a moral distinction between his behaviour and that of others who contribute to the injury. An example offered by Simester and von Hirsch is environmental pollution, where individual acts of pollution may not cause significant harm but, cumulatively, may have grave effects: See Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 85-8.

[380] Andrew Cornford, 'Book Review: The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law – By Peter Ramsay' (2014) 77 The Modern Law Review 516, 518-9.

preventive orders, arguing that while the latter can be seen as criminalising deviant lifestyles as such, the former always target specific courses of conduct. That is to say, preparatory offences concern conduct that is on the path toward the commission of actual offences, and so can be understood in such terms. In contrast, preventive orders might be understood as targeting those who make us feel insecure.[381]

These critiques miss the mark because they focus too closely on the form preparatory offences take without considering their likely use in practice. As will be demonstrated in the subsequent chapters on conspiracy and possession offences, there is a well-documented tendency for broadly drafted criminal offenses to be used inconsistently, targeting the marginalised and those considered to be the 'public enemy' of the time.[382] Given this, it is arguable that while, *prima facie,* preparatory offences are drafted to target an actual course of conduct that might culpably create risk of harm, in application these offences will be used to target people or groups that are considered to be dangerous.[383] As such, like preventive orders, they can be seen as concerned with targeting citizens who are viewed as contributing to insecurity. This becomes evident when one reflects on the scope of such offences: broadly drafted preparatory offences, such as the grooming offence[384] or preparation for terrorist acts offence,[385] capture conduct that is minimal and far removed from the commission of an offence. There will certainly be instances of such conduct that is not dangerous. Therefore, these extremely broad offences are unlikely to be justified on the basis of the risk of harm that the

[381] Ohana, 'Trust, Distrust and Reassurance' (n 351) 745.

[382] See Chapters IV and V.

[383] McSherry, 'Expanding the Boundaries of Inchoate Crimes' (n 195) 157-60.

[384] Sexual Offences Act 2003, s 15.

[385] Terrorism Act 2006, s 5.

prohibited conduct creates; risk of harm will not always be present or sufficiently grave. An alternative basis of justification is needed. Given this, it makes sense to consider preparatory offences as concerned with targeting dangerous persons considered to be contributing to insecurity.[386]

The balance struck between ideal and dangerous autonomy in modern preparatory offences, such as the offence targeting grooming of a child for sex offending[387] or preparation of terrorist acts,[388] is very different to that taken in traditional offence formulations, in which the reassurance function of the criminal law is achieved indirectly. It is no longer assumed that the criminalisation of attacks alone is sufficient to ensure people feel secure. This implies that people's trust in one another to conform to the law is severely depleted. Further reassurance in the form of preventively-focussed offences is required in order to enable citizens to feel safe enough to go about their daily lives. Dangerous autonomy – with its acknowledgement of the fallibility of agents and the risks they pose – has gained dominance over ideal autonomy in the logic of these offences. The historical pattern of offences, with their emphasis on ideal autonomy, could be said to institutionalise trust between citizens. In contrast, preventively oriented offences, such as preparatory offences, institutionalise distrust.[389] The creation of these offences signal that the state no longer trusts its citizens to comply with the law, and as such more coercive measures are necessary.

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[386] Cornford rejects this argument on the basis that the concept of 'objective dangerousness' is notoriously slippery and so cannot be relied upon: Cornford, 'Book Review: The Insecurity State' (n 380) 518-9. However, earlier in this Chapter I have rejected this concern and posited the use of a reasonable observer test to determine the dangerousness of conduct. Jakobs, as summarised by Ohana, supports the characterisation of preparatory offences as part of the 'enemy criminal law': Ohana, 'Trust, Distrust and Reassurance' (n 351) 726.

[387] Sexual Offences Act 2003, s 15.

[388] Terrorism Act 2006, s 5.

[389] Ramsay, *The Insecurity State* (n 22) 232.

Ramsay argues that this shift in emphasis has come about because of 'the lack of social cohesion engendered by the atomistic neoliberal economic and social order'.[390] Without delving into the very interesting discussion of the precise causes of the current approach to criminalisation, it suffices to recognise that a fundamental shift has occurred in relation to how the state conceives of citizens. According to Ramsay, now 'the official understanding of the representative citizen [is] as someone who feels intrinsically vulnerable to criminal victimization'.[391] That is, citizens are seen by the state as vulnerable to the exercise of other's dangerous autonomy and so must be protected by the state. Ramsay argues that the main outcome of this recognition of citizens as vulnerable is the inversion of the relationship between trust and reassurance historically present in the liberal model: instead of assuming that we can trust each other, modern logic maintains that we cannot trust each other unless we are sufficiently reassured.[392] Instead of focussing on ideal autonomy, the new logic of criminalisation places greater emphasis on dangerous autonomy. Ramsay's claims seem to be borne out. Despite the relatively low levels of crime experienced over the last two decades, there remains a high degree of public concern about crime; a concern that is disproportionate to the actual crime rate.[393]

[390] Ramsay, *The Insecurity State* (n 22) 111.

[391] *Ibid* 216.

[392] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 44.

[393] While the level of crime measured by the Crime Survey for England and Wales has been falling since a peak in 1995, the survey has consistently shown that most people perceive that crime across the country as a whole has still been rising. Over three-quarters of adults have consistently reported that they perceive crime to be a big problem for the country. In general, the survey shows that individuals' perceptions of crime on a national level do not match well with reality: Office for National Statistics, 'Public perceptions of crime in England and Wales: year ending March 2016' (7 September 2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/publicperceptionsofcrimeinenglandandwales/yearendingmarch2016> accessed 8 January2019. See also: Zygmunt Bauman, *Liquid Fear* (Polity Press 2006) 130: 'Contrary to the objective evidence, it is the people who live in the greatest comfort on record, most cosseted and pampered than any other people in history, who feel more threatened, insecure and frightened… and more passionate about everything related to security and safety than people in most other societies past and present.'

It is plausible to view the state as responding to citizens' feelings of vulnerability by enacting preventive measures that aim to reassure them.

In sum, many modern preventive offences target citizens who, through their conduct, fail to reassure us of their trustworthiness. A person who carries out preparatory conduct fails to reassure us that we can trust them to abide by the law. They make it difficult for us to view them as agents with ideal autonomy, worthy of our trust. In this logic, we hear an echo of Ohana's arguments concerning autonomy: that it is justifiable for the presumption of trustworthiness to dissipate as a person moves forward in the implementation of her unlawful plan. Such people have through their conduct 'proved themselves unworthy of the burden of trust promoted by [ideal] autonomy.'[394] Such people have, essentially, shown themselves to be dangerous.[395] Underpinning this logic is the assumption that, in a society in which citizens feel vulnerable to others, we have a shared duty to reassure each other. A failure to do so can ground criminal liability. If this assumption is accepted it can justify a very wide scope of criminal liability.[396] It also implies that all citizens carry within them the potential to become untrustworthy and thus dangerous, and so need to be constantly surveyed and regulated.[397] The danger of accepting this assumption is therefore clear.

5.2.3 *The Appropriate Balance Between Ideal and Dangerous Autonomy*

Should we accept this modern approach to criminalisation? Central to answering

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[394] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 29.

[395] Ramsay, *The Insecurity State* (n 22) 144.

[396] *Ibid* 146-7. Other authors also express concerns that a focus on securing social order might justify an overly broad, or socially authoritarian criminal law: Bottoms, 'Civil Peace and Criminalization' (n 364) 248-9; Farmer, 'Criminal Law as an Institution' (n 364) 95.

[397] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 182.

this question will be whether we assent to the characterisation of citizens as intrinsically vulnerable to criminal victimisation, and so in need of significant reassurance.[398] A preliminary question arises as to what a theorist ought to do in the face of political reality. If Carvalho and Ramsay are correct to argue that the structural conditions necessary for maintaining the dominance of ideal autonomy no longer exist, how should a theorist respond? On the one hand, there is a danger inherent in being too idealistic: favouring a minimalist account of the law at a time of great social insecurity may invite incredulity. A criminal law that does not succeed in providing a sense of security to citizens may lose their respect.[399] In the face of an imperfect reality, it may be best to make some concessions.[400] On the other hand, normative theory ought not be constrained by the limits of the current socio-political climate. There is a role for theories that provide ideal accounts of how the state and the law should function. The difficulty in realising an ideal does not make it any less an ideal.[401] Arguably, to the extent structural conditions do not favour a particular theory of criminalisation, work should be done to change those structural conditions.[402] However, it might also be argued that dissonance between structural conditions and a particular theory should lead us to conclude that the theory is wrong.

[398] Ramsay, *The Insecurity State* (n 22) 190; Carvalho frames the question in terms of the correct balance between trust and reassurance: Carvalho, *The Preventive Turn in Criminal Law* (n 20) 36.

[399] Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (n 126) 85.

[400] Pettit, 'Criminalization in Republican Theory' (n 38) 150.

[401] Farmer suggests that the answer to this 'lies in the critical space which is always opened between the institution and its values, and the process of reflecting on both the ideals and the practice in order to produce a critical understanding of the modern institution of the criminal law': Farmer, 'Criminal Law as an Institution' (n 364) 100.

[402] Multiple theorists emphasise that the criminal law is just one of many factors contributing to social order and trust. See, for example: Bottoms, 'Civil Peace and Criminalization' (n 364) 243; MacCormick, *Institutions of Law* (n 364) 221; Daniel Korman, 'The Failure of Trust-Based Retributivism' (2003) 22 Law and Philosophy 561, 572.

The current balance between ideal and dangerous autonomy is unsustainable: it undermines the legitimacy of the criminal law and it undermines representative democracy. Despite the best efforts of the state acting in accordance with this model, it cannot provide citizens with a sense of security. This provides strong reasons for rejecting the view of citizens as intrinsically vulnerable to criminal victimisation. The balance has moved too far toward dangerous autonomy, and the dominance of ideal autonomy must be reasserted.[403] This is not to ignore the difficulties of adopting this position in the present climate. It is to argue, nevertheless, that progress can only be made in improving the security of citizens by denouncing the self-defeating attitude of vulnerability and turning to mechanisms other than the criminal law to build social cohesion and mutual trust.[404]

Ramsay argues that there is a core contradiction in the current approach to criminalisation. Under this approach, the state has enacted a raft of measures directly targeting feelings of insecurity. This is meant to reassure citizens and increase feelings of security. The perceived need to further reassure citizens in this way arises out of the view that conventional offences have failed to adequately secure the social order. Therefore, inherent in the justification of these new, reassuring offences is 'the assumption that the state's threats of punishment do not inspire confidence in the population because they are

[403] Cf. Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' (n 126). Horder argues that the anticipatory perspective of criminal law, which can be seen as linked to dangerous autonomy, should be given at least equal status in the criminal law as the minimalist harm-done perspective, which is linked to ideal autonomy.

[404] This is similar to an argument suggested by Carvalho, albeit in different terms: 'The notion that trust has limits and conditions problematizes the universalistic conception of individual liberty underpinning the liberal model of criminal law. At the same time it can also offer the grounding for a more nuanced defence of the same model, by suggesting that it is possible to organize the criminal law around an expressivist conception of individual autonomy, provided that individuals are adequately assured. Even if there are tensions within criminal subjectivity, responsible subjectivity could, and should, still figure prominently as the normative position': Carvalho, *The Preventive Turn in Criminal Law* (n 20) 35-6.

inadequate to deter offenders.'[405] For Ramsay, the enactment of preventive offences thus amounts to 'an authoritative statement of the law's lack of authority.'[406] The enactment of such laws exposes a lack of confidence in the social cohesion of the political community.[407] This is to convey through the criminal law a profoundly sceptical view of society, and to reinforce the very vulnerability that the law is designed to alleviate. 'This can only have a deeply demoralizing effect that corrodes the underlying conditions for social order.'[408] According to Ramsay, by institutionalising distrust, and casting fellow citizens as potentially dangerous, preventive offences undermine the prospect of mutual trust which is essential to achieving the security which these offences purport to advance.

There are two threads to Ramsay's critique of criminal measures that target feelings of insecurity. First, such measures are counterproductive, in that they increase rather than reduce feelings of insecurity. Second, such measures communicate and reinforce the impotence of the criminal law in dealing with criminal threats. Ramsay's claims are made on a conceptual level, without reference to empirical evidence.[409] Can these claims be supported? The first claim, that measures targeting feelings of insecurity are counterproductive, has an intuitive appeal. As eminent sociologist Bauman argues:

> Fear prompts us to take defensive action, and taking defensive action gives immediacy, tangibility and credibility to the genuine or putative threats from which the fears are presumed to emanate. It is our response to anxiety that recasts

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[405] Ramsay, *The Insecurity State* (n 22) 217.

[406] *Ibid.*

[407] *Ibid* 219. Ramsay frames this in terms of a failure of sovereign authority which is inconsistent with the Hobbesian project of state. Carvalho disagrees with this characterisation: Carvalho, *The Preventive Turn in Criminal Law* (n 20) 77. Regardless of how this should be conceptualised relative to the theory of Hobbes, there is a clear kernel of truth in the concern that preventive offences are self-defeating in the message that they communicate to citizens.

[408] Ramsay, *The Insecurity State* (n 22) 232.

[409] Harry Annison, 'Book Review: Peter Ramsay, The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law' (2013) 17 Theoretical Criminology 419, 421.

> sombre premonition as daily reality, giving a flesh-and-blood body to a spectre.[410]

Ohana criticises this argument. His argument concerns the effect of preventive orders on levels of trust between citizens. Contrary to Ramsay, he claims that such orders can reinforce trust. Preventive orders respond to acts on the part of members of a polity which make others feel unsafe. These acts might give other citizens reason to doubt the authority of the criminal law, thus undermining their trust that others will conform with the law. However, by singling out these actors and subjecting them to an order, this comforts the public.[411] Preventive orders thus have the effect of:

> symbolically embed[ding] the understanding that insofar as outwardly disquieting courses of conduct are not engaged in, it is safe to assume that citizens are generally carrying themselves as law-abiding actors, and that the criminal law holds sway.[412]

How can we assess the relative strength of these competing arguments? Ohana states that it remains an open question whether preventive measures can restore trust. He acknowledges the possibility, identified by Ramsay, that such measures 'will merely disseminate trust deficits into the social fabric, encouraging distrust in fellow citizens without necessarily reproducing trust in turn.'[413] There does not seem to be any empirical research that directly addresses the impact on interpersonal trust of preventive measures of this sort. Nevertheless, it seems plausible to draw some inferences from information we do have in support of Ramsay's position. First, as already set out, we know that despite the relatively low levels of crime experienced over the last two decades, there remains a

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[410] Bauman, *Liquid Fear* (n 393) 131.

[411] Ohana, 'Trust, Distrust and Reassurance' (n 351) 747-8.

[412] *Ibid* 748.

[413] *Ibid* 750.

high degree of public concern about crime, a concern that is disproportionate to the actual crime rate. Similarly, it remains the case the individuals aged 35 and over generally overestimate their likelihood of experiencing criminal victimisation when compared to victimisation rates. There has been some reduction in concerns about victimisation in the last decade, in line with decreasing crime rates, but fear amongst over 35 year-olds remains disproportionate.[414] Second, we know that over the last two decades there has been a proliferation of preventive measures.[415] Taking these two pieces of information together, we might tentatively conclude that preventive measures have not been particularly effective in reducing public concerns about crime or fears of victimisation. However, whether they have been counterproductive is hard to gauge from this limited information.

Bauman cites a case study carried out by Grotowicz as evidence that preventive measures are counterproductive.[416] The case study analysed the response of the German Federal Republic to the terrorist outrages perpetrated by the Red Army Faction in the late 1970s. Grotowicz found that while in 1976, under 10 per cent of German citizens considered personal safety an important political issue, two years later the majority of citizens rated it as more important than rising unemployment or inflation. Between 1976 and 1978, German citizens witnessed a rapid increase in police and secret service numbers and were exposed to the increasingly bold claims of competing politicians who promised tougher anti-terrorist measures. Grotowicz's conclusion was that tougher legislation played into the hands of the terrorists, by enhancing their public visibility and

[414] Office for National Statistics, 'Public Perceptions of Crime in England and Wales' (n 393).

[415] See fn 20.

[416] Wiktor Grotowicz, *Terroryzm w Europie Zachodniej w imie narodu i lepszej sprawy* (PWN 2000) cited in Bauman, *Liquid Fear* (n 393) 151-3.

increasing the volume of fear in German society.[417] There thus seems to be some support for Ramsay's argument that preventive measures may increase distrust in society, rather than reducing it. However, there is certainly not enough here to conclude confidently in favour of Ramsay's position.

It may be said that these arguments neglect the possibility that *some* citizens do feel more secure knowing that preventive offences are in place, even if this is not reflected across the whole community. There does not seem to be data supporting this claim but let us assume it is true for the purposes of argument. There remains a central difficulty with relying on an increase in feelings of security for some citizens as justification for the use of preventive measures. The feeling of security that is arguably gained by some citizens through the enactment of preventive offences requires identifying fellow citizens as 'dangerous' actors; actors who cannot be trusted. Certainly, modern offences are not framed in such terms: preparatory offences, for example, target preparatory acts committed with criminal intent. Nevertheless, the effect of these offences is to identify those who cannot be trusted. They uphold the appearance of being based on risk assessments and individual agency but are used as tools to target the dangerous other: the sex offender,[418] or the terrorist.[419] In doing so, they create a cleavage in the political community between those who are responsible citizens who can be trusted, and those who cannot be trusted and are treated as threats and outsiders.[420] The corrosive effect of

[417] Bauman, *Liquid Fear* (n 393) 151-3.

[418] Sexual Offences Act 2003, s 15.

[419] Terrorism Act 2006, s 5.

[420] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 182-3. This can be described as the problematic, exclusionary character of preventive criminal law: *Ibid* 185. A central critique of Jakobs' enemy criminal law, which argues for the recognition of citizens and enemies as distinct, is that it seems to suggest the right to freedom and self-governance is not recognised by virtue of the personhood of the citizen, but rather is earned by cultivating loyalty to the law and refraining from disquieting fellow members of society. This is a deeply troubling premise: Ohana, 'Trust, Distrust and Reassurance' (n 351) 728. See also: Farmer, 'Criminal Law As An Institution' (n 364) 87: A focus on

this logic on social cohesion and order is apparent. Such an approach gives up on the project of a political community in which all can feel secure, regardless of political, moral and social divisions. There does, therefore, appear to be some basis on which to conclude that preventive measures fail to reduce, and may exacerbate, feelings of insecurity.

In relation to Ramsay's second claim – that preventive measures undermine the authority of the law itself – there is a large body of criminological work addressing the legitimacy of the police as law enforcement agents, and the law more generally.[421] The meaning of legitimacy within this literature is itself contested.[422] For our immediate purposes, it is sufficient to proceed on the basis that legitimacy is:

> a quality that is possessed by an authority, law, or institution that leads others to feel obligated to accept its directives… When people ascribe legitimacy to the system that governs them, they become willing subjects whose behaviour is strongly influenced by official (and unofficial) doctrine.[423]

In assessing Ramsay's claim that preventive measures undermine the authority of the law itself, research into what builds, undermines and maintains the legitimacy of the police and the law, in the eyes of the public, is thus highly relevant.

The bulk of empirical research to date has focussed on the connection between

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how the law is used and enforced highlights the ways in which criminal law supports broader processes of social exclusion; Adam Crawford, 'Regulating Civility, Governing Security and Policing (Dis)Order Under Conditions of Uncertainty' in J. Blad and others (eds), *Governing Security Under the Rule of Law?* (Eleven international Publishing 2011).

[421] For example, see the work of Tom R. Tyler, including the seminal paper: Tom R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283; Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013).

[422] See, for example, Tankebe and Liebling, *Legitimacy and Criminal Justice* (n 421) Part 1; Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102 The Journal of Criminal Law and Criminology 119, 124-132.

[423] Tom R. Tyler and Jonathan Jackson, 'Future Challenges in the Study of Legitimacy and Criminal Justice' in Justice Tankebe and Alison Liebling (eds) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 88.

‘procedural justice’ and legitimacy. Specifically, it has looked at how the quality of decision-making and quality of treatment experienced by citizens in their interactions with police affects their perceptions of police legitimacy. Quality of decision-making is concerned with ‘whether citizens are treated fairly when law enforcements authorities make decisions about them’.[424] Quality of treatment refers to ‘whether law enforcement officers treat citizens with proper respect as human beings, each with his or her own needs for dignity, privacy and so on.’[425] An extensive body of empirical research has shown that when citizens have interactions with the police in which quality of decision-making or quality of treatment is absent, this is powerfully delegitimating.[426] Conversely, when citizens regard procedures to be fair, this contributes to citizens accepting police decisions, ascribing legitimacy to the law, and long-term reductions in defiance, resistance and hostility toward the law and its enforcers.[427] Perhaps most strikingly, this research has shown that procedural fairness is far more important in public evaluations of the legitimacy of the police and law than the perceived performance or efficacy of the police. That is, when it comes to assessing the legitimacy of the police and the law, people are far more influenced by how they are treated by the police, than by how effective they perceive the police to be at fighting crime.[428]

This research does not speak directly to the question of whether preventive offences undermine the authority or legitimacy of the law. Nevertheless, two points can be made. First, to the extent that people feel that they are being treated unfairly when they

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[424] Bottoms and Tankebe, ‘Beyond Procedural Justice’ (n 422) 121.

[425] *Ibid* 121.

[426] *Ibid* 145.

[427] *Ibid* 121.

[428] Tyler and Jackson, ‘Future Challenges in the Study of Legitimacy and Criminal Justice’ (n 423) 84-5.

are investigated, arrested or charged for committing a preventive offence, this will undermine the legitimacy of the police and the law in their eyes. As will be explored further in Chapter IV, there is evidence that broadly drawn, preventive offences are often used, and are perceived to be used, in a discriminatory fashion. If preventive offences are implemented unfairly in this way, as there is good reason to believe they will be, then this will delegitimise the police and the law. Second, the perceived efficacy of the police and the law in fighting crime is not as significant when it comes to people's legitimacy assessments of the police and the law. Accordingly, focusing foremost on fighting crime is likely to be an ineffective strategy for securing the legitimacy of the law. Achieving preventive gains is unlikely to greatly increase people's assessments of the law's legitimacy. Pursuing such preventive gains may in fact be counter-productive if this generates a higher number of negative interactions between citizens and police.

Recent developments in the criminological literature may also provide insights more directly relevant to the relationship between the authority of the law and preventive offences. New research is being carried out to assess the impact of 'legal socialization' on perceptions of police legitimacy and the legitimacy of the law.[429] The legal socialization perspective considers the process by which people 'acquire beliefs and expectations concerning the appropriate role of the legal system as a regulatory force within society'.[430] In particular, through legal socialization people acquire beliefs as to the boundaries of power that legal authorities possess:

> People demarcate their lives into different domains and within each of these domains they place limits on whether and to what degree authorities have the right

[429] See: Rick Trinkner, Jonathan Jackson and Tom R. Tyler, 'Bounded Authority: Expanding "Appropriate" Police Behaviour Beyond Procedural Justice' (2018) 42 Law and Human Behaviour 280; A.Z. Huq, Jonathan Jackson and Rick Trinkner, 'Legitimating practices: Revisiting the predicates of police legitimacy' (2017) 57 British Journal of Criminology 1101.

[430] Trinkner, Jackson and Tyler, 'Bounded Authority' (n 429) 281.

> to regulate their behaviour. Individuals recognize limits on power and expect police officers to behave in accordance with this bounded authority…[431]

The views that people have as to the 'bounded authority' of the police is not synonymous with the legal scope of police powers. 'Bounded authority' judgements concern whether the police are perceived to go further than citizens themselves believe is right and proper.[432]

Recent research shows that the legitimacy of the police and the law is undermined when people view the police and the law as going beyond their 'bounded authority'.[433] This means that, in certain circumstances, 'increased intrusion by legal authority can be *in-and-of-itself* delegitimizing'.[434] Accordingly, it is possible that increased use of preventive offences may, quite independently of whether they are enforced in an unfair fashion, undermine the legitimacy of the law.[435] Whether they do so will depend on whether their enforcement is perceived as going beyond the 'bounded authority' of the law. Further research will be required to assess whether this is the case. However, there is, at least, an empirical basis for some concern about the effects of broadly drawn preventive offences on the perceived legitimacy of the law. Cumulatively there are, therefore, good reasons to endorse tentatively the intuitively appealing claims made by Ramsay: preventive measures, such as preparatory offences, institutionalise distrust between citizens and undermine citizens' trust in the authority of the criminal law.

A final concern in relation to the current approach toward criminalisation is its

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[431] Trinkner, Jackson and Tyler, 'Bounded Authority' (n 429) 282.

[432] *Ibid.*

[433] See: *Ibid*; Huq, Jackson and Trinkner, 'Legitimating practices' (n 429).

[434] Trinkner, Jackson and Tyler, 'Bounded Authority' (n 429) 282.

[435] *Ibid* 289.

impact on privacy and, in turn, on the potential for a functioning democracy. When preparatory acts are criminalised, this reduces the private sphere. Criminalising preparatory acts renders surveillance of thoughts legitimate, 'since this is where we find out if a preparatory act is about to be committed.'[436] Therefore, adherence to the current approach of the criminal law opens up all aspects of life to official surveillance and potential intervention. Furthermore, preparatory offences can be seen as targeting manifestations of disloyalty to the legal system. By failing to be deterred by the criminal law, a person engaging in preparatory conduct has shown herself to be disloyal to the legal system,[437] and thus to be a dangerous person. Criminalising conduct that displays an attitude of hostility towards legal norms 'amounts to a penal demand for attitudinal conformity.'[438] The core difficulty is that this reduces the sphere of existence in which citizens are free from surveillance or coercive power, in which they can engage in moral and political reflection.[439] This grave intrusion into the private sphere and demand for attitudinal conformity potentially hinders the discourse, and disagreement necessary for a functioning representative democracy. Further, the pervasive state presence legitimated under this approach represents an inversion of proper power relations within a democracy. Citizens become accountable to the state for their actions, under a constant duty to demonstrate their trustworthiness. Under a representative democracy the state should be

[436] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 219. See also Ramsay, *The Insecurity State* (n 22) 225.

[437] See, for example: Thorburn, 'Constitutionalism and the Limits of the Criminal Law' (n 364). Thorburn argues that the 'role of the criminal law is to identify when individuals are attempting to supplant the law's rules with their own preferred arrangements': *Ibid* 88.

[438] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 220. Ramsay draws here on the work of George Fletcher, see: George P. Fletcher, *Basic Concepts of Criminal Law* (Oxford University Press 1998) 180.

[439] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 225; Ramsay, *The Insecurity State* (n 22) 225.

accountable to the citizenry, not the other way around.[440] This undermines representative democracy itself. As Ramsay concludes:

> [T]he more the executive is able to coerce the purely private activity and attitudes of individual citizens, the less meaningful is the claim of government to represent the citizenry (and the more the citizenry appears to be required to represent the government).[441]

There are, therefore, compelling reasons for rejecting the balance between ideal and dangerous autonomy that is struck in the modern criminal law. It is self-defeating; it cannot provide citizens with the sense of security it aims for and it cannot build public trust in the criminal justice system. Further, it mandates the intrusion of the state into all aspects of citizens' lives, thus eroding the private sphere and altering the power dynamics that underpin a functioning representative democracy. The only way forward is a return to ideal autonomy as the dominant conception of autonomy in the criminal law. As Carvalho states, '[o]ne of the main duties in a polity that aspires to be a liberal democracy involves a certain kind of civic trust'.[442] The trust which a commitment to ideal autonomy entails is an essential aspect of collective self-government.[443] This trust is a duty, and a burden. It is a burden because there are good reasons not to trust other citizens. Institutionalising trust will mean tolerating a degree of insecurity and risk of harm. Nevertheless, it is only through such trust that the conditions necessary for a truly democratic liberal state can be secured.[444]

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[440] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 229.

[441] Ramsay, 'Preparation Offences, Security Interests, Political Freedom' (n 22) 228. Bauman also argues that institutionalised distrust saps the foundations of democracy: Bauman, *Liquid Fear* (n 393) 154.

[442] Carvalho, *The Preventive Turn in Criminal Law* (n 20) 27.

[443] Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 228.

[444] *Ibid* 234.

5.3 *Conclusions on Autonomy*

It is therefore appropriate, when considering the scope of the criminal law, to adopt an ideal conception of autonomy as a starting point. That is, citizens should be treated as rational, guided by reasons, and thus generally to be trusted to conform with the law. In the context of attempts liability, this supports Duff's argument that the criminal law should not intervene early, removing the chance for a person to change their mind and desist. Therefore, a narrow law of attempts should be favoured. Nevertheless, what a foray into political philosophy has exposed is that it is overly simplistic to state that ideal autonomy is the only conception of autonomy relevant to the criminal law. Dangerous autonomy, which recognises the fallibility of citizens and the risks they pose also has a role, even if a subsidiary one. Given the current climate of distrust, it seems overly idealistic to be as staunchly in favour of respecting ideal autonomy as Duff is. That is, the criminal law of attempts should not be limited to attacks, where the intending criminal has gone so far that the victim would be justified in using self-defence against them. Instead, in instances where a person has embarked on the offence itself, but not come to a point where self-defence would be warranted, the state should also be able to intervene. Although this comes at the cost of the offender's chance to repent at the very last minute, this is outweighed by considerations of harm prevention. That is, once a person has embarked upon a criminal offence, it becomes legitimate to treat them in terms of dangerous, as opposed to ideal, autonomy.

For the sake of clarity, this section sets out the proposals made by the England and Wales Law Commission as to attempts liability. [445] These proposals were not intended to

[445] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35). This proposal was ultimately dropped by the Law Commission following consultation, on the basis that the present law was working adequately and there was no appetite for reform: England and Wales Law Commission, 'Conspiracy and Attempts' (n 193).

extend the scope of the law, but instead to provide greater guidance to judges in its application.[446] The guidance offered is useful. The Law Commission proposed to replace the current law of attempts, as set out in section 1(1) of the Criminal Attempts Act 1981, with two offences. The first would be an offence of criminal attempt and would be limited to the last acts needed to commit the intended offence. The second would be an offence of criminal preparation, limited to acts of preparation which are properly to be regarded as part of the execution of the plan to commit the intended offence.[447] The intention in providing for two new offences was to prevent an overly narrow application of the law, as exhibited in the case of *Geddes*.[448] The Law Commission were concerned that too close a focus on the language of 'attempt' and its connection to the concept of trying had caused this overly narrow application. A new offence of criminal preparation would remove this possibility, by removing the distracting nomenclature of 'attempt'.[449] The aspect of the Law Commission's proposals that is of interest to us, then, is the scope of the new offence of criminal preparation.

The Law Commission endorsed the existing distinction between mere preparation and embarking upon the crime proper, which had been enunciated in *Gullefer*.[450] In

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[446] Although some critics thought that the proposals did extend the law, and extended them too far: Clarkson, 'Attempt: The Conduct Requirement' (n 208); England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) [8.76]. Nevertheless, I endorse the Law Commission's approach. This is in part a pragmatic argumentative move. If I endorse a law of attempts that is mainly critiqued for being too broad, I am likely to have the agreement of those who are generally supportive of a preventively-focussed criminal law. If I can then show that current preparatory offences are inconsistent even with such a broad law of attempts, this will have more persuasive force than if I had begun with a narrow law of attempts which was not generally accepted.

[447] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 208.

[448] *Geddes* (n 291).

[449] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 209.

[450] *Ibid* 215.

addition, they proposed to publish a list of examples as guidance for courts. The following examples were set out in Proposal 17:

> [W]e propose that the new general offence of criminal preparation should encompass at least the following situations:
>
> (1) D gains entry into a building, structure, vehicle or enclosure or (remains therein) with a view to committing the intended offence there and then or as soon as an opportunity presents itself.
>
> (2) D examines or interferes with a door, window, lock or alarm or puts in place a ladder or similar device with a view there and then to gaining unlawful entry into a building, structure or vehicle to commit the intended offence within.
>
> (3) D commits an offence or an act of distraction or deception with a view to committing the intended offence there and then.
>
> (4) D, with a view to committing the intended offence there and then or as soon as the opportunity presents itself:
>
> (a) approaches the intended victim or object of the intended offence, or
> (b) lies in wait for an intended victim, or
> (c) follows the intended victim.[451]

This thesis adopts the Law Commission's approach to the scope of liability for attempts and criminal preparation. It is irrelevant whether this liability is provided for in a single offence or divided into two. What is significant is how early the criminal law intervenes. The Law Commission's approach is supported by a commitment to ideal autonomy, which is only compromised in circumstances where a failure to allow state intervention would give rise to incredulity. In the example of an offender lying in wait for their intended victim, as in the case of *Geddes*, it cannot be said that an attack has yet been mounted. Nevertheless, when a person has come this far in execution of their criminal intention, it is acceptable to recognise their dangerous autonomy, and to intervene. To do so overrides their ideal autonomy, because they still have an opportunity

[451] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 219-20.

to desist before an attack commences. An insistence that a would-be offender approach the actual victim before the law can intervene would make crime prevention very much less effective, thereby increasing the risk of harm and undermining respect in the law. It would amount to a failure to recognise the role of the criminal law in providing for the security of citizens.

6. Conclusion

Criminal liability for attempts should be explained in objectivist terms. Duff's account of attempts—with necessary modifications—is compelling. Accordingly, a person should be liable for an attempt when they intend to commit a crime and take steps that are more than merely preparatory toward its commission. This approach to attempts is underpinned by an assessment of culpability that takes into account a person's intentions, beliefs, and the effect they have on the world. The effect that they have on the world is to be assessed from the perspective of a reasonable observer. Critical to limiting the scope of attempts liability is an understanding that, despite the culpability of a person and the need to prevent harm, it is essential for the state to respect their ideal autonomy. While any theoretical account must accept the subsidiary role of dangerous autonomy in the broader structure of the criminal law, dangerous autonomy should not be permitted to become the dominant conception of autonomy. This approach has implications for the legitimacy of specific preparatory offences which criminalise conduct that falls outside the scope of attempts liability. Preparatory offences are only legitimate if there are very strong reasons in favour of criminalisation which outweigh the infringement of ideal autonomy that they entail. Preparatory offences should never be justified on the basis that they contribute to a general sense of insecurity: such a justificatory route places too much emphasis on dangerous autonomy. An extension of the criminal law to allow dangerous autonomy to be taken into account must be so clearly needed that a failure to permit this would invite mockery of the law and so undermine the criminal justice system's credibility. Undoubtedly, where that line is drawn will be debatable and will shift with time. Nevertheless, we have identified a critical factor in determining the scope of preparatory offences: we should not deviate from respect for ideal autonomy more than is necessary to ensure that a basic respect for the law is maintained.

IV

Lessons from Conspiracy Law

This chapter considers the inchoate offence of conspiracy, engaging with its theoretical underpinnings in order to uncover general principles that must be considered in determining the limits of the criminal law. The offence of conspiracy has proved to be controversial in many ways. Not only is the precise formulation of the offence contested, the very existence of the offence has been challenged. Of particular interest is the rationale offered for this general inchoate offence. Conspiracy criminalises conduct at a far earlier stage than attempts law: all that is required is an agreement to commit an offence, without any action in furtherance of this plan necessary. Given that the law of attempts requires a more than merely preparatory act to ground liability, the immediate puzzle posed by conspiracy liability is how criminalisation at the earlier stage of agreeing to commit a crime can be justified, if at all.

This chapter first sets out the elements of conspiracy law, as formulated in the United Kingdom. It explores debates around the fault requirement for conspiracy, teasing out the various possible interpretations of an intention requirement in an inchoate offence and explaining how this may affect the scope of the offence. It then canvases reasons given for and against the existence of the conspiracy offence. Critically engaging with this debate, it will conclude that it is very difficult to justify the conspiracy offence in its current form. This chapter will then explore ways in which the conspiracy offence could be narrowed to a justifiable scope. The insights generated will contribute to the subsequent analysis of the justifiability of preparatory offences.

1. The Conspiracy Offence

The 'essence of a conspiracy is an agreement between two or more persons to commit a criminal offence.'[452] In the United Kingdom, the offence is set out in section 1 of the Criminal Law Act 1977 ('1977 Act'). It states that a person is guilty of conspiracy to commit an offence if she:

> agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions… will necessarily amount to or involve the commission of any offence… by one or more of the parties to the agreement.[453]

A person guilty of conspiracy is punishable by imprisonment, if the offence they intended is punishable by imprisonment, and may be subject to the same maximum term as the completed offence.[454] To understand the offence it is easiest to break down its formulation into discrete elements, discussing in turn the requirement of an agreement and the culpable mental state that must be proved to ground liability.

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[452] Ashworth, *Principles of Criminal Law* (n 41). See also: Ian Dennis, 'The Rationale of Criminal Conspiracy' (1977) 93 The Law Quarterly Review 39, 40; England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 4.

[453] Section 1(1)(a) Criminal Law Act 1977. Section 1(b) also provides that a person will be guilty of conspiracy if he agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, would necessarily involve the commission of any offence by one or more of the parties to the agreement but for the existence of facts which render the commission of the offence impossible. It should also be noted that, per section 5 of the Criminal Law Act 1977, section 1 replaces the common law offences of conspiracy. However, there remain at common law the related offences of conspiracy to corrupt public morals or to outrage public decency, and conspiracy to defraud. The focus of this chapter is on statutory conspiracy, as provided for by the 1977 Act, rather than the residual common law offences.

[454] Section 3 Criminal Law Act 1977.

1.1 *Agreement*

Even though agreement is at the heart of conspiracy law, the 1977 Act provides no definition of the term.[455] Nevertheless, legal authority has made it clear that an agreement involves a meeting of minds, where two or more people converge on a common purpose or design.[456] There need not be a physical meeting of the parties for an agreement to be reached.[457] To be guilty of a criminal conspiracy, the parties must agree to a criminal course of conduct. That is, the parties must agree to carry out acts and bring about consequences that, in the circumstances, will constitute a criminal offence.[458] Reaching such an agreement is the only act requirement of the conspiracy offence.[459] However, in practice it is uncommon for there to be direct evidence of the agreement. As a result, the existence of an agreement is generally inferred from other concerted or collaborative actions performed by the defendants.[460] In fact, most defendants are alleged

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[455] P. Jarvis and M. Bisgrove, 'The Use and Abuse of Conspiracy' [2014] Criminal Law Review 261, 263.

[456] Ashworth, *Principles of Criminal Law* (n 41) 453; Jarvis and Bisgrove, 'The Use and Abuse of Conspiracy' (n 455) 263. A useful overview of recent authorities can be found in *R v Mehta* [2012] EWCA Crim 2824; [2012] 10 WLUK 949 at [36]. This was a case of conspiracy to defraud at common law, but the same principles apply to interpret the meaning of 'agreement' in section 1 of the Criminal Law Act 1977.

[457] Ashworth, *Principles of Criminal Law* (n 41) 453.

[458] Section 1(1) Criminal Law Act 1977. See also: Ashworth, *Principles of Criminal Law* (n 41) 454. It is not necessary that parties realise their agreed course of conduct is criminal for them to be guilty: *Churchill v Walton* [1967] 2 AC 224.

[459] Abraham S. Goldstein, 'Conspiracy to Defraud the United States' (1958) 68 Yale Law Journal 405, 409. Note that in some jurisdictions, most notably some American states, there is an additional requirement of an overt act in furtherance of the criminal agreement. This was rejected in the United Kingdom by the Law Commission: England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 29. See also: Phillip E. Johnson, 'The Unnecessary Crime of Conspiracy' (1973) 61 California Law Review 1137, 1142-3; D. Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (2006) 59 Current Legal Problems 185, 188.

[460] Ashworth, *Principles of Criminal Law* (n 41) 450, 454; Dennis, 'The Rationale for Criminal Conspiracy' (n 452) 40; England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 4; Jarvis and Bisgrove, 'The Use and Abuse of Conspiracy' (n 455) 264; Peter Gillies, *The Law of Criminal Conspiracy* (2nd edition, Federation Press 1990) 176.

to have gone some way toward carrying out their conspiracy, or to have completed it.[461] While further acts often play an important evidential role, they are not a formal requirement of the offence. If direct evidence of an agreement – such as the testimony of a conspiracy member – is available, there may be no need to prove any further acts on the part of the conspirators.

1.2 *Intention*

The culpable mental states that a party must possess to be liable for conspiracy are complex. Section 1(1) of the 1977 Act implies – through the words 'if the agreement is carried out in accordance with their intentions' – that a person must enter an agreement possessing an intention that the agreement be carried out. Further, it states that the intention must be such that, if realised, 'will necessarily amount to or involve the commission of any offence'. Precisely what this means – to possess an intention which if realised would 'necessarily' involve the commission of an offence – is unclear.[462] The

[461] Paul Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (1976) 65 The Georgetown Law Journal 925, 930-1; Gillies, *The Law of Criminal Conspiracy* (n 460) 1, 5-6, 10.

[462] Even the more straightforward requirement that the parties must intend the agreement to be carried out has been the subject of confusion in application. According to the Law Commission, a person should only be liable for conspiracy if they intend the agreement they have entered into to be carried out: England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 34-5. On this approach, a person who enters a conspiracy as an undercover agent, intending to thwart the conspiracy before an offence is committed, will not be liable for conspiracy. Neither will a person who appears to agree to commit an offence, never intending this to occur but instead intending to trick the other parties in order to secure some personal gain, such as financial payment. However, the House of Lords in the case of *Anderson* took a different view, upholding the conviction of a defendant who had not intended the offence agreed upon to be committed: *R v Anderson* [1986] AC 27. The decision has been widely criticized and in the subsequent decision of *Yip Chiu-Cheung* the Privy Council on appeal from Hong Kong refused to follow *Anderson*: *R v Yip Chiu-Cheung* [1995] 1 AC 111. Nevertheless, *Anderson* remains the leading authority in the United Kingdom. In rejecting the approach taken in *Anderson*, the Law Commission claims that 'there is an integral link between conspiracy and intention' such that it does not make sense to speak of someone conspiring when they lack an intention that the conspiracy be carried: Law Commission, 'Conspiracy and Attempts' (n 193) 35. They bolster this conceptual claim by arguing that it would not be right for a person to be liable for the inchoate offence of conspiracy, removed as it is from substantive offending, if they lack an intention that the offence be committed. This is the correct view, even if it is not clearly the current position of the law: to be liable for conspiracy one must intend the criminal agreement to be carried out.

idea of intending to commit an offence seems straightforward enough. However, complexity enters when we recognize that offences are generally made up of a cluster of elements, such as conduct, consequence, and circumstance elements. In order to commit the substantive offence, the defendant may be required to have a different mental state, sometimes short of intention, in relation to each of the offence elements. What then does it mean for a person to intend to commit an offence? Must they intend every element of the offence, even if this is not required by the substantive offence itself?

For example, consider the offence of rape of a child under 13, set out in section 5 of the Sexual Offences Act 2003. A person commits this offence if they intentionally penetrate the vagina, anus, or mouth of a person who is under 13.[463] This offence consists of a conduct element (penetration) and a circumstance element (that the victim be under 13). While the conduct requirement of penetration must be committed intentionally for section 5 to apply, liability is strict as to the circumstance element of the offence. That is, a person can commit this offence even if they do not know or intend that the victim be under 13; in fact, they can be liable even if they reasonably believe that the victim is over 13. Given this, what mental state must a person have in order to be liable for a conspiracy to rape a child under 13? Would it be enough that the parties to an agreement intend that a victim be penetrated by one of the parties and that victim happens to be under 13? Or, must the parties to the agreement intend that a victim be penetrated and intend or know that this victim be under 13?

Section 1(2) of the Criminal Law Act 1977 aims to settle this issue, but it has proven controversial. The subsection provides that where the offence which is the object of the conspiracy includes a circumstance element, to be liable for conspiracy, a person

[463] Section 5(1) Sexual Offences Act 2003.

(and at least one other party to the agreement) must either know that the circumstance will be present at the time that the conduct constituting the offence takes place, or intend that the circumstance be present.[464] For example, to be liable for conspiring to rape a child under 13, a person must intend that the victim will be penetrated by at least one party to the agreement, and either know or intend that this victim is under 13.[465]

However, the Law Commission has criticised the approach taken in section 1(2) on the basis that it is too generous to the accused. The objection is that to require proof of intention or knowledge allows a person to escape liability when they knowingly take an unjustified risk that a prohibited circumstance will be present.[466] That is, a person who is aware that the intended object of sexual intercourse may be under 13, but does not know or intend this, cannot be liable for conspiring to commit rape of a child. Similarly, a person who intends to have sexual intercourse with another and is indifferent as to whether that other will consent, cannot be liable for conspiracy to rape.[467] The Law Commission argues that this is not right. They propose instead that if the substantive offence requires no proof of fault or proof only of negligence in relation to a circumstance element, it will be sufficient for conspiracy liability if the prosecution shows that the conspirator was reckless concerning the possible presence or absence of the circumstance.[468] This would mean that a person who was reckless as to the presence of consent, or age of an intended

[464] This interpretation of section 1(2) was confirmed in *R v Saik* [2006] UKHL 18; [2007] 1 AC 18.

[465] In accordance with the judicial approach to conditional intention, it will be sufficient if the parties agree to pursue the course of conduct even if the circumstance detailed in the substantive offence is present: Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 225.

[466] England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 7; England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 7.

[467] Section 1 Sexual Offences Act 2003 read in combination with section 1 Criminal Law Act 1977. See also: England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 7.

[468] England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 10. Ashworth supports this extension also: Ashworth, *Principles of Criminal Law* (n 41) 465.

sexual partner, could be liable for conspiracy to rape, or conspiracy to rape a child under 13. However, the Law Commission's recommendation has not been implemented, and section 1(2) still governs the law in this area.

Responses to the Law Commission's proposals set out a range of different possible formulations of the *mens rea* requirement of conspiracy. The Criminal Bar Association and Spencer (amongst others) endorsed the approach taken in 1(2) and rejected the proposal to extend the scope of the conspiracy offence further.[469] In contrast, the Council of Her Majesty's Circuit Judges and Duff argued that the proposed extension of the law of conspiracy did not go far enough, and that conviction should be made easier by allowing strict liability as to circumstances in respect of conspiracy, if this is how the substantive offence is formulated.[470] This would mean that a person could be liable for conspiracy to rape a child under 13 if they agreed with another to have sexual intercourse with a person who happened to be under 13, regardless of whether they intended or knew the age of their sexual target, or were reckless or negligent as to their age. These different positions as to the *mens rea* requirements of the conspiracy offence clearly have significant implications for the reach of the offence. There is a necessary relationship between commentators' positions on the *mens rea* requirements of conspiracy, and their overall view as to the appropriate scope of conspiracy liability. For example, Spencer, who opposed an expansion of the *mens rea* requirement of conspiracy, thinks that the current offence of conspiracy is overly broad.[471] Given this interrelationship, it is not

[469] England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 39.

[470] *Ibid* 44.

[471] *Ibid* 23.

possible to resolve the question as to the appropriate *mens rea* requirement for conspiracy prior to a discussion of the broader justifiability of the conspiracy offence.[472]

Nevertheless, for our immediate purposes, this debate affecting conspiracy law reveals that any inchoate offence formulated in terms of the defendant intending to commit a substantive offence does not, despite appearances, precisely stipulate the mental state the prosecution must prove.[473] The uncertainty in the meaning of 'intention' in inchoate offences is particularly troubling, as this *mens rea* element is often relied upon to safeguard against over-extension of the criminal law. This is because the act requirement in inchoate offences may be minimal and, without proof of *mens rea*, may be entirely innocent.[474] It is only the requirement of proof of intention to commit a substantive offence that prevents inchoate offences from capturing innocent conduct, or otherwise overcriminalising conduct that is remote from the commission of a crime. However, as this section has shown, there is a great deal of uncertainty about what is meant by the apparently stringent *mens rea* requirement of intention to commit a substantive offence. Further, how this uncertainty is resolved can make a considerable difference to the scope of the offence.

For example, consider the implications of this uncertainty as to the meaning of intention in the context of the current grooming offence, section 15 of the Sexual Offences

[472] In this way I differ from theorists who being with a philosophical exploration of the concept of 'intention' in the abstract, importing these insights into the criminal law. Instead, I take a more contextualised approach, recognising the significance of the role of intention as a 'gatekeeper' to criminal liability in many inchoate offences, and allowing this role to shape my understanding of the meaning of intention. For an interesting discussion of different approaches to what 'intent' means in the context of the criminal law, see: Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (n 38). See also: Antony Duff, 'Intentions Legal and Philosophical' (1989) Oxford Journal of Legal Studies 76, 76: 'A philosopher who begins from the ordinary extra-legal concept of intention must of course be alert to the possibility that, given the law's "specific requirements", the concept's legal meaning should differ from its ordinary meaning'.

[473] Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1139.

[474] Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 187-8.

Act 2003. If a person (A) is charged with meeting a child (B) following sexual grooming, with the intention of committing the offence of rape of a child under 13, the uncertainty of 'intention' in this context means it is unclear whether the defendant need intend, know, be reckless, or have no particular mental state as to the age of the victim to be liable. Depending on how the intention requirement is interpreted, A could be liable under section 15 for communicating with and arranging to meet a 12 year old (B), who they intend to have intercourse with, when they:

- do not know the age of B;
- reasonably believe B to be over 13;
- are reckless as to whether B is over 13;
- know B to be under 13; or
- intend that B be under 13.

There is manifestly a considerable variation in the moral wrongdoing of A, and the level of risk that A poses, depending on the mental state he has vis-a-vis B's age. Should A be liable for grooming if he has any of these mental states, or is his conduct only sufficiently blameworthy and/or dangerous to warrant criminalisation in some instances? Certainly, how such a question is answered will greatly influence the breadth of the section 15 grooming offence: it will be much easier to convict A if all the prosecution needs to prove is that B was in fact under 13; conversely, it will be much harder to secure a conviction if the prosecution must prove that A knew or intended that B was underage. The current formulation of the offence includes a requirement that A did not reasonably believe that B was 16 or over.[475] Nevertheless, while this precludes conviction in some circumstances, it still does not resolve the question of what mental state A must have in relation to B

[475] Section 15(1)(d) Sexual Offences Act 2003.

being over or under 13, if the offence they are alleged to have intended is one against an under 13-year-old. The offence thus provides incomplete guidance on this central issue of *mens rea*.

The implications of this uncertainty in the meaning of 'intention' is extremely significant in the context of grooming, in particular, given that the range of sexual offences a person may be liable for intending to commit are laden with circumstance elements, such as the age or lack of consent of the intended victim. These circumstance elements transform otherwise legal sexual interactions into criminal conduct. The mental state a defendant has in relation to such circumstances, when he is thinking about future sexual conduct, alters our assessment of his moral blameworthiness and the risk he poses and, accordingly, the appropriateness of criminalising his preparatory conduct.[476]

The appropriateness of a particular interpretation of 'intention' must be bound up with the justifications offered for inchoate liability in a particular context.[477] The broader the meaning given to 'intention' in any given context, the weaker the case will generally be for criminalisation. For example, a person (C) who intends to have sexual intercourse with another, reasonably but mistakenly believing they are over 13, is less morally blameworthy than a person (D) who intends to have sexual intercourse with someone they know is under 13. Further, the risk posed by the C is less than D, as C may desist should

[476] The same difficulty does not arise in the context of the preparation of terrorist acts offence: section 5 Terrorism Act 2006. This offence requires an intention to commit acts of terrorism or to assist another to commit such acts. The definition of 'terrorist acts', by virtue of section 20 of the Terrorism Act 2006 and section 1 of the Terrorism Act 2000, requires that the act 'is designed to influence the government or an international government organisation or to intimidate the public or a section of the public' and 'is made for the purpose of advancing a political, religious, racial or ideological cause.' The mental states required in relation to committing a terrorist act are thus stronger than those required in relation to many sexual offences. There is no question of importing relatively weak *mens rea* requirements into a preparatory terrorist offence. However, other terrorist offences, beyond the focus of this thesis, can certainly be criticized on this basis: for example, section 57 Terrorism Act 2000: Possession for terrorist purposes.

[477] See fn 472.

they discover the age of their intended sexual partner. Therefore, the case for criminalising C's conduct in arranging to meet his intended sexual partner is weaker than the case for criminalising D's conduct. Whether the reasons for criminalising C or D are strong enough to outweigh countervailing considerations will depend on an overall assessment of the justifiability of inchoate liability in the given context. This overall assessment will determine the appropriate meaning to be given to 'intention' in that context. Accordingly, the next section will consider the general rationale for the conspiracy offence, looking also to gain insight into the rationale of preventive offences more generally.

2. Concerns About the Conspiracy Offence

Although the conspiracy offence has been a consistent presence in the criminal law for over 400 years, it has been controversial for almost as long.[478] In its previous instantiation people could be liable for conspiring to do something that was legal if carried out alone. This broad offence was used illegitimately to suppress trade union activities, such as agreements to strike, and to target political dissidents.[479] The conspiracy offence is now limited to agreements to commit criminal offences. Nevertheless, there remain concerns about the breadth of the offence and the associated potential that the offence will be abused. The very necessity and justifiability of the ongoing existence of the

[478] Steven Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (2013) 88 Tulane Law Review 483, 489-90: Although the roots of conspiracy can be traced back to legislation in the 13th century, the offence was initially of very narrow application and not inchoate in nature. It was not until the 17th century that inchoate liability for conspiracy emerged.

[479] Ashworth, *Principles of Criminal Law* (n 41) 452; Goldstein, 'Conspiracy to Defraud the United States' (n 459) 416; Christopher B. Gray (ed), *The Philosophy of Law: An Encyclopedia* (Garland Publishing 1999) 150.

offence has been called into question. This section will first consider the concerns raised about the offence and then the range of possible justifications for the offence.

The conspiracy offence is often referred to as the 'prosecutor's darling' because of the tactical advantages that it affords them.[480] Some of these benefits are inherent in the definition of the offence, while others are procedural. The offence itself, requiring as it does only proof of an agreement as an act requirement, can be much easier to prove than many completed substantive offences, or the inchoate offences of attempting, assisting, or encouraging an offence. Even when a substantive offence has been committed, or the plan has reached a point at which defendants might alternatively be charged with another inchoate offence, prosecutors often choose to charge conspiracy.[481] The conspiracy offence is particularly useful to target a person who has been involved in planning and organising a crime, but has kept themselves sufficiently insulated from the substantive offending that it is difficult to prosecute them via the complex doctrines of complicity, or the even more complex offences of encouraging or assisting a crime.[482] In addition, it can be easier for prosecutors to present to a jury a single charge of conspiracy, as opposed to a number of substantive offences.[483] It is possible for prosecutors to charge conspiracy, even when the substantive offence it targeted has been committed, for two

[480] Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 185; Goldstein, 'Conspiracy to Defraud the United States' (n 459) 409; Ashworth, *Principles of Criminal Law* (n 41) 450-1; Jarvis and Bisgrove, 'The Use and Abuse of Conspiracy' (n 455) 265; Paul Marcus, 'Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area' (1992) 1 William and Mary Bill of Rights Journal 1, 1.

[481] Ashworth, *Principles of Criminal Law* (n 41) 451. Jarvis and Bisgrove, who are barristers, note that in practice most cases of conspiracy involve prosecution in circumstances where one or more substantive criminal offences have been committed: Jarvis and Bisgrove, 'The Use and Abuse of Conspiracy' (n 455) 264.

[482] Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 43; Goldstein, 'Conspiracy to Defraud the United States' (n 459) 409; Neal Kumar Katyal, 'Conspiracy Theory' (2002) 112 Yale Law Journal 1307, 1326-7.

[483] Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 185-6.

reasons. First, the very broad nature of the crime of conspiracy makes this possible, requiring proof only of an agreement and the requisite fault.[484] Second, conspiracy does not 'merge' with the substantive offence if the latter is committed.[485] This is because conspiracy is viewed as a distinct offence such that even when the crime that is its object is completed, the fact of a prior conspiracy represents a separate wrong that can be the focus of a separate charge.[486]

In addition to these features of conspiracy doctrine, a host of procedural implications follow a charge of conspiracy. One is the likelihood that alleged co-conspirators will be tried jointly. Another is the exception to the hearsay rule that allows the prosecution to adduce as evidence against every co-conspirator the hearsay statements of other alleged parties to the conspiracy, made in pursuance of it.[487] These prosecutorial advantages have as their necessary corollary significant disadvantages for defendants.[488] Some argue that the difficulties defendants face when charged with conspiracy are so great that they risk unfair convictions.[489]

Considering the formulation of the conspiracy offence itself, and how this contributes to concerns about its abuse, it is argued that the act requirement of conspiracy – agreement – is too far from the core harm of a completed substantive offence to warrant

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[484] Gillies, *The Law of Criminal Conspiracy* (n 460) 11.

[485] The Criminal Practice Directions 2013 stipulate that the onus is on the prosecutor to justify bringing both substantive counts and the related conspiracy count. Failing justification, the prosecutor must elect to proceed with either the substantive or conspiracy counts: Practice Direction (Criminal Proceedings) [2013] EWCA Crim 1631, para 14A.3. A common ground of justification is that the substantive offences do not adequately reflect the overall criminality: see *Archbold Criminal Pleading, Evidence and Practice* (Sweet & Maxwell 2014) 33-60.

[486] Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 57.

[487] The Criminal Justice Act 2003, s 118(1).

[488] Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1138; Ashworth, *Principles of Criminal Law* (n 41) 452.

[489] Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1138.

criminalisation.[490] Conspiracy as an offence is thus overly broad and may capture individuals who are not truly deserving of conviction and punishment. This argument is made in its strongest form by Goldstein, who states that conspiracy doctrine comes the closest of all general inchoate liability doctrines to making a state of mind alone the basis of criminalisation.[491] He notes that an agreement is very often proven using the same evidence relied upon to prove the *mens rea* elements of the offence. Consequently, the offence does not really have a distinct act requirement that adds to the *mens rea* that must be proved by the prosecution.[492] This seems contrary to the maxim that we do not punish evil intentions *per se*. Even if one does not fully accept Goldstein's argument, it is clear that conspiracy criminalises conduct at a much earlier stage than other inchoate offences, such as attempts law. Further, there remain concerns that the *actus reus* of 'agreement' does not provide a robust constraint on the scope of the conspiracy offence.

The act requirement of 'agreement' is itself somewhat amorphous, widening further the potential ambit of the conspiracy offence.[493] There need not be evidence of a physical meeting at which an agreement was reached, nor of a verbal agreement reached at distance. There need not be evidence that all the co-conspirators communicated with one another, nor that they knew each other's identities.[494] Proof of a tacit understanding

[490] Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 187-8, 227.

[491] Goldstein, 'Conspiracy to Defraud the United States' (n 459) 405.

[492] Goldstein, 'Conspiracy to Defraud the United States' (n 459) 409-10. In conspiracy both 'act' and intent are 'heavily mental in composition': Note, 'The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants' (1948) 62 Harvard Law Review 276, 278. Agreement is an act primarily mental in nature: Sanford H. Kadish, *Encyclopedia of Crime and Justice* (Free Press 1983) 232.

[493] Gerald Orchard, '"Agreement" in Criminal Conspiracy – 1' [1974] Criminal Law Review 297, 297-8; Gillies, *The Law of Criminal Conspiracy* (n 460) 261.

[494] Richard Card, 'The Working Paper on Inchoate Offences: (2) Reform of the Law of Conspiracy' (1973) Criminal Law Review 674, 678.

between conspirators is sufficient.[495] An agreement is generally inferred from circumstantial evidence: the concerted acts of the alleged co-conspirators. Perhaps this approach is necessary to enable the conspiracy offence to function, given how difficult it would be to provide direct evidence of a physical meeting or a verbal agreement. Nevertheless, there is a danger that an agreement will be too readily inferred by a judge or jury,[496] and illegitimate inferences will be drawn in relation to those who associate with criminal gangs.[497] If inferences of an agreement are wrongly drawn, a defendant may be found guilty because of acts she carried out when she did not understand their significance relative to a broader criminal plot.[498] The risk of being found guilty by association is exacerbated by the procedural realities of joint trials and admission of co-conspirators' hearsay evidence.[499] This risk is particularly acute in cases involving a large number of co-defendants, where juries may struggle to differentiate between individual defendants.[500] The breadth of the offence, i.e. intervening at the very early stage of an agreement, combines with the flexibility in practice of proving an agreement to render conspiracy an offence with a vast potential reach. Add to this the broad prosecutorial discretion as to whether conspiracies are prosecuted, and there is a significant risk conspiracy law will be used in an oppressive manner.[501]

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495 Orchard, '"Agreement" in Criminal Conspiracy – 1' (n 493) 299-30.

496 Gerald Orchard, '"Agreement" in Criminal Conspiracy – 2' (1974) Criminal Law Review 335, 343. See also: Kadish, *Encyclopedia of Crime and Justice* (n 492) 232-3; Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 952.

497 Ashworth, *Principles of Criminal Law* (n 41) 452; Marcus, 'Criminal Conspiracy Law' (n 480) 19.

498 Note, 'The Conspiracy Dilemma' (n 492) 284.

499 Ashworth, *Principles of Criminal Law* (n 41) 452; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1139.

500 Marcus, 'Criminal Conspiracy Law' (n 480) 7; Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 943. Empirical research does indicate that it is uncommon for juries in large joint trials to acquit some defendants if they find others guilty.

501 Ashworth, *Principles of Criminal Law* (n 41) 452; Johnson, 'The Unnecessary Crime of Conspiracy' (n

In particular, conspiracy doctrine poses a risk to the rights of privacy, freedom of speech, and freedom of association.[502] The possibility of prosecuting on the basis of mere agreement encourages the police to use intrusive tactics to gain evidence.[503] Consider, for example, the recent controversies surrounding the infiltration of environmental and animal rights activist groups by undercover police officers in the United Kingdom.[504] Further, the expression of controversial ideas can, in certain group instances, be suppressed via the use of the conspiracy doctrine. Conspiracy doctrine has a chequered history of use against political dissidents; this includes use as a tool against trade union movements, against those opposing the military draft during the American war in Vietnam, against socialists and communists, and more recently against perceived terrorist threats.[505] As Morrison notes, '[i]n hindsight, one can discern a clear pattern of abusive or good-faith-but-mistaken conspiracy prosecutions.'[506] It is the breadth of the conspiracy doctrine, on paper and in practice, that allows the offence to be used against whomever is perceived to be the public enemy of the time.[507] This critique of the use of conspiracy law

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459) 1138-9.

[502] Ashworth, *Principles of Criminal Law* (n 41) 452; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1139.

[503] Ashworth, *Principles of Criminal Law* (n 41) 452.

[504] For example, see: Rob Evans, 'Police Forced to Name Undercover Officers Who Duped Women' *The Guardian* (15 August 2014) <http://www.theguardian.com/uk-news/2014/aug/15/metropolitan-police-forced-to-name-undercover-officers> accessed 8 January 2019; Paul Lewis and Rob Evans, 'Undercover Infiltration Scandal – What's It All About' *The Guardian* (29 August 2014) <http://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2014/aug/29/undercover-police-and-policing-mark-kennedy> accessed 8 January 2019.

[505] Ashworth, *Principles of Criminal Law* (n 41) 451; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1139; Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 498. For a discussion of the American case concerning conspiracy to aid and abet men to avoid the Vietnam military draft, see: Note, 'The Logic of Conspiracy' (1970) Wisconsin Law Review 191.

[506] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 498.

[507] This links to concerns that preventive measures, while apparently neutral on their face, are being used as the new 'vagrancy laws', illegitimately targeting those who are considered to be dangerous character types. Janus discusses the resurrection of an 'outsider jurisprudence', using the examples of sexual predator laws, in: Janus, 'The Preventive State, Terrorists and Sexual Predators' (n 104). See

highlights the danger that this broad inchoate offence poses to political freedom of expression and a functioning representative democracy. The pattern of use of the conspiracy offence thus provides a concrete example of the anti-democratic critique made by Ramsay in relation to the increasingly preventive focus of the criminal law, and specifically the use of broad preparatory offences.[508] He argued that broad preventive offences result in a reduction of the private sphere, making the surveillance of thoughts legitimate. Further, they can be utilised to target those considered to be hostile towards the current legal order. In this way, such offences hinder the discourse and disagreement necessary for a functioning representative democracy.

In addition to these concerns about the abuse of the broad conspiracy doctrine, there is a question as to whether the offence is necessary. Given the availability of attempts liability, the new inchoate offences of encouraging or assisting crime, and complicity liability for attempts and substantive offences it is unclear what ground is left for conspiracy to cover.[509] Further, it is arguable that these alternative doctrines address the mischief that conspiracy targets in a more refined way, reducing the risk of overcriminalisation and abuse.[510] Mere prosecutorial convenience does not alone seem sufficient to justify the ongoing existence of the conspiracy offence, with its attendant risks. What arguments, then, have been offered in favour of the conspiracy offence?

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also: Carvalho, *The Preventive Turn in Criminal Law* (n 20) 182-3.

[508] See Chapter III.

[509] It is true that conspiracy is the only offence that criminalises agreement where no further acts have been taken, and where the agreement itself involves no encouragement or assistance on the part of co-conspirators. Such a case is theoretically possible but will occur rarely, if at all, in practice: English and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 26.

[510] Ashworth, *Principles of Criminal Law* (n 41) 452; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1140-1; Marcus, 'Criminal Conspiracy Law' (n 480) 4; Gillies, *The Law of Criminal Conspiracy* (n 460) 7. For a discussion of how civil law jurisdictions do without a general offence of conspiracy, with attempt and complicity doctrine providing a functional equivalent, see: George Fletcher, 'Book Review: Is Conspiracy Unique to the Common Law?' (1995) 43 The American Journal of Comparative Law 171.

3. Justifying the Conspiracy Offence

Any defence of the conspiracy offence must be made in two steps. The first is to establish the role of the offence: that there is a reason for having a conspiracy offence alongside all the other inchoate and non-inchoate offences available to prosecutors. The second, and more difficult, is to establish that the offence is normatively justified. There must be reasons offered as to why forming a conspiracy is sufficiently blameworthy to warrant the involvement of the criminal law, characterised as it is by censure and punishment.[511]

3.1 *The Unique Role of the Conspiracy Offence in the Criminal Law*

This section first considers whether the conspiracy offence has been rendered obsolete by the new offences of assisting or encouraging crime set out in the Serious Crimes Act 2007, in conjunction with the more established doctrines of attempt and complicity. The Law Commission, along with a number of academics, argues that the conspiracy offence serves a unique and important purpose, targeting the distinct wrong of group criminal activity. This is said to justify its continued existence, despite the almost complete overlap between conspiracy and other offences. The argument is that the conspiracy offence alone captures and accurately labels shared criminal plans taking place across a period of time. While other offences may also apply to group conduct, in cases

[511] Jens David Ohlin, 'Group Think: The Law of Conspiracy and Collective Reason' (2007) 98 The Journal of Criminal Law & Criminology 147, 160; Katyal, 'Conspiracy Theory' (n 482) 1369-70. While acknowledging that he does not engage with retributivist cases for conspiracy, Katyal seeks to assume that his utilitarian account of conspiracy doctrine is sufficient to justify its existence. This is odd when viewed in the context of broader criminal law theory. See also: Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 89, 90.

of collective action it is artificial to focus on the discrete, individual actions of different actors. The only way to fully comprehend and fairly label the conduct of criminal groups is the conspiracy doctrine. As modern criminal activity becomes increasingly organized and sophisticated, so too will the role of the conspiracy doctrine will become more important.[512]

Initially, this argument for the unique role of conspiracy sounds promising. However, it is weakened once one becomes aware that, in practice, conspiracy is generally charged in circumstances where the agreed upon offense or offenses have been committed, or at least attempted.[513] This may be because the conspiracy offence is simpler to prove than primary and secondary liability for a completed offence. It may be the case that a conspiracy charge is the best option currently available to prosecutors seeking to capture especially complex or difficult to prove criminal schemes. Nevertheless, there is something problematic about charging an inchoate offence, focused on agreement, in circumstances where substantive offenses have occurred. It inaccurately describes what the defendants have done, falling foul of concerns for fair labelling in the criminal law,[514] and fails to acknowledge the harm that has been suffered by the victim(s) of the offenses.[515] Numerous commentators have suggested that if this is the main use of the conspiracy offence, then it is not an inchoate conspiracy offence that is required, but

[512] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 2, 31; England and Wales Law Commission, 'Conspiracy and Attempts' (n 193) 15-6; Ohlin, 'Group Think: The Law of Conspiracy and Collective Reason' (n 511) 169, 171. See also, Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 228-9; Marcus, 'Criminal Conspiracy Law' (n 480) 42.

[513] Empirical research carried out in the United States supports anecdotal evidence to this effect: Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 930-1.

[514] See: Ashworth, *Principles of Criminal Law* (n 41) 78-80.

[515] Thank you to Lucia Zedner for this thought on the implications for victims of the practice of charging conspiracy where substantive crimes have in fact been committed.

instead some general offence which covers group commission of substantive offences in the course of a broad criminal enterprise.[516] The only cases currently prosecuted that would not be covered by such an alternative crime would be the rare instances in which direct evidence of an agreement is available, by way of an informant, prior to the commission of any attempt or offence.[517] It is questionable whether enabling prosecution of such a narrow range of cases justifies the extension of the criminal law that conspiracy represents. Perhaps the modern shift to intelligence-led policing will increase the regularity of prosecution of conspiracies at the early stage of agreement,[518] but this is speculative.

Therefore, it is not clear that the conspiracy offence in its current form is the right response to group criminality, such that its continued existence can be justified. Nevertheless, until and unless a new offence is created, the conspiracy offence does in practice provide a useful and unique response to group crimes, and one evidently favoured by prosecutors. Even granting the current usefulness of the conspiracy offence, other normative considerations militate against the existence of the offence in its present form. This section now turns to consider the broader, normative justification of the conspiracy doctrine.

A common justification offered for the conspiracy offence is that it makes it possible to intervene early, earlier than any other general inchoate crime, and thereby prevent crime.[519] However, preventive gains alone cannot justify criminalisation.

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[516] Gillies, *The Law of Criminal Conspiracy* (n 460) 265; Card, 'The Working Paper on Inchoate Offences: (2) Reform of the Law of Conspiracy' (n 494) 676; Gray, *The Philosophy of Law: An Encyclopedia* (n 479) 150; Herbert Wechsler, William Kenneth Jones and Harold L. Korn, 'The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy' (1961) 61 Columbia Law Review 957, 961.

[517] Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 930-1.

[518] Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 185.

[519] Ashworth, *Principles of Criminal Law* (n 41) 448, 452; Dennis, 'The Rationale of Criminal

Conduct may only be criminalised if it is wrongful. Further, according to the Standard Harms Analysis, in determining whether an offence is justified, it is necessary to weigh the likelihood that harm will occur and its likely gravity against the costs of prohibiting the conduct in question, including the loss of individual autonomy. Additional side constraints must also be considered in determining whether the offence is justified, such as whether the existence of the offence will lead to violations of rights.[520] Most literature defending the conspiracy doctrine fails to consider the full range of issues bearing on criminalisation, generally focusing only on the risks posed by conspiracies to the exclusion of countervailing considerations. This section will assess the different arguments offered for the conspiracy offence, placing these claims within the context of a broader criminalisation enquiry, which considers the Standard Harms Analysis and the need for conduct subject to the criminal law to be wrongful.

3.2 *The Wrongfulness of Conspiring to Commit an Offence*

It is uncontroversial that agreeing to commit a crime is a wrong. It is wrong to commit murder. Not only is murder *per se* wrong, it is also commonly accepted that the intention to commit murder is wrong, as is a shared intention or agreement to commit murder, that is, a conspiracy to commit murder. Nevertheless, there are differing views as to just how wrong conspiring is. These differences of opinion will in part be influenced by how harmful conspiracies are thought to be. This is because the harm caused by conduct is often partially constitutive of what makes the conduct wrong. Accordingly, different assessments of the harm caused by conspiracies will lead to different

Conspiracy' (n 452) 40; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1137-8; Ormerod, 'Making Sense of Mens Rea in Statutory Conspiracies' (n 459) 228; Marcus, 'Criminal Conspiracy Law' (n 480) 3.

[520] See Chapter II.

assessments of its wrongfulness. As I will conclude that the risks associated with conspiring are not generally as grave as they are often said to be, I accordingly also conclude that the wrong in agreeing with others to commit an offence is generally not significantly worse than an individual deciding to commit an offence.

However, this is not the end of the story. Another possible argument in support of the particular wrongfulness of conspiracy is that conspiring is inherently heinous.[521] The wrongfulness of agreeing to commit a crime exists independently of the harm conspiracies cause. Deliberately plotting with others to break the law is a wrong of a very grave character, evidencing strong antisocial tendencies.[522] Conspiracies involve a greater level of commitment and loyalty to the criminal cause than that present in individuals who decide to commit a crime. The Law Commission goes so far as to speak of conspiracies involving joint and several group responsibility to see the offence through.[523] This sort of commitment warrants disapprobation.

These arguments that conspiring is an inherently heinous act are unconvincing. It is true that where an individual agrees with another to commit a crime, this agreement generates a new reason for them to commit the crime. They have, in addition to whatever other reasons they might have for committing the offence, an obligation to adhere to the agreement. Therefore, there is a difference between an individual forming their own intention to commit a crime, and an individual agreeing with another to commit a crime. In the former instance, the individual's decision to renounce their intention will obliterate any reason to act which that intention itself generated. In contrast, where an agreement has been reached with another, one individual's change of mind will not destroy the

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[521] Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 52.

[522] Goldstein, 'Conspiracy to Defraud the United States' (n 459) 414.

[523] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 31, 35.

reason to act that the agreement has generated. Even if one co-conspirator changes her mind, there will continue to be a reason which weighs on her, arising from the agreement, to carry out the crime; namely, the obligation to comply with the agreement.[524]

Nevertheless, this cannot support the claim that conspiracies *necessarily* involve a greater level of commitment and loyalty to the criminal cause than that present in individuals who decide to commit a crime. That there is an additional reason for committing the crime when an agreement is made does not tell us how much weight a person places on that reason, how important for them it is to keep their agreement and how weighty they consider countervailing reasons to be. The current definition of agreement, for the purposes of conspiracy law, applies equally to a person who firmly commits to engage in group activity and a person who reluctantly approves of another's criminal plot.[525] An agreement to commit a crime does not necessarily entail joint and several responsibility to complete that crime, as the Law Commission suggests. The parties may agree to the commission of a crime, without agreeing to carry out the crime personally if the other parties are prevented from doing so. The degree of commitment involved in a conspiracy varies. Co-conspirators may be quick to break their agreement, should they change their mind, or they may treat the agreement as a solemn promise which they are firmly obligated to keep or – perhaps in organised criminal gangs – which they break at their peril. Therefore, it cannot be said that conspiring is always more wrongful than an individual determination to commit a crime, because of the greater commitment and loyalty involved. A conspirator may be more committed to a criminal plot shared with others than if it were a plot she formed alone. But she may not be. A person who acquiesces in another's criminal plot may be less committed and loyal to that plot than an

[524] See, for example: Margaret Gilbert, 'Agreements, Coercion and Obligation' (1993) 103 Ethics 679, 686-688, 698.

[525] Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1164.

individual who hatches her own plan and commits to completing it. This is the case regardless of formal philosophical claims about additional reasons being generated by an agreement. Therefore, broad generalisations about the relative moral culpability of conspiracies – and their essential heinousness – are unjustified.

Perhaps the core concern of these arguments is that conspiracies are particularly wrongful because they involve multiple people. However, it is unclear how the mere presence of additional people marks a conspiracy out as worse than an individual planning criminal activity. If the involvement of more people does not in fact increase the risk of harm being caused, how is this any worse than the same number of people forming individual criminal plans? Why should they be criminalised if they plan together, but not if they plan individually? Perhaps there are concerns about a person recruiting others who might otherwise have avoided criminality. However, this wrong is more appropriately addressed by the offences of encouraging or assisting crime than by the conspiracy offence.[526] The encouraging and assisting offences are focused on the negative influence of one individual upon another. They better describe the circumstances of recruitment to criminality than the conspiracy offence. [527]

While the notion of conspiring as an inherently heinous act retains some currency in America, Dennis notes that it is no longer popular elsewhere.[528] The House of Lords questioned the heinousness of group activity in the 1970s, with Lord Simon of Glaisdale

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[526] See the Serious Crimes Act 2007.

[527] For a similar argument see: Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1178. See also: England and Wales Law Commission, 'Assisting and Encouraging Crime: A Consultation Paper' (HMSO 1993) 10: 'It might… be argued that, even where the rules as to conspiracy are properly applied, it is preferable for the misconduct of those who assist or encourage others to commit crimes to be controlled by offences specifically directed at that category of conduct, rather than for those assisters and encouragers to be wrapped together with the intended principle offender in a more generally defined crime of conspiracy.'

[528] Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 52.

stating in *R v Withers*[529] that 'although some conduct… may be more heinous… when committed by numbers, not all such conduct will be so.'[530] The idea of the inherent heinousness of conspiracy did not feature prominently in the Law Commission's justification for the conspiracy offence, upon its codification.[531] Civil law countries do not share the assumption that conspiring is sufficiently wrongful to attract the attentions of the criminal law.[532] Even in America, where the idea that conspiracy is a distinct evil has sway, the providence of this idea casts doubt upon its legitimacy. The rhetoric of distinct evil first emerged in the labour union cases; that is, the idea of conspiracy as inherently heinous helped to bolster an abusive use of the conspiracy offence. Steven Morrison argues that the popularity of the idea in the United States continues to encourage questionable prosecutions.[533] This gives us extra reason to be suspicious of the argument that conspiring is a uniquely heinous act.

Another possible argument is that conspiring is wrong because upon entering an agreement with others a person – to a certain extent – loses control over what will happen. That person will not necessarily be able to stop their co-conspirator from completing the intended crime, even if they themselves change their mind. In this way, by entering an agreement, conspirators act in a way that is akin to a person attempting a crime who takes the last act necessary to complete it: in doing so they unleash a risk to others that is

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[529] [1975] AC 842.

[530] *Ibid* at 870. For a discussion of judicial scepticism of group danger and heinousness rationale for conspiracy, see: Kenneth A. David, 'The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States' (1993) 25 Vanderbilt Journal of Transnational Law 951, 964.

[531] See: England and Wales Law Commission, 'Conspiracy and Attempts' (n 193). Although, admittedly, the supposedly unique wrongfulness of loyalty to a criminal group is highlighted in the Law Commission's consultation paper: England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 35.

[532] Fletcher, 'Book Review: Is Conspiracy Unique to the Common Law?' (n 510) 171.

[533] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 492.

independent of their own future choices. This is a grave wrong. Further, when a conspiracy is understood in these terms it makes it difficult for a conspirator to object that intervening at such an early stage removes the opportunity for her to change her mind: to some extent, it is already too late for her to do so.[534]

This line of argument involves a 'slight exaggeration'.[535] Entering into an agreement with others to commit a crime does not amount to losing control in the same way, or to the same extent, as carrying out the last act in an attempt: for example, firing a gun at someone. The necessity of further acts on the part of at least one of the conspirators in order for the intended crime to be committed renders this a very different scenario to that where all that remains is for physical forces to take their course. There are things a person might still conceivably do that could be very effective in preventing a conspiracy coming to fruition, should they have a change of mind. It will be highly contextual, depending on the nature of the agreement and the character and motivations of those who entered into it, whether one conspirator changing their mind will impact on the course of the conspiracy. In some instances, the change of mind of a peripheral co-conspirator may have little effect on the course of a criminal enterprise. However, where a person instigated the criminal plot and was the leader of her co-conspirators in its pursuit, her change of mind is likely to be very significant indeed. So too where the co-conspirator who withdraws possesses an essential skill or characteristic necessary to execution of the plot. Therefore, the analogy with loss of control in the attempts context is too weak to justify treating conspiracy in a like manner. The core concern addressed by this argument is really that conspiracies increase the chance that harm will occur, because of the

[534] Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 44; Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 215; Ramsay, *The Insecurity State* (n 22) 143; Alexander, 'Culpability' (n 331) 237.

[535] Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 44.

involvement of multiple actors, as opposed to the involvement of multiple actors being uniquely wrongful because a risk is unleashed over which individual co-conspirators do not have control.[536]

Even if the idea that a conspirator has lost control of a risk in entering into a conspiracy is taken seriously, as it is by Alexander and Ferzan, this does not provide a good reason for the current scope of the conspiracy offence. In fact, Alexander and Ferzan go on to advocate the abolition of the conspiracy offence. They see the wrong of unleashing the risk that a co-conspirator will complete the crime as best captured by the offence of solicitation – encouragement or assistance in the United Kingdom – and I would agree.[537] If someone enters a conspiracy and then changes their mind, but their co-conspirator is not recalled, they are best described as having encouraged the commission of an offence. Alexander and Ferzan conclude that if conspiracy is to have any independent role that reaches beyond solicitation it must be because the person in agreeing with others to commit a crime has increased the risk of his own criminality.[538] This makes sense: what is implied by the conviction of conspiracy is that the conspirators were more involved in the criminal enterprise than simply being involved in its inception and then stepping back. Again, we are back at the core argument for criminalising conspiracies: they increase the chance that harm will occur. A focus on loss of control

[536] In fact, Asp's suggestion of 'loss of control' in the conspiracy context comes after he has recited familiar arguments about the psychological impact of the involvement of others: that it will be harder to abstain or abandon a plan: Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 44.

[537] Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1174-5, 1178-9. Ramsay describes conspiracy as a 'special case of encouragement more generally': Ramsay, *The Insecurity State* (n 22) 143. Although he is not here advocating for the abolition of conspiracy, his observation aptly captures the true nature of liability under the conspiracy offence if the 'loss of control' argument is favoured as a justification.

[538] Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1174-5, 1178-9.

fails to show that conspiracies are uniquely wrongful, independently of the concern that they are uniquely dangerous.

Katyal hints at another reason for thinking conspiracies are uniquely wrongful. In seeking to justify the heavy punishments for conspiracy available in American law – sometimes greater than the punishment for the completed offence – Katyal points to the information extraction role of conspiracy law. Prosecutors in America often use the threat of severe punishment to encourage conspirators to 'flip' and provide evidence against their co-conspirators at trial. Katyal seeks to justify this practice, including the apparently disproportionate punishments threatened, by arguing that conspiring involves two wrongs: the act of agreeing to commit a crime, and the omission of not providing information to law enforcement. The suggestion is that upon entering an agreement, conspirators become subject to an affirmative duty to report the criminal plot to police. A failure to do so represents a distinct and additional wrong.[539]

This argument is difficult to sustain. English criminal law has traditionally been averse to the imposition of positive duties on citizens, and rightly so: positive duties represent a significant imposition on autonomy.[540] The only apparent reason for imposing a duty on conspirators to report is prosecutorial convenience. It would also be convenient for prosecutors if all those who encouraged or assisted a crime, or were complicit in a crime, were under a duty to assist prosecutors, subject to the threat of more severe punishment if they refused to do so. The existence of such a broad duty, backed up by criminal sanction, involves an unacceptable level of state coercion. It might be right to reward those who cooperate with the state by mitigating their sentence. It cannot be right

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[539] Katyal, 'Conspiracy Theory' (n 482) 1312-3, 1334-6, 1338.

[540] Although for a discussion of the proliferation of positive obligations, see: Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013).

to increase punishment beyond that proportionate to the crime committed because of a refusal to cooperate.[541] Conspiracy is not particularly wrongful because conspirators have a duty to report their crime and have failed to do so.

Therefore, there is no reason to conclude that a group plotting to commit a crime is significantly worse, morally speaking, than an individual planning to commit a crime. We may intuitively think that group activity is more blameworthy, but this intuition is driven by the assumption that groups are more dangerous than individuals, not by anything inherent in group activity. If conspiring does not in fact increase the risk of harm, it is unclear why group agreements should be treated as any more wrongful than individual plans. The case for the justifiability of the conspiracy offence seems to turn largely on the claim that conspiring is particularly dangerous.

3.3 *The Harm Caused by Conspiring to Commit an Offence*

There are broadly two ways in which the harm associated with conspiracies is characterised. They are not necessarily mutually exclusive; a combination of the two may best represent the harm caused by conspiring to commit a crime. Nevertheless, it is worth considering them separately, at least initially. By way of overview, the first form of argument focuses on the relationship between the act of agreeing to commit a particular substantive offence and the commission of that offence. An agreement is seen as an integral step on the path toward the offence, and a step that significantly increases the risk that the offence will be successfully completed. It is the risk that the intended offence will be committed that is the focus of this rationale. The second form of argument considers

[541] That is, unless there is a discrete crime of failing to report which applies. Such crimes do exist in respect of terror-related offences, immigration offences and financial crimes. However, these offences are linked to specific statutory duties to report: see, Ashworth, *Positive Obligations in Criminal Law* (n 540). There is no general duty to report that could explain the alleged heinousness of all conspiracies.

the act of agreeing to commit a crime as a stand-alone source of harm. It is not the risk that the offence the conspirators agreed to will be committed that is the concern; instead, the combination or partnership formed by the agreement is considered to be harmful to society.[542]

3.3.1 *Conspiracy Increases the Risk that the Crime Agreed Upon Will Be Committed*

The most common claim made in support of the conspiracy offence is that conspiracies increase the risk the crime agreed upon will be committed and increase the magnitude of harm caused when the crime occurs. The argument is that the risk in cases of conspiracy is enhanced by group agreement to such an extent that it is justifiable to treat conspiracies differently than individual criminal enterprises. As shown in Chapter III, an individual who intends to commit a crime and carries out a merely preparatory act will not be liable for attempt: their act is remote from the intended crime and does not give rise to a sufficient risk of harm to warrant the intervention of the criminal law. In contrast, it is argued that earlier intervention is justified in cases of conspiracy because, despite the remoteness of an agreement to commit a crime from the ultimate offending, such an agreement increases the likelihood that harmful offending will occur to a significant extent. This argument for the conspiracy offence has found favour with both the England and Wales Law Commission and the Supreme Court of the United States of America.[543] Nevertheless, it is not unanimously accepted.

The most prominent challenge to this argument came from Goldstein over 40 years ago. He was sceptical of the truth of the oft-repeated claim that group criminality

[542] Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 43-4.

[543] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 28-9; *United State v Recio* 123 S Ct 819, 822 (2003) citing *Callanan v United States* 364 US 587 (1961).

was more dangerous than individual criminal activity. He argued that there was no empirical data to support this assumption and, further, common sense suggests that while some instances of group behaviour may be more dangerous, this will not always be the case. One can readily imagine a circumstance where the inclusion of multiple people in a plan would increase the chances of detection, of people being dissuaded from offending, or the attempted offence being bungled.[544] Goldstein therefore concluded that it is unsafe to generalise about conspiracies: some will present risks that are great enough to warrant criminalisation, but others will not. This uncertain empirical state of affairs cannot form the basis of a justification of the general offence of conspiracy.[545] This is particularly so given that the conspiracy offence has been criticised for the vagueness of its agreement requirement, and the readiness with which an agreement is inferred from circumstantial evidence in practice. A finding of an agreement may, therefore, form a particularly weak basis from which to conclude that conspirators are dangerous.[546]

Despite this robust attack, the claim that group activity is more dangerous is still commonly made in support of the conspiracy offence. Katyal has made the most thoroughgoing attempt to establish an empirical basis for this popular argument.[547] His work has been enthusiastically and unquestioningly cited by those predisposed toward the conspiracy offence, including the England and Wales Law Commission.[548] Katyal

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[544] Goldstein, 'Conspiracy to Defraud the United States' (n 459) 414. See also: Francis Sayre, 'Criminal Conspiracy' (1921) 35 Harvard Law Review 393, 410; Gillies, *The Law of Criminal Conspiracy* (n 460) 5; Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 966.

[545] Goldstein, 'Conspiracy to Defraud the United States' (n 459) 414. See also: Marcus, 'Criminal Conspiracy Law (n 480) 4; Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1151, 1163-4; Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 46-7; Gillies, *The Law of Criminal Conspiracy* (n 460) 264; Gray, *The Philosophy of Law: An Encyclopedia* (n 479) 150.

[546] Gray, *The Philosophy of Law: An Encyclopedia* (n 479) 150.

[547] Katyal, 'Conspiracy Theory' (n 482).

[548] England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 29-30.

establishes what it is about group behaviour that warrants special attention, but does not ultimately succeed in identifying a firm basis for the conspiracy offence in its current form. He does not show that all, or most, conspiracies are dangerous enough to warrant criminalisation. Katyal's strategy is to draw on psychological research and economic theory to make broad claims about group dynamics and the risks associated with group criminality. Unsurprisingly, there is very little data available concerning the trajectory of criminal conspiracies specifically: many conspiracies are undetected, and those that do come to light are unrepresentative, having generally progressed a long way toward completion. However, as Katyal identifies, there is a wealth of psychological research concerning group behaviour generally that can help to illuminate the likely group dynamics involved in conspiracies. In addition, basic economic principles suggest there may be significant advantages for conspirators in choosing to work with others.

Katyal argues that one key insight offered by psychology is the way groups form a sense of common identity amongst members. This identity encourages loyalty to the group, with members likely to put the group's interests first even if this is personally disadvantageous. Group membership often creates an insider/outsider mentality, which can facilitate the commission of harm against non-members. Members will also generally place greater stock in the opinion of insiders than outsiders, and so may be less readily dissuaded from their course of action. Another important psychological effect of group criminality involves the ability of members to distance themselves from the immorality of the harm they are jointly causing. Those who play a small role in a larger criminal enterprise may feel they are not doing something very wrong. The disaggregation of wrongdoing present in conspiracies can help conspirators to overcome internal qualms about committing a crime. All of this suggests that once a criminal plan is jointly agreed upon, it is generally more likely to be executed than an individual's criminal plan. In addition, the mutual encouragement gained by co-conspirators may lead to greater extremes in both the attitudes and conduct of group members. This may result in graver harms being caused by a group, as opposed to individual criminal actors.[549]

Drawing on economics, Katyal identifies the efficiencies associated with criminal conspiracies that render their success more likely. A conspiracy allows for specialisation of labour, the sharing of resources and opportunities, and a reduction in competition between members. Criminal groups can decrease the chances of detection via the use of coordinated lookouts or coordinated bribery. In addition to specialisation, the availability of a number of actors enables criminal groups to achieve more complex ends than those that an individual might accomplish.[550] All of these considerations together lead Katyal to conclude that group criminal agreements are indeed more dangerous than individual criminal plans, and accordingly the conspiracy offence is justified.[551]

The difficulty with Katyal's account is that he fails to meet the objection that not all conspiracies will be dangerous. While it is true that a well-executed conspiracy may take advantage of the possible efficiencies available to a group, there is no evidence to suggest that all conspirators do act in this economically efficient manner. It is easy to imagine, and to find examples, of conspiracies where the number of people involved has instead contributed to the plan being scuppered, rather than advanced. Katyal's arguments based on group psychology are more compelling, as there is a sense in which people cannot help being affected by group dynamics. Nevertheless, as Katyal acknowledges,

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[549] Katyal, 'Conspiracy Theory' (n 482) 1312, 1316, 1321-2, 1327.

[550] *Ibid* 1312, 1325, 1326. See also: Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1337-8; Marcus, 'Criminal Conspiracy Law' (n 480) 3-4; England and Wales Law Commission, 'Conspiracy and Attempts: A Consultation Paper' (n 35) 29-30.

[551] Although it should be noted that Katyal offers a number of additional arguments that he together considers justify the conspiracy offence, including the risk of conspirators going on to commit further crimes beyond those initially agreed upon, and the value of the conspiracy offence in obtaining information from informers. These additional arguments are discussed separately.

not every criminal group will manifest the group tendencies identified by psychologists. The strongest claim he can make is that many conspiracies will.[552] The paradigm instance of conspiracy that Katyal has in mind involves repeat conspirators: that is, actors who repeatedly enter conspiracies together, engaging in an ongoing path of criminality. Such repeat offenders are to be distinguished from those who enter one agreement, execute it, and then part ways. In the former instance, the psychological effects of group membership will be at their height, and so too the associated risk. In the latter instance, the psychological impact may be much weaker, if present at all.[553] It is unclear, for example, whether harmful group dynamics would manifest in a case where conspirators had no previous affiliation and communicated only about the details of their plan via the internet. Recognising this variation in the nature of agreements, Katyal concedes that it might not be appropriate to prosecute all single-shot agreements.[554] So, where does this leave Katyal's argument? All that can be concluded from his survey of the psychology and economics literature is that conspiracies have a unique potential to be more dangerous than individual criminal endeavours, by virtue of their group nature. That is not the same as saying that conspirators are in fact more dangerous than individual actors.[555]

How might supporters of the conspiracy offence meet this challenge? One possible rejoinder is to say that, despite some instances of conspiracy that are not very

[552] Katyal, 'Conspiracy Theory' (n 482) 1318, fn 31.

[553] Katyal notes that the psychological literature suggests features of group psychology arise even in 'minimal groups'. However, the extent to which group psychology takes hold will vary depending on the type of agreement, and the effect may be very minor in some cases: *Ibid* 1335.

[554] *Ibid* 1313-4, 1334-6.

[555] '[C]onspiracies are not per se dangerous, but where they are dangerous, they may be especially so': Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 488. See also, Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1151, 1163-4; Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 46-7. Although these articles were written before Katyal's, their arguments still hold weight.

dangerous, on average conspiracies are still more dangerous than the plans of individuals, and this is sufficient to attract the attention of the criminal law. After all, we criminalise other types of conduct where each token may create a different level of risk. For example, not every attempt is equally dangerous. Inept attempts may pose very little risk of harm, but they are criminalised. Moreover, impossible attempts, where, by definition, there is no risk of harm, are still criminal.[556] So too, conspiracy should be criminalised, if on average it creates a sufficiently grave risk of harm.

This analogy with attempts cannot justify the current scope of the conspiracy offence. First, it is still unclear whether, on average, entering into an agreement to commit a crime significantly increases the chance that the crime will occur. If the burden of justification is on those seeking to support the conspiracy offence, they have not discharged it on this point. Second, even if it is the case that conspiring on average increases the likelihood of the intended crime being committed, there are reasons to question whether this is sufficient to justify criminalisation. It is true that we criminalise all instances of attempt, regardless of the level of risk posed by the particular token of conduct. Nevertheless, the reasons why this is justifiable do not apply equally to the conspiracy offence.

Considering attempts, it should first be noted that the criminalisation of impossible attempts is itself controversial.[557] But even if this is accepted and all attempts, whether impossible or inept, are criminalised, the reasons for this general prohibition do not apply to justify the criminalisation of all conspiracies. The manifest danger account,

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[556] Section 1(2) Criminal Attempts Act 1981.

[557] See, for example, Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 104:
> Although an attempted crime is wrong in virtue of the attack on the victim's rights, the grounds for its criminalization rest, in the background, also on the fact that it conduces to harm. This is the worry about impossible attempts: that no harm is threatened and, if the legal specification of such cases can be adequately distinguished, they should therefore not be criminalised.

developed by Fletcher and endorsed in Chapter III, provides that an attempt can be understood as an act that manifests danger to the community. To determine if an act does so, we must consider whether the act is a token of a type of conduct that would, in the long run, produce harm. That is, even if this instance of the act proves to be harmless, would this act if repeated over a period of time generally be harmful? In effect, what this approach provides is that, on average, the risk of harm posed by an attempt, proximate as it necessarily is to the completed offence, is sufficiently high to warrant criminalisation. The same cannot be said of conspiracies. The risk of harm posed by an attempt, given its proximity to completion, will on average be much greater than the risk posed by a conspiracy, which is remote from the completed offence. In addition, the wrong involved in an attempt is much graver than that involved in a conspiracy: not only does the actor have an intention to commit an offence, but they have progressed beyond the point of mere preparation in executing that plan. As Duff would say, they are at the point of attacking the interests of their intended victim, not simply plotting this attack.[558] Why are these features of attempts relevant?

Whether particular conduct should be criminalised depends on, amongst other things, both the wrongfulness of the conduct, and the harm or risk of harm it causes or creates. The interaction between these two related factors is a complex one. Ultimately, the case for criminalisation must be assessed in the round. Sometimes a slight wrong that causes grave harm may be justifiably criminalised: for example, inconsiderate driving causing death.[559] In other instances, conduct that is extremely wrongful may be justifiably criminalised, even if it causes very little or no harm: for example, a harmless instance of rape where the victim is unconscious at the time of offending and never finds out what

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[558] Duff, *Criminal Attempts* (n 190) 387.

[559] Section 2B Road Traffic Act 1988.

has happened.[560] If both the wrongfulness of the conduct, and the level of risk it creates are relatively low, criminalisation may not be justified at all. With this in mind, we can return to considering attempts liability and a possible analogy with conspiracy.

In some ways, the crime of attempt may be seen as analogous to the crime of rape. Rape involves a very grave wrong and generally involves infliction of great harm, although there are instances of harmless rape. Rape is unquestionably justifiably criminalised in every instance – harmful or otherwise – because of the grave nature of the wrong involved and, on average, the great harm inflicted. The case for attempts liability is similar, although not as strong. There is a relatively grave wrong involved: intending to commit a crime and moving beyond mere preparation in execution of this plan. There is also, on average, a high risk of harm being inflicted, even if in some instances there is little, or no risk involved. This combination of wrongfulness and risk is sufficient to justify criminalisation in all instances of attempt.

The same cannot be said of conspiracy: the wrong involved in conspiracy is not as grave as the wrong in attempts. Similarly, it is safe to assume that on average the risk involved in conspiracies is less than that posed by attempts. Therefore, cumulatively, the case for criminalising conspiracy is much weaker than that for criminalising attempts. As shown in Chapter III, the general attempts offence is justified only in its current narrow form. If it were extended to encompass conduct earlier in the criminal enterprise it would not be justified, as it would impinge too greatly upon ideal autonomy. For the same reasons, the broadly drafted conspiracy offence cannot be justified. The conspiracy offence in its current form captures conduct that is not sufficiently blameworthy nor dangerous enough to justify criminal intervention. Some conspiracies may be analogous

[560] For a discussion of the role of harm in justifying the criminalisation of rape see: Gardner, 'The Wrongness of Rape' (n 74). See also: Simester and von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (n 24) 104.

to attempts, where the agreement creates a level of risk akin to that created by an attempt. These instances of conspiracy can be criminalised, for the same reasons that attempts liability is justified. But the criminalisation of all conspiracies, regardless of the risk they actually create, is not supported by an analogy with attempts.[561]

Another rationale might be offered for criminalising all conspiracies, despite the variation in their dangerousness. It is not uncommon for the criminal law, as currently enacted in the United Kingdom, to target conduct of a certain type even though not every token of that conduct creates a risk of harm. Moreover, many of these offences seem to be, at least arguably, justifiable. Familiar examples include driving offences and offences of weapon possession. By briefly considering the now well-worn arguments justifying over-inclusive driving and weapons offences, we can reveal a logic of justification that may be extended to apply to conspiracy. The rationale behind driving offences is, presumably, to reduce the harms caused by accidents. In order to achieve this harm, the criminal law provides, *inter alia*, that vehicles should not be driven over certain speed limits. It is not, however, the case that every time someone exceeds the speed limit they create a risk of harm. The road may be empty of other users, and they may know this. They may be a particularly capable driver who can readily handle a car safely at that speed. Nevertheless, every breach of the speed limit can lead to conviction and punishment. How can this be justified, if an individual defendant has not in fact driven dangerously in exceeding the speed limit?

Criminalisation of speeding is legitimate because the defendant in these cases has breached a *justifiable* rule. The rule, requiring adherence to a speed limit, is justified because it is the only, or most, effective means of securing the aim: reducing accidents. Were it necessary in every incidence of speeding for it to be shown that a risk of harm

[561] See: Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 45-7.

was caused, enforcement would become much more complicated and the goal of securing road safety would be drastically undermined. The rule is therefore justified because it serves an important state interest and does not impose an onerous burden on citizens. When a citizen then breaches that rule, they commit a moral wrong. That moral wrong is the breach of the duty the law *legitimately* lays on citizens to contribute to road safety by complying with the law.[562] A similar logic applies to certain weapon possession offences, for example, possession of an automatic firearm,[563] or possession of a bladed article in a public place.[564] These offences are enacted to reduce the rates of violence involving such weapons and the significant harm thus caused. Not every person who possesses an automatic firearm or carries a bladed article in public creates a risk of harm that can justify criminalisation. Nevertheless, these over-inclusive blanket prohibitions contribute significantly to a reduction in harm and do so at little cost to individuals: it is not much of a burden to forego possession of an automatic weapon or a blade in public. Therefore, these prohibitions are justified, and a breach of them is a wrong for which a defendant can be rightly punished.[565]

Could the same logic be used to justify criminalisation of conspiracy, in its current form? On first impression, this seems promising. While not every instance of conspiracy is dangerous enough to warrant criminalisation, nevertheless, the criminalisation of all conspiracies provides for effective enforcement and thus enhances the law's preventive

562 See: Husak, *Overcriminalization* (n 21) 154-6; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 24-9; 'Introduction' in Antony Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press 2014) 48-9. Duff suggests that there is an additional element present in such cases which justifies punishment: 'civic arrogance': Duff, *Answering for Crime* (n 38) 104. I agree with Simester and von Hirsch that it is not necessary to postulate this additional feature of offending to justify these offences: Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 24) 26.

563 Section 5(1) Firearms Act 1968.

564 Section 139 Criminal Justice Act 1988.

565 See: Tadros, 'Crimes and Security' (n 23).

potential. It is not an unreasonable burden to expect citizens to refrain from entering into agreements with others to commit criminal acts. Therefore, it is just to impose a law that criminalises all such agreements, and it is just to punish all those who break that law. There are, however, two objections to this approach. The first objection is based on a closer examination of the claim that it is just to impose a law criminalising all agreements to commit a criminal offence. This claim is found wanting. The second objection questions the applicability of this logic of criminalisation to offences with ulterior intent elements, such as conspiracy and preparatory offences.

Acceptance of the necessity of over-inclusive offences in some circumstances should not be seen as a permission to draft over-inclusive offences whenever this is convenient. Husak rightly argues that there should be a presumption against over-inclusive offences, precisely because they result in the conviction and punishment of individuals who have not caused the mischief with which the offences are primarily concerned. This is unjust: a road user or a weapon possessor who does not cause danger is treated harshly when they are convicted and punished as if they have caused such danger. Given this, over-inclusive legislation should only be used where this is necessary to achieve the objective pursued by the law, and where that objective is a significant one.[566] It is undeniable that the objective pursued by the conspiracy offence, of reducing organised criminal activity, is a significant one. It is, however, highly questionable whether an over-inclusive conspiracy offence is necessary to effectively realise this objective.

The conspiracy offence overlaps with a number of criminal offences which, as has been argued,[567] often more accurately capture the criminality in question. If these criminal

[566] Husak, *Overcriminalization* (n 21) 156-7.

[567] See §3.1 of this Chapter.

offences could be used to effectively target group criminality, there would be no need for such a broad conspiracy offence.[568] For over-inclusivity to be justified in a law, it ought not be possible to draft the law in more precise terms without suffering intolerable losses in its enforceability and effectiveness. This is because we should only 'regrettably tolerate over-inclusive law when substantial state objectives cannot be attained in their absence.'[569] However, given that conspiracies are generally only prosecuted once considerable steps have been taken by the co-conspirators toward commission of their intended offence, or indeed once that offence has been committed,[570] it is not clear that the very broad scope of the current conspiracy offence is necessary. The objectives of the law could be equally served by a more narrowly drafted offence, if most instances of conspiracy that are currently prosecuted would also fall within that narrower offence. The case for conspiracy being necessarily over-inclusive seems lacking.

The second objection to applying the logic used to justify driving and weapon possession offences to the conspiracy offence concerns the nature of the offences in question. '[D]ifferent values or goals are properly relevant in different contexts of criminalization; that principles concerning moral culpability and concerns with efficiency, might weigh differently in different contexts.'[571] This section will argue that the balance between efficiency and moral culpability struck by driving offences and offences of weapon possession is not the appropriate balance in the context of conspiracy. It is plausible to consider offences punishable by heavy prison sentences and described in

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[568] The fact that other statutes already proscribe the defendant's conduct seems to show that overlapping laws are more extensive than necessary to achieve whatever substantial objective the state may have: Husak, *Overcriminalization* (n 21) 158.

[569] *Ibid* 168.

[570] See fn 513.

[571] See: 'Introduction' (n 562) 9-10.

terms which convey a high level of moral culpability as close to the core of the criminal law.[572] Further, it is plausible to argue that where an offence has these features, it is more unjust for the offence to apply to a person who does not in fact cause the mischief at which the offence is targeted. It is a greater injustice for a person to be punished harshly and subject to strong moral condemnation when they do not deserve it, than if they are lightly punished and condemned and do not deserve it. Therefore, in relation to offences which carry heavy penalties and express strong moral condemnation, it is much harder to justify an over-inclusive criminal offence on the basis of preventive gains. The balance between moral culpability and efficiency should be struck so as to place greater emphasis on the offence accurately tracking moral culpability.

This is the difficulty with applying this logic of over-inclusive criminalisation to the conspiracy offence, and to other offences containing an ulterior intention element. The presence of an ulterior intention element is significant in framing how morally wrongful an offence is and, relatedly, the appropriate level of punishment for such offending.[573] A person is more morally blameworthy when they intend to commit an offence, than if they simply increase the risk of such offending. Where a co-conspirator intends that a violent offence against a person be committed, they are more blameworthy than a person who merely creates a risk of such an offence occurring. They are more blameworthy still than a person who breaches a rule that is aimed at preventing violent offences. This higher degree of blameworthiness is clearly acknowledged in the punishment available for conspiring: a conspirator can be liable to the same maximum punishment as a person who commits the offence toward which she conspires.[574] Heavy

[572] 'Introduction' (n 562) 9-10.

[573] Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 36-7.

[574] Section 3 Criminal Law Act 1977.

penalties are also a feature of preparatory offences: for example, the grooming offence is punishable by 10 years' imprisonment,[575] and preparation of terrorist acts is punishable by life imprisonment.[576] Conviction for either offence is highly stigmatic. Therefore, given the high level of moral culpability captured by offences involving an ulterior intention element, and the associated severe penalties, it is difficult to justify an over-inclusive offence of this sort.[577] The balance must be in favour of accurate moral culpability assessments and away from efficiency when so much is at stake for individual defendants.[578]

So where does this leave the argument that the conspiracy offence is justified because agreements increase the risk the crime agreed upon will be committed? The core objection to this argument, first made 40 years ago, still stands. This is so despite the dogmatic repetition of the argument by key legal actors such as the England and Wales Law Commission and the United States Supreme Court, and the efforts of Katyal to support the argument with empirical evidence. The objection is that not all conspiracies are equal: some do create grave risks that the crime agreed upon will occur, while others do not. It is unclear whether, on average, conspiracies create a significant risk that the planned crime will be completed. But even if conspiracies generally do create such a risk, it is problematic to apply the conspiracy offence to all criminal agreements, whether they

[575] Section 15(4) Sexual Offences Act 2003.

[576] Section 5(3) Terrorism Act 2006.

[577] It is acknowledged that all rules are necessarily generalisations that are likely to be over- and under-inclusive in some respect: see Frederick F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Reprint, Clarendon Press 2002). The issue then is a matter of degree: it is not whether an offence is over-inclusive, but how over-inclusive it is.

[578] It is for this reason that Edwards' arguments against over-inclusive offences should not be limited to those offences which are were never meant to serve as a guide to that which must not be done, nor as a ground for censure and punishment: Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (n 171) 728-9. The same rule of law concerns apply to over-inclusive offences which contain an ulterior intention element.

are dangerous or not. An analogy with the law of attempts, or with driving offences and weapon possession offences – offences that are generally applicable even though the conduct they target creates variable levels of risk – cannot justify the general application of the conspiracy offence. Therefore, *prima facie*, the current formulation of the conspiracy offence is too broad, unjustifiably criminalising criminal agreements that do not significantly increase the risk of the planned crime occurring.[579]

3.3.2 *The Existence of a Conspiracy is a Harm to Society in and of Itself*

It has also been argued that there are broader risks posed by conspiracies, aside from the risk that the offence planned will be committed. One possible harm directly caused by conspiracies is public alarm.[580] For example, the known presence of child abuse rings in a community will tend to cause fear. Community members may feel it necessary to act less freely in order to avoid perceived danger. This conjecture sounds remarkably similar to that canvassed and rejected in Chapter III. The idea is that conspiracies contribute to feelings of insecurity, which in turn impede the freedom of others, and so should be criminalised. This logic, of focussing on feelings of insecurity as a harm that an offence may legitimately target, was rejected, on the basis that it is self-defeating.[581] There are further problems with justifying criminalisation with reference to public alarm, as community fears may be influenced by prejudice. The fact that a given community is alarmed by the presence of groups of foreign men in their midst – perhaps following the media frenzy surrounding a case like Bullfinch[582] – cannot alone justify criminal

[579] See also: Gillies, *The Law of Criminal Conspiracy* (n 460) 5, 7.

[580] Note, 'Developments in the Law: Criminal Conspiracy' (1958) 72 Harvard Law Review 920, 925.

[581] See Chapter III.

[582] See: Sandra Laville, 'Oxford Child Sex Abuse Ring: How Police Overcame Past Mistake to Jail Gang'

intervention targeting such groups. As shown in Chapter III, there must be more than public fear underpinning criminalisation. Therefore, general conspiracy law cannot be justified on the basis of public alarm or feelings of insecurity.

Another risk arguably associated with conspiracy is that of ongoing criminality. Criminal agreements pose a risk of harm to society because conspirators are likely to commit further crimes beyond the initial object of the conspiracy. The claim is that entering a criminal agreement with others makes it more likely that conspirators will continue in a life of crime. This is because group membership produces a degree of loyalty and internal momentum that is not present in individual endeavours.[583] Further, involvement in group criminality may serve to educate conspirators, equipping them for further offending.[584] Conspiracies are justifiably criminalised because they create the potential for ongoing criminality on the part of the conspirators.[585]

This argument faces a familiar challenge: it might be true that some conspiracies facilitate ongoing criminality, but not all conspiracies will do so.[586] It is quite possible for

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The Guardian (14 May 2013) <http://www.theguardian.com.uk/2013/may/14/oxford-child-sex-ring-police-investigation> accessed 8 January 2019; 'Oxford Grooming Gang: Profiles' *The Guardian* (14 May 2013) <http://www.theguardian.com/uk/2013/may/14/oxford-grooming-gang-profiles> accessed 8 January 2019; Vikram Dodd, 'Is Child Grooming for Sexual Abuse a Race Issue?' *The Guardian* (14 May 2013) <http://www.theguardian.com/uk/2013/may/14/child-grooming-sexual-abuse-race> accessed 8 January 2019.

583 Ashworth, *Principles of Criminal Law* (n 41) 451; Katyal, 'Conspiracy Theory' (n 482) 1315, 1376-7; Marcus, 'Criminal Conspiracy Law' (n 480) 4.

584 Dennis, 'The Rationale of Criminal Conspiracy' (n 452) 51; Goldstein, 'Conspiracy to Defraud the United States' (n 459) 413.

585 The courts in the United States have favoured this argument: see, for example, *Callanan v United States* 364 US 587 (1961). However, the drafters of the Model Penal Code did not fully accept this argument, as evidenced by a rejection of cumulative sentencing for completed substantive offences and conspiracy charges in most cases (s 1.07 Model Penal Code). See: David, 'The Movement Toward Statute-Based Conspiracy Law in the United Kingdom and the United States' (n 530) 969, 985-6.

586 Despite judicial and academic assertions that group activity creates a unique danger, most lawyers, judges and law professors said, in response to a survey, that whether a group in fact posed a greater danger would depend on the circumstances of the case: Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 934.

a conspiracy to be a single-shot affair. Further, the evidence linking a conspiracy to commit a particular crime to more distant future offending is relatively tenuous: Katyal seeks to extrapolate from the psychological data on group behaviour to support these claims, but this is a stretch.[587] Finally, it is difficult to argue that conduct should be criminalised because it may lead the actor to do something else in the future, which they currently do not intend to do. Without a blameworthy mental state as to future conduct, the state is effectively convicting and punishing an individual on the basis that they have a propensity to commit crime. This sort of propensity-based criminalisation is deeply problematic.[588] The general conspiracy offence cannot be justified on this basis: not all conspiracies pose a risk of encouraging ongoing criminality, and for those that do this is an insufficient and problematic basis of criminalisation.

Conspiracies, therefore, cannot be said to be generally harmful because they cause feelings of insecurity or because they facilitate future crimes beyond that which is the object of the present conspiracy.

3.4 *Assessing the Justification of the Conspiracy Offence*

This chapter has canvassed and assessed the strength of a range of arguments made in support of the conspiracy offence. It has shown that while conspiring is indeed wrongful, entering an agreement with others to commit a crime is not significantly worse, morally speaking, than determining individually to commit a crime. Certainly, the inherent wrongfulness of conspiring is not grave enough to justify criminalisation without

[587] Katyal, 'Conspiracy Theory' (n 482) 1376-7.

[588] Further discussed in Chapter V in the context of character liability. There it is argued that, given the nature of character, it is only possible for a person to be found to have a propensity to commit a crime if they have in fact committed that crime. The logic of character liability is different from the logic of prediction; even with a focus on character, criminalisation cannot be justified on a merely predictive basis.

evidence that a significant risk of harm is caused by criminal agreements. Considering the evidence available as to the risk of harm posed by conspiracies, it has been shown that not all conspiracies create a sufficiently grave risk of harm to justify criminalisation. By drawing an analogy with attempts, it becomes clear that the case for criminalising conspiracies is much weaker than the case for attempts liability. Given the costs to ideal autonomy of criminalising all conspiracies, the current offence of conspiracy cannot be justified. If a broader law of attempt cannot be justified, as shown in Chapter III, neither can the law of conspiracy as currently enacted. This conclusion is further bolstered by concerns about conspiracy law encouraging police breaches of the right to privacy, undermining freedom of speech and association, and being used to target not only those who warrant prosecution, but also people who are considered to be the public enemy of the time.

4. Reshaping the Conspiracy Offence

Having concluded that the conspiracy offence cannot be justified in its current form, it is worth considering how the offence might be reframed. This section explores suggested reforms of conspiracy law as a means of identifying the ways in which an overly broad preventive offence might be narrowed. This will be instructive when it comes to considering possible offence formulations targeting preparation. There are two broad responses to the difficulties faced by the conspiracy offence to consider. Both of these approaches add a new element to the offence, requiring either that the prosecution prove the dangerousness of the agreement, or the commission by a conspirator of a qualifying overt act.

4.1 *Requiring Proof of Dangerousness*

As this chapter has shown, some agreements to commit a crime can be justifiably criminalised, but not all agreements will be dangerous enough to warrant criminalisation. As a first line of inquiry it therefore makes sense to consider whether the conspiracy offence can be limited to capture only those agreements that are dangerous. This approach would see conspiracies punished only where they greatly increase the likelihood of substantive offending, or where the target offence(s) of the conspiracy is of a very serious nature such that even a small increase in the possibility of its commission represents the creation of a grave risk worthy of punishment.[589] Such an approach would recognise that the risk posed by a mere agreement varies greatly, depending on the facts of the case; that the danger posed by conspiracies is not homogenous.[590]

This is the approach proposed by Morrison. He argues that the conspiracy offence should be formulated such that prosecutors must prove a conspiracy's dangerousness in order to secure a conviction.[591] In order to flesh out the amorphous concept of dangerousness, he draws on section 5.05(2) of the Model Penal Code. This provision allows courts in conspiracy cases to mitigate sentence or, in extreme circumstances, dismiss a prosecution where the 'conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger'. Morrison adopts this as a definition of 'undangerous' conspiracy, inverting it to provide a positive definition of dangerousness: a conspiracy is dangerous

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[589] Note, 'The Conspiracy Dilemma' (n 492) 284.

[590] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 511; Peter Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (1975) 75 Columbia Law Review 1122, 1157.

[591] See: Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478).

if it is not so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger.[592] The prosecution could prove that a conspiracy is dangerous in this requisite sense by, for example:

- proving the commission of the substantive crime that was the object of the conspiracy;
- proving the potential danger of the co-conspirators as persons, for example, by showing them to be professional criminals;
- proving an overt act that represents a clear step towards the commission of the object crime;
- proving that the object of the conspiracy is a serious crime, or a string of crimes.[593]

Morrison claims that the addition of a dangerousness element to the conspiracy offence would allow for the law to respond in a more nuanced fashion to the variability of group conduct in real life, capturing only those agreements that warrant the attention of the criminal law. Further, requiring proof of dangerousness would help to alleviate public perceptions that prosecutors abuse the conspiracy offence.[594] He insists that the introduction of a dangerousness element is feasible. Currently, most conspiracies are prosecuted in cases where the object crime has been committed or attempted. In such cases, proving dangerousness will be simple. Therefore, the addition of such a requirement would not greatly affect current conviction rates, while providing an additional safeguard against the use of the offence in borderline cases.[595] Further, the

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[592] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 499.

[593] *Ibid* 501; Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 948.

[594] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 507-8.

[595] *Ibid* 504-5; citing Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461).

inclusion of a dangerousness enquiry in the Model Penal Code – which has inspired similar provisions in Arkansas, Colorado, New Jersey, and Pennsylvania – evidences that a dangerousness requirement is workable.[596]

There are a number of difficulties with Morrison's proposal. The first is the ambiguity of the dangerousness requirement itself, as he defines it. It is not obvious what it means for a conspiracy to be 'so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger'. What would be considered 'inherent' to a conspiracy? Is the definition meant to apply to conspiracies that are very unlikely to succeed because the conspirators plan to adopt obviously inept means? Is it meant to apply to conditional conspiracies, where the conditions that must obtain for the conspiracy to be carried out are very unlikely to arise? It is not at all clear. Morrison's proposal rolls into one dangerousness enquiry a number of difficult subsidiary issues, such as how factually impossible conspiracies[597] and conditional intentions should be treated by the criminal law,[598] while providing little guidance as to how to resolve these issues. Further, there is a tautology in adopting the Modern Penal Code's wording as a definition of dangerousness. A conspiracy is 'undangerous', according to this definition, if the conspiracy is so unlikely to succeed that neither the conspiracy, nor the conspirators present a public danger. Morrison therefore

[596] Morrison, 'Requiring Proof of Conspiratorial Dangerousness' (n 478) 484-5, 488.

[597] See, for example: Michael Cohen, 'The Law Commission Report on Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (2) Questions of Impossibility' [1980] Criminal Law Review 773; I. Dennis, 'Preliminary Crimes and Impossibility' [1978] Current Legal Problems 31; Jennifer Temkin, 'When Is a Conspiracy Like an Attempt – and Other Impossible Questions' [1978] The Law Quarterly Review 534.

[598] See, for example: Patrick A. Broderick, 'Conditional Objectives of Conspiracies' (1985) 94 The Yale Law Journal 895; J.C. Smith, 'Conspiracy Under the Criminal Law Act 1977 (1)' [1977] Criminal Law Review 598; Adrian Lynch, 'Mens Rea in Statutory Conspiracy (2) A Further Comment' [1978] Criminal Law Review 205; J.C. Smith, 'Mens Rea in Statutory Conspiracy (3) Some Answers' [1978] Criminal Law Review 210.

fails to avoid the main criticism levelled at offences formulated with a dangerousness element: that requiring a case-by-case assessment of dangerousness introduces into the law a standard that is too vague, thereby failing to specify clearly what behaviour is criminal.[599]

Allied to this concern is the problem of determining the threshold at which a conspiracy becomes dangerous enough to warrant criminalisation. It is difficult to express this in the abstract. Morrison's Model Penal Code inspired definition only serves to exclude a very small range of conspiracies, where the conduct and the conspirators pose no public danger at all. This leaves criminalised a whole range of conspiracies that may pose some danger but are not sufficiently dangerous to warrant the attentions of the criminal law. But once one begins to consider different gradations of dangerousness, some of which qualify for criminalisation and some of which do not, it becomes very difficult to formulate an offence definition that is clear and workable in the courtroom.[600] This is compounded by evidential problems arising from the uncertainty inherent in predictions of how conspirators would have behaved if their plot had not been interrupted.[601] Perhaps such uncertainty should be tolerated, in order to ensure that only deserving conspirators are punished,[602] but if an alternative offence definition with clearer boundaries can be formulated then this should be favoured.

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[599] Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (n 590) 1157; Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 949; Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1147-9.

[600] A flexible approach, considering the danger of conspiracies on a case-by-case basis, 'would tend to increase the uncertainty as to what behaviour is criminal, and it might also require proof of additional factors at an already complex trial.' Although the author here is considering the likely outcome of adopting a flexible dangerousness assessment in conjunction with a substantial overt-act requirement, the point holds where a dangerousness requirement alone is added to the conspiracy offence: Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 949. See also: Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (n 590) 1157.

[601] Gray, *The Philosophy of Law: An Encyclopedia* (n 479) 150.

[602] Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 949.

4.2 *Requiring Proof of an Overt Act*

Another more promising strategy for narrowing the conspiracy offence is to identify a concrete *actus reus* or *mens rea* element to add to the offence definition. This has the advantage of avoiding the difficulties faced by evaluative requirements, such as dangerousness, which are relatively amorphous. The challenge with this strategy is to identify an act or a mental state that it is justifiable for the criminal law to fix upon. The problem with the conspiracy offence, as it is currently defined, is that it captures conspiracies that are not sufficiently dangerous to warrant criminalisation. If this is to be solved by adding another act or mental state element to the conspiracy offence, then this addition must filter out insufficiently dangerous conspiracies. Given the diversity of factual circumstances in which conspiracies occur, it is difficult to identify one factor that consistently renders a conspiracy more likely to succeed. The presence or absence of one factor can never serve as a perfect correlate of whether or not a conspiracy is sufficiently dangerous to warrant criminalisation. Nevertheless, the addition of an element to the conspiracy offence, proof of which will in most cases indicate that the conspiracy is dangerous enough, could be an improvement on the currently overbroad conspiracy offence. Perhaps some conspiracies that should be criminalised will not be, and vice versa, but a well-formulated additional element could still represent a refinement of the current offence.

This section will argue that an overt act requirement can be formulated which can narrow the conspiracy offence in a desirable way. The path to this conclusion is not straightforward. This section will argue that overt acts are relevant indicators of dangerousness because they serve as evidence of a firm intention. It is the presence of a firm intention that maps onto the dangerousness of a conspiracy. This section will therefore begin by discussing intention and its relationship with dangerousness. It will then discuss why requiring proof of a particular quality of intention directly might be problematic, positing proof of an overt act as a means of addressing this difficulty.

4.2.1 *Intention and Dangerousness*

To be liable for conspiracy a defendant must hold an intention which if realised 'will necessarily amount to or involve the commission of any offence'. As already discussed, what it means to hold such an intention is complex. This section will elaborate on this complexity, arguing that the concept of intention is amorphous in further ways than those already explored. Intention is often considered to be the paradigm instance of *mens rea* in the criminal law, perhaps even the 'gold standard', ensuring the personal culpability of the defendant.[603] It is often relied upon in preventive offences to safeguard against over-extension of the criminal law. Despite this, the concept of intention is not monolithic, nor its meaning settled.[604] There are differing qualities of intention, so to speak, and these differences are relevant in considering the culpability of the intention holder and the likelihood that their intention will be fulfilled. This is a source of variation present in all conspiracies that bears on the moral blameworthiness and dangerousness of the conspiracy. Accordingly, if the conspiracy offence could be narrowed so as to capture only those conspirators who have an intention that is relatively more likely to be fulfilled,

[603] Most countries employ intention as 'one of the principal determinants both of liability to punishment and its severity.' 'Intention to do the act forbidden by law, or something like it, is also generally necessary for serious crime, though there are exceptions': Hart, *Punishment and Responsibility* (n 50) 114-5.

[604] Although intention 'has been subjected to at least as much judicial and academic scrutiny as any other mens rea term, theoretical and practical consensus around a clear concept of intention seems as far away as ever': Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (n 38) 621.

this would go some way to excluding from liability conspiracies that are not sufficiently dangerous to warrant criminal attention.

To flesh this idea out, this section must begin by recognising a distinction between different forms of intention. A person can hold a bare intention that they will do something in the future, without having acted in any way to fulfil this intention. Alternatively, a person might intend to do something in the future and be doing an act now that is a step toward the fulfilment of this intention. In the context of conspiracy what is required is proof of an act done with some further intention: namely, entering an agreement with the intention that this will facilitate the commission of a crime.[605] Finally, a person can do an act intentionally. Here the language of intention is not referring to the relationship between the act and some further plans, but instead describes the quality of the act itself.[606] Bare intentions, independent as they are of any conduct or manifestation in the public realm, are not the concern of the criminal law. If bare intentions were criminalised, the resultant offences would be thought crimes.[607] However, both intentional acts and acts performed with some further intention play a prominent role in offence definitions.[608]

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[605] I will use this as shorthand for the more complex – and wordy – statutory formulation: each conspirator, to be liable, must hold an intention which if realized 'will necessarily amount to or involve the commission of any offence'.

[606] This distinction is well established in philosophy, although contested. See, for example: Michael Bratman, 'Two Faces of Intention' (1984) 93 The Philosophical Review 375; Kieran Setiya, 'Intention' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2014). My description of the distinction will undoubtedly be considered inadequate by some, but it is sufficient for our purposes to outline the distinction in broad strokes. In my approach I follow in the footsteps of Hart, who adopted a tripartite distinction: Hart, *Punishment and Responsibility* (n 50) 117.

[607] Antony Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Wiley-Blackwell 1990) 38.

[608] Duff quotes the case of *Jaggard v Dickinson* [1981] 1 WB 527 in distinguishing offences of further intention from those that require only an intentional or intended action: the former require an intention which 'extends beyond' the *actus reus* of the offence, while the latter require an intention which 'extends only to the *actus reus* of the offence': Duff, *Intention, Agency, and Criminal Liability* (n 607) 38-9. Asp uses the term 'conduct intent' to refer to what I have called here 'doing an act intentionally'. He explains that this is the normal type of intent used under criminal law, and highlights that it extends not just to whether the act was itself done intentionally, but also whether the person had intent in relation to the consequences of the act or the circumstances accompanying the act: Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 41.

Despite the same language of 'intent' being common to each of these usages, what is meant by intention in the context of an intentional act is different from what is meant when a person acts with some further intention. This is evidenced by the fact that we can talk about a person acting intentionally in order to achieve some future intention without this being repetitive nonsense. For example, it makes sense (even if it is verbose) to say: 'I intentionally put on my jacket because I intend to go for a walk outside.'

This distinction is important in understanding the role of intention in assessing an actor's responsibility and blameworthiness. When a person acts intentionally she can generally be considered responsible for her actions, because their intentionality shows that she chose to act in this way.[609] In contrast, in cases of acting with some further intention, the intention informs our moral assessment of that action. If a person speaks to a child because they intend to befriend them, this is not wrongful. If a person speaks to a child because they intend to groom them for sexual offending, this is wrongful. In both instances the person is responsible for the act of speaking to the child, but the moral assessment of this act is altered by the further intent.

There is another significant distinction between the intention involved in intentional acts and acts with further intent. There is a relatively simple binary between acts done intentionally and acts done unintentionally, at least in common usage. It makes little sense to speak of doing an act more or less intentionally: you have either acted intentionally or you have not.[610] It is therefore safe to determine responsibility on the basis

[609] At least, this is the case on some accounts of intention.

[610] Although, admittedly, sometimes in common usage issues such as duress are treated as part of the intentionality inquiry, as opposed to be considered separately as a question of justification or excuse for intentional action. Nevertheless, my experience with teaching suggests that once it is explained that duress is to be treated as a separate enquiry, and that intention and motive should be differentiated, people are quick to understand that an act can meaningfully be fully intentional while being excused on other grounds.

of whether an action is intentional. The enquiry is generally relatively straightforward and the answer intuitive.[611] In comparison, when it comes to further intentions, there is far more room for confusion. With future-directed intentions, the potential offender could yet change her mind and abandon the intention before it reaches fruition. This is not the case when she is already doing the act she intends.[612] It is therefore meaningful to talk about future-directed intentions in terms of relative strength. A person might firmly intend to go for a run this afternoon, being strongly committed to realising this intention. Alternatively, she might so intend but lack firm resolve. Bad weather or another distraction might easily dissuade her from fulfilling her intention. Her intention might be so weak that it represents no more than a wish that she will go for a run this afternoon. It can be unclear, even to ourselves, whether we in fact intend something in the future or are instead fantasising, wanting something to come to pass but not really intending to bring it about.[613] In this way, it is not always clear whether a person holds a future-directed intention; and even if they do, this intention could be a barely-there commitment, readily abandoned, a stubbornly held plan pursued at all costs, or anything in between.[614]

[611] I do recognize that difficult questions can arise where a person has intentionally put themselves in a state in which they then commit unintentional acts, such as in extreme cases of voluntary intoxication and knowing failures to manage certain medical conditions. Nevertheless, these are peripheral instances. In most cases, an enquiry into the intentionality of actions will be straightforwardly resolved.

[612] Similarly, Alexander and Ferzan argue that '[t]he mental states required for inchoate crimes cannot be identical to those required for completed crimes': Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1139. See also: Asp, 'Preventionism and Criminalization of Nonconsummate Offences' (n 157) 41.

[613] '[T]he lines between intending, on the one hand, and fantasying, wishing, desiring and wanting, on the other, even if philosophically clear are quite difficult to draw as a practical matter, even for the actor himself: Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327) 1172; citing Gerald Dworkin and David Blumenfeld, 'Punishment for Intentions' (1966) 75 Mind 396. See also: Broderick, 'Conditional Objectives of Conspiracies' (n 598) 896: It is difficult to read another person's mind, and to differentiate between idle speculations and serious plans.

[614] Relatedly, future-directed intentions may be conditional. A person may decide to do something, but only if a particular condition is met. I intend to go for a run, but only if my friend Josh agrees to come with me. There is near consensus that some conditional intentions are sufficient to ground liability for conspiracy. After all, all future-directed intentions are in some way conditional: for every intention one can imagine circumstances in which it would be abandoned. The crime of conspiracy would be

Inherent in arguments about the dangerousness of group activity is the assumption that, in reaching an agreement, conspirators have evidenced that they hold a firm intent that a crime be committed.[615] However, the presence of an agreement should not be equated with firmness of intent. Agreements may range from weak accords to passionate and unshakeable mutual commitments. Whether parties to an agreement hold a firm intention to see their plan through will ultimately depend on the facts of the case, on 'the particular quality of the plot and plotter'.[616] The strength of a conspirator's intent therefore cannot be assumed. Whether she is firmly committed to commission of a crime or not will affect how morally blameworthy we consider her to be and will influence the likelihood that the crime will be attempted. A conspirator with an unwavering intention to carry out an agreement to kill is both more blameworthy, and will generally render the conspiracy more dangerous, than a conspirator who holds a weak intention to see the plan through. It is true that a conspiracy, being a group endeavour, may still be dangerous even when one conspirator is not strongly committed to the shared plan. Certainly, many other factors will bear on whether a conspiracy is very dangerous or not. Nevertheless, it is to be expected that in many cases higher levels of commitment from conspirators will

useless if conditional intentions did not suffice. Nevertheless, intuitively, there are some cases of conditional intention in which it is unclear whether there should liability. There has been considerable debate as to how conditional intentions should be treated by the criminal law; particularly about how to distinguish between conditional intentions which warrant the attentions of the criminal law and those that do not. See, for example: Smith, 'Conspiracy Under the Criminal Law Act 1977 (1)' (n 598); D.W. Elliott, 'Mens Rea in Statutory Conspiracy (1) A Comment' (1978) Criminal Law Review 202; Lynch, 'Mens Rea in Statutory Conspiracy (2) A Further Comment' (n 598); J.C. Smith, 'Mens Rea in Statutory Conspiracy (3) Some Answers' (n 598); Broderick, 'Conditional Objectives of Conspiracies' (n 598); Alexander and Ferzan, 'Mens Rea and Inchoate Crime' (n 327). This is an additional source of uncertainty and variation in the concept of intention that has implications for inchoate offences. The puzzle of conditional intent is not my main focus here, and will be left for future consideration.

615 For example, see Broderick, 'Conditional Objectives of Conspiracies' (n 598) 898: 'By unambiguously committing themselves to the execution of a specific crime, therefore, conspirators mark themselves as dangerously likely criminals and as proper targets for state action.' See also: Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 924.

616 Gray, *The Philosophy of Law: An Encyclopedia* (n 479) 150.

correlate with a higher likelihood that the planned crime will be attempted.[617] Requiring proof of a strong commitment to the commission of a crime would therefore serve to limit the conspiracy offence in an effective way. The offence would capture cases where the conspirators' commitment makes it likely they will complete or at least attempt their target crime. In such cases the conspirators themselves will have been shown to hold a culpable mental state. This narrowing of the conspiracy offence would be an improvement on the currently overbroad conspiracy formulation.

This proposal is not without its problems. What precisely should be proved by the prosecution in addition to the current elements of the conspiracy offence remains ambiguous. According to this argument, we should be looking for a firm intent on the part of the conspirators but elaborating further on what this means – how firm is firm enough – proves difficult. The matter could be left to the jury, asking them to determine whether the conspirator held a firm intention, relying upon their common sense and supposed community values to render the right decision. However, this seems risky in the context of conspiracy law. The cases in which the offence of conspiracy has been abused have generally been fraught political matters: for example, cases involving the suppression of labour unions, communists, socialists, and those encouraging others to avoid the Vietnam war draft. It is precisely in such circumstances, where public opinion may be divided and where moral panic may drive decision-making, that the law of conspiracy needs to be clear in its elements to avoid abuse in its application. Further, it is appropriate to be sceptical about our ability to assess with any level of confidence the strength of an intention held by another person. We should be reluctant 'to put so much trust in either

[617] In this I differ from Buscemi, who argues that broad generalizations are unlikely to be of help in measuring the strength of intent embodied in an agreement and the probability that action will be inspired by that intent: Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (n 590) 1157.

the omniscience or the benevolence of those who administer the law.'[618] Therefore, this section will instead argue for the addition of an overt act requirement to the current conspiracy offence formulation.

4.2.2 *Intention, Dangerousness, and Overt Acts*

The aim of adding an overt act requirement to the existing conspiracy offence formulation is to ensure that there is a strong evidential foundation for the finding of a firm intention to commit an offence. Requiring proof of a substantial overt act will ensure that people are not convicted on the basis of shared fantasies, or when they hold genuine but weak intentions that are very unlikely to be acted upon.[619] Requiring an overt act may also help to temper any tendency in jurors to infer intention illegitimately. This is particularly important as a safeguard against the misuse of the offence in politically charged cases, or cases concerning crimes that give rise to moral panic, such as terrorism or child sex offending.

It is commonplace in American conspiracy offences for there to be an overt act requirement. However, in most American states a relatively minor act committed by any one of the conspirators will be sufficient. The act need not be criminal, but it must be taken as a step toward the fulfilment of the conspiracy. It must occur after the formation of the agreement and before its termination.[620] Formulated in this way, the overt act requirement has no real effect on conspiracy prosecutions, since even a very trivial act will suffice.[621] Such minimal acts will offer little in the way of evidence that the intent of

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[618] Johnson, 'The Unnecessary Crime of Conspiracy' (n 459) 1161.

[619] Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (n 590) 1154-6.

[620] Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 945-6.

[621] Kadish, *Encyclopedia of Crime and Justice* (n 492) 232; Note, 'Developments in the Law: Criminal

the conspirator is firm or that the conspiracy is likely to be carried out. If an overt act is to provide evidence of a firm intention, it must be more significant than that commonly required in America.

There are a few states that have legislated for more substantial overt act requirements: namely, Maine, Ohio, Washington, and Vermont. These states require proof of a 'substantial step' taken in furtherance of the conspiracy. In all these jurisdictions, excluding Maine, conduct constitutes a substantial step if it manifests a purpose on the part of the actor that the conspiracy be completed. In Maine the requirement is more stringent still: the act must be strongly corroborative of the firmness of the actor's intent to complete commission of the crime.[622] The notion of a 'substantial step' is borrowed from attempts law. In the Modern Penal Code a person is liable for attempt if they have taken a substantial step toward commission of the offence in question. Conduct is deemed to be a 'substantial' step when it strongly corroborates the actor's criminal purpose.[623] By adopting a more substantial overt act requirement in these terms, the law of conspiracy is brought more in line with that of attempts.[624] This in turn means that the conspiracy offence is constrained to a defensible scope. Something akin to the approaches taken in these jurisdictions would be an excellent way of limiting the overreach of conspiracy law.

There may be some concern that requiring proof of a substantial overt act in such terms would undermine the efficacy of conspiracy law by precluding the prosecution of conspiracies that are very dangerous despite no qualifying overt act having taken place.

Conspiracy' (n 580) 947.

[622] Buscemi, 'Conspiracy: Statutory Reform Since the Model Penal Code' (n 590) 1153-4.

[623] Section 5.01 Model Penal Code.

[624] Kadish, *Encyclopedia of Crime and Justice* (n 492) 232.

There might be evidence of dangerousness – aside from a substantial overt act – available, such as proof that the defendants are career criminals with a history of committing such crimes. Nevertheless, it is unlikely that the addition of a substantial overt act requirement will practically impede prosecutorial practice. Very few conspiracies are prosecuted prior to attempt or commission of the substantive offence, and at this stage proof of a substantial overt act will be unproblematic.[625] There are rare cases that might currently be prosecuted that would no longer be criminalised, such as those in which there is evidence provided by an informer but no overt act has been taken. However, the loss of the opportunity to prosecute such cases is justifiable, given the important protection that a substantial overt act requirement provides against possible abuses of the conspiracy offence.[626] This section has shown that it is not feasible to require proof of dangerousness as a means of limiting the scope of the conspiracy offence. While recognising the difficulties in fixing upon any one factor as an indicator of dangerousness, it has argued that requiring proof of a substantial overt act – as evidence of a firm intention – would limit the conspiracy offence in a desirable way.

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[625] Note, 'Developments in the Law: Criminal Conspiracy' (n 580) 948-9; Marcus, 'Conspiracy: The Criminal Agreement in Theory and in Practice' (n 461) 930-1.

[626] At this point I must acknowledge an additional complication with requiring proof of an overt act. In most American jurisdictions, including those with relatively stringent overt act requirements, an act is required only on the part of one conspirator. Once such an act is proved all her co-conspirators can be liable. This presents something of a conundrum. It is not feasible to say that the overt act of one defendant provides evidence that each of the conspirators had a firm intention to bring about commission of the agreed crime; this would be a legal fiction. Nevertheless, it would be too onerous to require proof of overt acts by each conspirator before they can all be charged. How then is the approach of requiring only one overt act to be justified? We might view the overt act of one conspirator as evidence that the conspiracy as a whole is in action, has moved beyond the minds of the conspirators into the real world and poses a sufficient danger. The co-conspirators who have not carried out an overt act can then be understood, in a sense, to be secondary parties to the overt act of their fellow conspirator.

5. Conclusion

The insights that have been gained from this engagement with conspiracy law are as follows. First, what it means for a person to intend a crime is uncertain, particularly in relation to what a person's mental state must be *vis-à-vis* any circumstance elements of the intended offence. It has been shown that different positions as to the meaning of intention in this context can greatly alter the scope of an inchoate offence. This source of variation must be carefully considered when formulating an offence and assessing its justifiability. Second, conduct that is merely preparatory to a substantive crime may create differing levels of risk, depending on the circumstances in which the conduct occurs. This is in part a function of the conduct being remote from the commission of the substantive crime. This creates difficulties for the justification of offences criminalising merely preparatory conduct, as not all instances of this conduct will be sufficiently dangerous to warrant criminalisation. Third, where an offence includes an ulterior intent element, it is very difficult to justify an over-inclusive offence, which captures both dangerous and non-dangerous instances of conduct. Offences criminalising merely preparatory acts should be drafted so as to capture, as accurately as possible, the dangerous conduct at which they are targeted. Fourth, in the case of the conspiracy offence, in order to limit the offence to those instances of an agreement to commit a crime that are (on average) dangerous enough to warrant criminalisation, proof of a substantial overt act should be required. A similar approach might be taken to limiting other offences targeting preparatory conduct, if there is concern that they are over-broad and capture instances of conduct that are insufficiently dangerous to warrant criminalisation.

V

Lessons from Compound Possession Offences

This chapter will consider possession offences with an ulterior intent element; that is, 'compound' possession offences. As with the previous chapters on attempts and conspiracy, it will engage with the theoretical underpinnings of these possession offences in order to uncover general principles that should be considered in determining the limits of the criminal law. However, the consideration of possession offences must differ in some ways from that of attempts and conspiracy. Both attempts and conspiracy are general inchoate offences, which attach to substantive offences defined elsewhere in the criminal law. In contrast, there is no general inchoate offence of possession.[627] Instead, there are a raft of specific possession offences, targeting possession of particular items, which vary in their formulation and scope. These include 'simple' possession offences, which criminalise possession of an item *per se*, without any requirement of an intention to use the possessed item in connection with some criminal act in the future.[628] In contrast, 'compound' possession offences require proof of a further ulterior intent.[629] It is the latter, compound possession offences that are the focus of this chapter. As with the attempts and conspiracy offences, they mirror preparation offences structurally through their inclusion of an ulterior intent element paired with an act, or here, with possession of an item. They also represent a puzzle from a justificatory perspective, because a person may intend to

[627] Although the Model Penal Code includes a broad inchoate offence of possessing instruments of crime and weapons: s 5.06.

[628] Markus Dirk Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process' in Antony Duff and Stuart P. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 104; Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Criminal Law and Philosophy 237, 243.

[629] Markus Dirk Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2001) 91 The Journal of Criminal Law & Criminology 829, 860-1.

commit a crime and possess an item that they intend to use for this purpose, but nevertheless be a long way from commission of the crime. Therefore, possession with ulterior intent offences seem at odds with the concerns for respecting ideal autonomy that underpinned arguments for a narrow law of attempts. How might they be justified, if at all?

This chapter begins by discussing the meaning of the 'possession'. It will then consider the claims that possession offences are illegitimate because they criminalise a state of affairs, as opposed to an act. In doing so, it will explore the importance of the so-called 'act requirement' in the criminal law. This will provide valuable insights into why the criminal offences have traditionally been seen to require an act element, and what this can tell us about the appropriate scope of the criminal law. This chapter will consider the link between possession of certain articles with intent and the creation of risk, and when this might justify criminalisation. It will also consider critiques of possession offences on the basis that they function, in practice, by targeting dangerous individuals, rather than dangerous conduct. This will lead to an exploration of the potential implications of a character-based approach to criminal liability for the scope of the criminal law. This chapter will conclude that some current compound possession offences cannot readily be justified.

1. An Introduction to Compound Possession Offences

Possession offenses, both simple and compound, are common in the criminal law of the United Kingdom and the United States. They have been described as 'one of the most ubiquitous forms of crime in modern systems of criminal law.'[630] They are both

[630] Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 238.

widely enacted and widely enforced.[631] There are many different possession offences on the books, and they differ in the purposes they are intended to fulfil.[632] To name but a few compound possession offences in the United Kingdom, it is an offence to possess a firearm with intent to endanger life,[633] with intent to cause fear of violence,[634] or with intent to commit an indictable offence.[635] It is also an offence to possess an explosive substance with intent to cause an explosion likely to endanger life,[636] or to possess anything with intent to destroy or damage property.[637] It is an offence to possess a controlled drug with intention to supply it to another.[638] It is also an offense to possess any article for use in the course of any fraud,[639] or to possess false identity documents with an improper intention.[640] It is an offence to possess an indecent photograph of a child with a view of it being distributed or shown to others.[641]

Common to these disparate offences is the central requirement of possession. But what does it mean to possess something? What must be proved to establish possession

[631] Dubber, 'Policing Possession' (n 629) 834-5. Although, prosecutors prefer to use of simple possession offences, due of their ease of prosecution. It is for this reason that the most prosecuted English firearms offences are simple possession, rather than the more complex possession with intent offences that are available: Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 244.

[632] Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 239.

[633] Firearms Act 1968, s 16.

[634] Firearms Act 1968, s 16A.

[635] Firearms Act 1968, s 18.

[636] Explosive Substances Act 1883, s 3(1)(b).

[637] Criminal Damage Act 1971, s 3.

[638] Misuse of Drugs Act 1971, s 5(3).

[639] Fraud Act 2006, s 6.

[640] Identity Documents Act 2010, s 4.

[641] Protection of Children Act 1978, s 1.

varies for different offences.[642] In the United Kingdom, the leading authority[643] on the matter is the House of Lords decision of *Warner v Commissioner of Police for Metropolis*.[644] This judgment makes clear that, despite the prevalence and importance of the concept of possession in English law, there is no clear and comprehensive legal definition of possession.[645] Instead the precise meaning of possession will depend upon the context in which it is used.[646] Generally, to possess something a person must have physical control or custody of that thing.[647] A person may have physical control over the things in their pocket, their car, their room, and so forth.[648] However, mere physical control is not sufficient to constitute possession. There must also be a mental element, although the precise nature of this mental element is unclear.[649] Ultimately what is required to establish possession will depend upon the context in which it is deployed. The approach the judiciary takes to interpreting the meaning of possession in different contexts was explained well by Lord Wilberforce:

> Ideally, a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities; he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others. But these elements are seldom all present in situations which the courts have to deal, and where one or more of them is lacking,

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[642] A.P. Simester, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th edition, Hart Publishing 2013) 81, fn 96.

[643] At least in the context of drug offences: see Simester, *Simester and Sullivan's Criminal Law* (n 642) 162.

[644] [1969] 2 AC 256.

[645] *Ibid* 286 per Lord Morris Borth-y-Gest, 309 per Lord Wilberforce.

[646] *Ibid* 299 per Lord Guest, 304 per Lord Pearce, 310 per Lord Wilberforce.

[647] *Ibid* 282 per Lord Reid, 289 per Lord Morris of Borth-y-Gest, 299 per Lord Guest, 309 per Lord Wilberforce.

[648] *Ibid* 305 per Lord Pearce.

[649] *Ibid* 282 per Lord Read. It is difficult to distil a ratio decidendi from the judgments: see Simester, *Simester and Sullivan's Criminal Law* (n 642) 162.

> or incompletely present, it has to be decided whether the given approximation is such that possession may be held sufficiently established to satisfy the relevant rule of law… It is not surprising that this has led to differences of opinion… [and] that the solution adopted ultimately depends upon the need justly and adequately to meet the requirements of the relevant rule…[650]

This flexibility in the meaning of possession has allowed for a significant dilution of the concept in practice.[651] For example, in some American states one can 'constructively' possess something in circumstances where you do not actually physically control it; it is sufficient for constructive possession if you could have brought that thing within your physical control, or at least could have kept others from bringing it within theirs. Furthermore, in some states, you will be presumed to constructively possess an item, such as a controlled substance, if it was merely in your presence. To escape liability a defendant must prove that they did not have constructive possession of the drug. This is very difficult to do, given how little it takes to establish constructive possession. Moreover, this practice of presuming possession on the basis of presence has the odd effect that several people can be found to possess the same item simultaneously. For example, if there is a controlled substance in a car, everyone in that car could be found to possess that drug.[652] This amounts to a significant broadening of the physical control element of possession. A similar broadening is apparent in the United Kingdom. In the context of drug possession, it has been held that the physical element of possession is established if the substance is present in a place over which the defendant has dominion or control.[653] In *Warner*, a majority held that knowing possession of a container is

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[650] [1969] 2 AC 256, 309-310.

[651] Surprisingly, George Fletcher praises possession offences for the relative certainty of their elements: Fletcher, *Rethinking Criminal Law* (n 212) 198.

[652] Dubber, 'Policing Possession' (n 629) 862-3, 896; Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 244. For example, see NY Penal Law s 220.25.

[653] *R v Lewis* (1988) 87 Cr App R 270. This judgment has been criticised as extending the meaning of possession too far: Simester, *Simester and Sullivan's Criminal Law* (n 642) 163. It can be contrasted

presumed to be knowing possession of its contents.[654] This represents a departure from the ideal of possession, as set out by Lord Wilberforce, where a person knows the qualities of what they have under their control. Presumptions of this sort abound in the law of possession, significantly reducing what must be proved in order to secure a conviction.[655]

Along with this flexibility in the central concept of possession, another feature of compound possession offences that makes them unusual is that possession offences have no *actus reus* requirement since possession is not an act, but a state of affairs.[656] This represents a deviation from a supposedly central tenet of the criminal law: that liability requires an act by the defendant.[657] It is, however, precisely these unusual features of possession crimes that make them easy to enforce and so popular with prosecutors.[658] One could go as far as to say that possession offences are '[d]esigned for ease of enforcement and imposition'.[659] Possession as an ongoing state of affairs, as opposed to an act, is easy to detect and easy to prove.[660] Although compound possession offences require proof of an intention, presumptions that exist in favour of the prosecution can make proof of

with *R v Kousar* [2009] EWCA Crim 139; (2009) 2 Cr App R 5, in which it was held that a defendant who knew about and acquiesced in the storage of counterfeit goods in his home did not possess them. While she may have had the ability to control the stored counterfeit goods, to have possession she needed to have exercised control over them: para 18.

654 Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 244.

655 Dubber, 'Policing Possession' (n 629) 862; Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 244, 248.

656 Dubber, 'The Possession Paradigm' (n 628) 103.

657 Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 240, 254; Dubber, 'Policing Possession' (n 629) 859-60.

658 Dubber, 'Policing Possession' (n 629) 918; Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 240.

659 Dubber, 'The Possession Paradigm' (n 628) 117. Although this is most true in relation to simple possession offences, aspects of compound possession offences also make them easy to enforce relative to other inchoate offences.

660 *Ibid* 96; Dubber, 'Policing Possession' (n 629) 901.

further intention easy. For example, possession of a sufficient quantity of a controlled drug forms the basis of an almost irresistible inference that there is an intent to supply.[661]

The very breadth of available possession offences and ease in prosecuting them leads to an allied concern: discrimination in their enforcement. On their face possession offences are generally applicable, but in practice they are used as a measure to target particular types of individuals.[662] Possession offences first became prominent in America in the context of opium regulation. Opium possession offences were systematically enforced in a manner that oppressed the Chinese.[663] In modern America there is evidence that drug and weapon possession offences are enforced more readily against black, Hispanic and poor people than other members of the population.[664] Undoubtedly, profiling plays a significant and problematic role in the policing of possession offences.[665] This has led Dubber to claim that possession offenses provide a pretext for the harassment of those perceived to be outsiders;[666] they have replaced vagrancy offences as the modern technique for punishing undesirables.[667]

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[661] Dubber, 'Policing Possession' (n 629) 947.

[662] Dubber, 'The Possession Paradigm' (n 628) 98; Douglas Husak, 'Guns and Drugs: Case Studies on the Principled Limits of the Criminal Sanction' (2004) 23 Law and Philosophy 437, 458. While the arguments here are made in relation to possession offences generally – simple and compound – there is no reason to believe they do not apply equally to compound possession offences considered alone. The inclusion of an intention requirement in the conspiracy offence has not prevented that offence from being used in an unequally, against perceived 'out groups': see Chapter IV. Therefore, it is unlikely the inclusion of an intention requirement in a possession offence will prevent its discriminatory application. After all, contributing to the discriminatory application of possession offences is the reality that certain communities are more frequently under surveillance, and stopped and searched. This will feed into higher rates of detection within these communities of *all* types of possession offences, not only simple possession offences. Cf. Fletcher, *Rethinking Criminal Law* (n 212) 204.

[663] Dubber, 'Policing Possession' (n 629) 954.

[664] *Ibid* 847.

[665] *Ibid* 896.

[666] *Ibid.*

[667] *Ibid* 831, 911-5.

Given the extent to which compound possession offences seem to depart from central tenets of traditional criminal law theory – through the relative lack of *actus reus* and the use of presumptions to establish *mens rea* elements[668] – and concerns about discriminatory enforcement of these offences, it is essential to consider on what basis, if any, possession offences can be justified.

2. Justifying Compound Possession Offences

Given the wide array of compound possession offences, deployed in different contexts for different purposes and formulated in subtly different ways, it is not possible to come to firm general conclusions about the justifiability of possession offences. Nevertheless, it is possible to explore in broad terms the arguments for and against such offences. To this end, this section will first consider whether the absence of an act in compound possession offences renders them unjustifiable, since they fall foul of the traditionally accepted, although controversial, act requirement in criminal law. It will clarify the scope and purpose of the act requirement. Having determined that the act requirement does not stand in the way of criminalising possession, it will move to consider on what basis compound possession offences might be justified. It will focus on risk-based possession offences, where possession is seen as being linked to the creation of a risk or danger. The rationale of risk-based compound possession offences is said to be the prevention of harm, and the punishment of those who create the risk of harm.[669]

[668] Fletcher argues that for compound possession offences the burden of proof on the issue of intent should not be shifted or eliminated by the use of a legislative presumption. However, he considers an exception to this approach in relation to possession of things that are dangerous or are of such a nature that they give rise to suspicions of intended illicit use, such as weapons, narcotics or obscene materials: Fletcher, *Rethinking Criminal Law* (n 212) 199-200-1.

[669] Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 239.

These are the arguments commonly offered in favour of drug and weapon possession offences. This section will explore two different risk-based arguments: those that focus on the state of possession as culpably creating a risk of harm, and those that point to possession as evidence that the possessor is a dangerous individual. It will conclude that there are grave difficulties for both arguments, calling into question the legitimacy of many compound possession offences.

2.1 *Possession Offences and the Act Requirement*

Possession, as a state of affairs, arguably falls foul of the so-called act requirement in the criminal law. Roughly put, the act requirement states that it is a necessary condition of criminal liability that there be proof of a voluntary act by the defendant.[670] The act requirement is both descriptive and normative: it purports to describe accurately most existing criminal offences and it claims that criminal offences ought to include an act element.[671] Despite traditional acceptance of the act requirement, its precise content is contentious.[672] It is unclear what an 'act' is for the purposes of the act requirement.[673] It is unclear what role an act must play in a criminal offence for the requirement to be met.

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[670] Antony Duff, 'Action, and the Act Requirement and Criminal Liability' (2004) 55 Royal Institute of Philosophy Supplement 69, 69; Douglas Husak, 'Rethinking the Act Requirement' (2007) 28 Cardozo Law Review 2437, 2437; A.P. Simester, 'On the So-Called Requirement for Voluntary Action' (1998) 1 Buffalo Criminal Law Review 403, 404.

[671] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 70; Douglas Husak, 'The Alleged Act Requirement in Criminal Law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 110; Husak, 'Rethinking the Act Requirement' (n 670) 2438.

[672] Ashworth, 'The Unfairness of Risk-Based Possession Offences (n 628) 240; Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 405; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 108; Husak, 'Rethinking the Act Requirement' (n 670) 2437; Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 71.

[673] Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 108; Husak, 'Rethinking the Act Requirement' (n 670) 2437; Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 71.

Must criminal liability be imposed for an act, as the object of liability, or is it sufficient that an act is a necessary condition of liability, even if the object of criminal liability is something else, such as a thought or an involuntary movement?[674] It is unclear why we should believe that an act is required for criminal liability.[675] There is even disagreement about how these various questions should be answered, with some commentators turning to the philosophy of action for guidance,[676] and others rejecting this philosophy as irrelevant in the context of the criminal law.[677]

These central disagreements have led to a wide range of conclusions about the true nature of the act requirement and its role in the criminal law. Husak argues that, despite the act requirement's pedigree, it does not stand up to scrutiny and should be rejected. He advocates instead for a 'control requirement'.[678] Duff argues that the act requirement should be recast as an act presumption, with action understood as a social phenomenon.[679] Simester argues that action is not a necessary condition of criminal liability, it is voluntariness that is necessary. Nevertheless, he argues that action is part of the paradigm instance of criminal wrongdoing; it should normally be required and any departure from this paradigm should be closely scrutinized.[680]

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[674] If an act is required as an object of liability, what we are held criminally liable for must be an act. If an act is only required as a condition of liability, we could be criminally liable for things other than acts, so long as they are suitably related to some act: Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 71-2; Husak, 'Rethinking the Act Requirement' (n 670) 2438-40; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 111.

[675] Husak, 'Rethinking the Act Requirement' (n 670) 2437; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 108.

[676] See, for example: Michael Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford University Press 2010).

[677] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 74-7; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 108-9.

[678] Husak, 'Rethinking the Act Requirement' (n 670) 2438.

[679] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 80-6.

[680] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 406.

Given this uncertainty about the very existence and content of the act requirement, it cannot be said with any confidence that possession offences are illegitimate because they fail to satisfy it.[681] It is not even clear that possession offences do fall foul of the act requirement. If the act requirement is interpreted as requiring liability to be imposed for an act, then possession offences will not satisfy it. Possession is patently not an act; it is a state of affairs. However, if the act requirement merely requires that an act is a necessary condition of liability, then possession offences might meet the requirement. Following an approach similar to that taken in the Model Penal Code, it can be argued that if a person is in possession they have either knowingly received the thing possessed, or at least have come to have control of that thing and have knowingly omitted to terminate this control.[682] This means that while possession itself is not an act, possession is evidence of some prior act or omission and this, the argument goes, is sufficient to satisfy the act requirement. This approach to reconciling possession offences with the act requirement is far from satisfying.[683] It seems a stretch to look beyond the state of possession that is criminalised, in search of an act or omission in the history of the defendant, not specified in the offence definition, upon which to affix our attention. If this is all that is required to satisfy the act requirement it would seem possible to reconcile most offence formulations with the act requirement.

Nevertheless, despite controversies as to its existence and content, the act requirement has long been a feature of criminal law theory and it does have a 'certain

[681] Dubber, 'The Possession Paradigm' (n 628) 117.

[682] See section 2.01 of the Model Penal Code. For discussion of this provision see: Husak 'Rethinking the Act Requirement' (n 670) 2440; Dubber, 'The Possession Paradigm' (n 628) 103; Dubber, 'Policing Possession' (n 629) 985; Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 241-3.

[683] Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 242.

intuitive plausibility'.[684] The plausibility of the act requirement is most readily felt when we consider the kinds of liability it generally purports to exclude: liability for involuntary bodily movements, liability for states of affairs, liability for thoughts, and liability for omissions.[685] It seems correct that criminal liability should not be imposed on these bases, or at least that any extension of the law to prohibit involuntary bodily movements, states of affairs, thoughts, or omissions should be specially justified. The act requirement has served to limit these forms of liability. However, it has not been clearly explained why these forms of liability are problematic. By exploring the reasons why liability is curtailed in these contexts, we will reveal the normative considerations that inform the act requirement.[686] This will help us to determine whether the act requirement should be retained, or if it is better replaced with some other principle or principles. We can then return to consider compound possession offences, and whether or not their criminalisation of a state of affairs as opposed to an act is problematic.

2.1.1 *Exclusion of Liability for Involuntary Bodily Movements and for States of Affairs: The Relevance of Control*

It is fundamentally unjust to convict a person for something over which they had no control. For example, X suffers from epilepsy and strikes another person during a seizure. Or, Y's leg hits his doctor when his reflexes are being tested. Neither X nor Y should be liable for assault. This is because the criminal law functions by censuring those who are responsible for criminal conduct. As we have seen, legal ascriptions of

[684] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 70.

[685] *Ibid* 70-1.

[686] Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 116.

responsibility depend upon viewing people as ideal autonomous agents,[687] not simply as bodies. As ideal autonomous agents we have practical agency and are able to guide our behaviour with reference to reasons.[688] The criminal law addresses us as ideal autonomous agents, providing us with determinative reasons not to engage in criminal conduct.[689] If a person nevertheless decides to behave in a way that breaks the criminal law, she can rightly be held responsible for doing so. She has exercised her practical agency, she had control over how she behaved, and because she had control she may be held responsible for her behaviour.[690] In contrast, where a person's body moves involuntarily, this movement is not an exercise of her practical agency. She had no control over the movement and so cannot be held responsible for it. This is the principle that underpins the act requirement's exclusion of liability for involuntary bodily movements. Generally, our actions are under our control, and our non-acts are not. For this reason, generally, a person should be held criminally responsible only for her acts.[691]

Nevertheless, despite action being the paradigm instance of conduct over which we have control, we can also have control over some non-actions. Possession is an example of this. Possession is a state of affairs, not an act, but we have control over

[687] See Chapter III.

[688] See Duff, *Answering for Crime* (n 38) 57-8: In his discussion of moral responsibility Duff states: 'I have control over X, an actual or potential state of affairs, insofar as it is within my power both to bring it about that X is the case and to bring it about that X is not the case. Control is in part a matter of how far the world is responsive to me and my agency: can I bring about those results in the world that I intend and try to bring about? It is also a matter of my own capacities for thought and movement: how far can I think and move "at will"? It is also, in relation to control over one's own conduct, a matter of reason-responsiveness: how far is my conduct guided by what I recognise as good reasons for action?'

[689] Although on rare occasions there may be good reasons to ignore criminal law prohibitions, as in cases of civil disobedience where the prohibition itself is unjust.

[690] See: Husak, 'Rethinking the Act Requirement' (n 670) 2458; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 118,121; Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 408, 413.

[691] Husak, 'Rethinking the Act Requirement' (n 670) 2454; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 118-20.

whether we possess something or not. We can exercise this control in choosing to acquire something, or in choosing to retain something once we become aware it is within our physical control. Given this, there is nothing intrinsically wrong with criminalising possession, a state of affairs, so long as the person could have done something to prevent or terminate their possession.[692] This provides a plausible account of why there is not a blanket ban on possession offences. However, it also helps us to understand why we might be concerned about some of the presumptions operating in the field of possession liability, such as the presumption that a person possesses a gun if she is in its presence. If a person is unknowingly in the presence of a gun, she cannot be said to exercise control over this state of affairs. It is for this reason, and not because there is no act in the offence definition, that it would be unjust to hold her criminally liable on the basis of mere presence.

Focusing on the presence or absence of control, instead of the presence or absence of an act, also helps us to understand why other forms of state of affairs liability remain problematic. Consider, for example, the notorious case of *R v Larsonneur*,[693] in which the conviction of a defendant for being an alien found in the United Kingdom was upheld, even though she had been deported back to the United Kingdom from the Irish Free State against her will. This decision has been severely criticized, and for good reason. However, the problem with the decision was not that the defendant was convicted for a state of affairs, as opposed to an act, but that she was convicted for a state of affairs over which

[692] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 409-10.

[693] (1934) 24 Cr App R 74.

she had no control.[694] We might understand the decision of *Robinson v California*[695] in similar terms. In that case the United States Supreme Court declared unconstitutional a statute making it an offence to be addicted to narcotics. This decision is arguably correct, but not because liability should never be allowed for a state of affairs. Instead, liability was problematic because drug addiction is a state of affairs over which an addict does not have control, or at least does not have sufficient control to be held responsible. Alternatively, it might be argued that the decision was incorrect on the basis that those who become addicted to narcotics have control over their initial drug taking.[696] Regardless of the line of argument preferred, and I prefer the former, viewing the case in terms of control, rather than in terms of the presence or absence of an act, brings to the foreground the normative considerations most relevant to determining whether it is just to hold someone responsible in such circumstances.[697]

The effectiveness of a focus on control in understanding difficult cases has led Husak to argue that a control requirement is more plausible than an act requirement. The

[694] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 411-2. Although Duff takes a different view of this case, arguing that the defendant did have a minimal degree of control exercised through, either, voluntarily disembarking from the ship upon its return, or because she had control over where she had gone and so whether she would be forcibly returned to the United Kingdom: Duff, *Answering for Crimes* (n 38) 58-9. The difference of opinion on the facts of this particular case are, nevertheless, not pertinent to the overarching question of whether a control requirement exists. It simply highlights that its application, in certain circumstances, will be open to contest.

[695] 370 US 660 (1962).

[696] Parallels might be drawn with 'culpability in causing' cases. For example, consider the liability of a person who suffers an epileptic seizure while driving who is convicted of negligent driving, on the basis that they negligently failed to take their epilepsy medication. Although, during the seizure, they were not in control of their bodily movement, they may still, it is argued, be held liable because they had prior control over whether or not a seizure would occur. For a discussion of these cases see: Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 74, 78; Husak, 'Rethinking the Act Requirement' (n 670) 2457.

[697] Duff would contest this characterisation, arguing that in both *Larsonneur* and *Robinson* a 'minimal control requirement' was satisfied, in that in each case the defendants had control over a prior choice which then lead on to the offending conduct. Instead, Duff frames the critical question as 'whether it would be reasonable to hold that, at that earlier time, she had a prospective responsibility… to act' in such a way that the criminal event would not have ensued: Duff, *Answering for Crime* (n 38) 58-60.

concept of control is undoubtedly imprecise but, Husak argues, it is an improvement upon the act requirement.[698] A control requirement could be stated as follows: that a person should be criminally liable only for what lies within her control as a rational agent, and this depends on her capacity to act for and be guided by reasons.[699] Certainly, recognizing the role of control enables us to approach directly one of the central normative concerns underpinning the act requirement. Nevertheless, Husak's control requirement does not capture everything that the act requirement is achieving when it purports to preclude liability for states of affairs. What Husak does not adequately address is that people may have control over a state of affairs in two ways: they may have taken actions that brought the state of affairs about, or they may have omitted to prevent the state of affairs or terminate it once it had arisen. Consider possession, for example. A person may come into possession of an item by actively acquiring it. Alternatively, a person might come into possession of an item by discovering that someone has left it in her room, and by then deciding not to discard it. In both cases, she has control such that she might appropriately be described as responsible for her possession. However, in the latter case her liability is, in effect, for a voluntary omission.[700] This is important because omissions liability raises unique concerns. These will be explored in due course. For now, it is sufficient to note that while the control requirement goes some way to helping us resolve whether state of affairs liability might be acceptable in a given instance, it is but one of a number of considerations that must be addressed.

The act requirement has, in effect, functioned as a rule of thumb for the application of underlying principles. The first is the control requirement, but we should not stop there

[698] See: Husak, 'Rethinking the Act Requirement' (n 670).

[699] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 88.

[700] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 412.

in considering what other considerations inform the act requirement. This continued discussion of the act requirement goes further, perhaps, than is strictly necessary to assess the justifiability of compound possession offences. Nevertheless, discussing the act requirement in full facilitates the broader inquiry as to the limits of the criminal law.

2.1.2 *Exclusion of Liability for Thoughts: The Public / Private Divide*

The act requirement is also traditionally taken to exclude liability for mere thoughts.[701] The extent of the act requirement's role in limiting liability for thoughts depends in large part upon how it is interpreted. If it is interpreted as requiring liability to be for an act, then it might play a significant role. On this account, an offence would be illegitimate if, for example, an intention to commit an offence was the true object of liability. This would be the case even if the offence included an act element. Some interpret the offence of attempts in this light, arguing that the object of attempts liability is the intention to commit a crime. The defendant is sufficiently culpable to warrant criminal liability, regardless of whether or not she carries out any acts in furtherance of this intention. The act element of an attempt is merely a condition of liability, required to provide sufficient evidence of the culpable intention.[702] A similar view might be taken of compound possession offences, which criminalise possession of a certain item with an intention to use it to commit a crime in the future. If this account of attempts liability is accepted, and if the act requirement dictates that an act should be the object of liability, then attempts liability is unjustifiable. This is a remarkable conclusion. It would not follow from the alternative and arguably more plausible[703] interpretation of the act

[701] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 70.

[702] *Ibid* 72.

[703] Husak, 'Rethinking the Act Requirement' (n 670) 243

requirement, which would be satisfied with the presence of an act as a condition of liability. But, on such an interpretation, the act requirement would be satisfied by a very minimal act element. Such an act element would do little to assuage concerns that the criminal law was focusing too greatly on intention or intervening too early. It is hard to see that there is a significant difference between criminalising a firm intention alone, and criminalising a firm intention paired with the sparest of acts.[704] It is an error to think that as soon as there is an act element present in an offence any concern about it being a 'thought crime' dissipates. After all, the core of the offence may still be the criminal intention, and this raises unique concerns. The act requirement, then, seems either to exclude too much or too little; it is a poor proxy for the concerns that underpin our reluctance to criminalise thoughts. It is worth considering these concerns directly.

Our concern to limit liability for thoughts might in part be explained with reference to the control requirement. There are some types of thought over which we do not have control. At any given moment an idea or an image might pop into my head, unbidden. Once I acknowledge the presence of such a thought, I have some degree of control over whether I keep thinking about it or develop the idea or image further. But I do not have control over its first appearance, nor may I have sufficient control over its subsequent reappearances to be held responsible for having the idea. We have all had the experience of trying and failing to quash an unwanted thought.[705] There are, however, thoughts that we can be said to have control over. If I am at the supermarket and need to determine the total cost of my shop, I might carry out some mental arithmetic. The thinking involved would be under my control. Likewise, if I take an idea and develop it

[704] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 90.

[705] See Duff, *Answering for Crime* (n 38) 61. Duff notes that I can try, sometimes successfully, to make myself think about X or not think about Y.

into an intention, and if I form a plan of how to carry out that intention, these are thought processes over which it can be said I exercise control.[706] Therefore, if all that the act requirement boils down to is a control requirement, many forms of thought could form the basis of criminal liability. In fact, in accordance with the control requirement, liability for holding a criminal intention with proof of no act could be legitimate. This seems problematic and suggests that there is more to the act requirement than a concern for control.

Criminalisation of thoughts might be objected to on the principled basis that thoughts are not the proper business of the state, and so should not be the business of the criminal law. Thoughts might be morally wrongful, but if they remain unexpressed and unacted upon, they are private matters not to be intruded upon, and certainly not to be punished, by the state. There is much disagreement about where to draw the line between the public realm, in which the criminal law may function, and the private realm, from which it is precluded.[707] But, if anything is private, thoughts are. As Duff argues:

> [I]t is surely not controversial that the criminal law of a state that claims even a minimal respect for liberal values must not intrude into the private realm of thought.[708]

Related to this concern for the private realm is the reality that most thoughts, in and of themselves, will have no impact on the world. They will not cause any harm, nor create a risk of harm, that warrants the attention of the criminal law. For example, the fact

[706] Tadros argues that we have the same kind of control over which intentions to form as we have over our actions: Tadros, *Ends of Harm* (n 50) 146.

[707] See discussion of 'public wrongs' in Chapter II.

[708] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 70. See also: Tadros, *Ends of Harm* (n 50) 97-8. He argues: 'Our right to judge wrongly depends on our refraining from acting in a way that is sensitive to those wrongful judgements. Our right to our private thoughts is to this extent defeasible.' In other words, it is only by bringing her judgements into the public realm, through action, that the offender makes her judgements the business of the state.

that a person maintains a sexual fantasy, no matter how abhorrent or wrongful it may be, will not cause nor make sufficiently likely any harm in the world. A fantasy, alone, is not structured so as to compel the fantasizer to action. However, the picture becomes more complex when we consider action-oriented thoughts, such as intention. It is arguable that a firm intention to commit a crime does create a risk that harm will be caused; it increases the likelihood that the intention holder will commit the intended crime.[709] It is questionable whether this, without anything further, pushes such an intention out of the private realm and into the public domain, such that it may be criminalised. But even if a principled ban on the criminalisation of intentions alone, on the basis of privacy, is not accepted,[710] it is likely that the risk of harm created by an intention alone will generally fall far below the level required to warrant the intervention of the criminal law. Recall that on the Standard Harms Analysis, as set out in Chapter II, the magnitude of the risk is to be weighed against the social costs of prohibition. Given the highly intrusive nature of imposing liability for intentions alone or even intentions paired with very minimal acts and the extreme incursion upon ideal autonomy that this would represent, it is unlikely criminalisation will be justified. This, in turn, links to practical concerns that it will not be possible to enforce the criminalisation of intentions in a non-oppressive manner.[711]

Therefore, instead of focusing on the presence or absence of an act, the real work in limiting liability for thoughts should be done by considering a number of principles. The first is the control requirement, which should preclude liability for many instances of

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[709] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 89-90; Duff, *Answering for Crime* (n 38) 102-5.

[710] As Ramsay notes, liberal legal opinion has recently had a strong commitment to the European Convention on Human Rights. Under this framework the right to privacy set out in article 8 can be limited in any way that is 'necessary in a democratic society in the interests of national security, public safety… for the prevention of disorder or crime…' That is, it is not an absolute right. See: Ramsay, 'Democratic Limits to Preventive Criminal Law' (n 38) 220.

[711] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 89.

thought. The second is the principle that thoughts exist in the private realm, so that, generally speaking, they should not be criminalised. Certainly, liability must be precluded for fantasies and other thoughts that do not in and of themselves spur a person to action, even if they are offensive and wrongful. When it comes to action-oriented thoughts, such as intentions, there may not be a blanket ban upon their criminalisation. Nevertheless, any application of the Standard Harms Analysis must recognize the deep intrusion into the *prima facie* private realm of thought that is involved in any offence that has intention as its object. This will weigh the scales heavily against criminalisation. In the immediate context, this suggests that it would be difficult to justify, for example, a hypothetical crime formulated in the following terms: possession of any article with an intention to use this in the commission, preparation, or instigation of an act of terrorism.[712] The object of liability in this offence is arguably the criminal intent. The requirement that the person possess any item whatsoever[713] is all that prevents the offence from being a pure thought crime. The addition of this thin requirement of possession does little to mitigate concerns that the offence's focus on intention is a significant intrusion into the private realm. This intrusion must weigh heavily against criminalisation.

2.1.3 *Exclusion of Liability for Omissions: Protecting Ideal Autonomy*

The act requirement functions as a presumption against omissions liability, with the presumption rebutted in circumstances where a person has failed to discharge a special duty to act.[714] Traditionally, duties to act have been recognized in a limited range of

[712] This is a variant on the current section 57 of the Terrorism Act 2000.

[713] Although the item possessed would need to be related in some way to the criminal intent.

[714] Duff, 'Action, and the Act Requirement and Criminal Liability' (n 670) 71, 102. For a full exploration of omissions liability, see: Andrew Ashworth, *Positive Obligations in Criminal Law* (n 540).

circumstances. A duty may arise in the context of a special relationship between two people, for example, the relationship between a parent and child, or a doctor and patient. In the context of these special relationships, the failure to discharge the associated duty, by omitting to do something required, may give rise to criminal liability.[715] A duty to act has also been recognized where a person creates a dangerous situation accidentally or unknowingly. Upon becoming aware of the situation, they have a duty to take steps that are within their powers to counteract the danger they have created.[716] A duty is also (controversially) imposed in some jurisdictions on the owner of property to ensure that their property is not used to commit an offence, either as a means of committing that offence or as a location for its commission. For example, in the United Kingdom, an owner of a car who is a passenger is under a duty to prevent the driver from driving dangerously.[717] Notably, the reasons for or against recognizing a duty to act in certain circumstances are not provided by the act requirement itself. The act requirement merely establishes that omissions liability is *prima facie* unacceptable, and other reasons must be offered to justify a departure from this position.

The traditional explanation for the limitation of omissions liability is that such liability is far more likely to impinge upon individual autonomy than liability for acts.[718] When an act is criminalised, one option is prohibited among the many acts that a person may choose to carry out, under threat of punishment should she choose the prohibited

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[715] For example: Criminal Justice and Courts Act 2015, s 20.

[716] *R v Miller* [1983] 2 AC 161.

[717] *Du Cros v Lambourne* [1907] 1 KB 40 discussed in: Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 242-3. For another example, see section 8 of the Misuse of Drugs Act 1971 which makes it an offence for an occupier of premises to knowingly permit those premises to be used for certain drug-related activities.

[718] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 426-7; Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 116.

option. When an omission is criminalised, a person is forced to carry out a certain act or acts, under threat of punishment should she choose to do something else. The latter is far greater an imposition upon a person's autonomy than the former. In the former, a range of valuable options which will not attract punishment are still available to the person; in the latter, the person must either act in accordance with the duty or suffer punishment. In addition, respect for the autonomy of persons requires that we hold people responsible only for their own actions, and not the actions of others. Omissions liability threatens this, by potentially requiring a person to prevent the harm that another person's action may cause, if unhindered.[719]

It is this potential for severe curtailment of individual autonomy that underpins the *prima facie* exclusion of omissions liability. When should this presumption be displaced? In determining when omissions liability will be allowed under the Standard Harms Analysis, the high cost to autonomy will be weighed against the magnitude of the risk involved in permitting omissions. Factors such as the existence of special relationships will alter the weights in the balance. Only in rare cases will the balance fall in favour of criminalisation.[720] It is this reality that the act requirement captures, in its presumptive exclusion of omissions liability. Again, the act requirement is shown to function as a rule of thumb indicating the usual conclusion reached when the true principles at stake are applied.

[719] Simester, 'On the So-Called Requirement for Voluntary Action' (n 670) 426-7.

[720] For a full exploration of omissions liability, see: Andrew Ashworth, *Positive Obligations in Criminal Law* (n 540).

2.1.4 *Conclusions: The Act Requirement and Possession*

This section has identified several important considerations that underpin the traditional act requirement. The first is the requirement that a person should not be criminally liable for something over which they had no control. The second is that thoughts that are not practically oriented, such as fantasies, are private and should not attract the attentions of the criminal law. In contrast, practically-oriented thoughts, such as intentions, are not in principle beyond criminalisation. Nevertheless, the application of the Standard Harms Analysis will generally preclude criminalisation of intentions, due to the impact on privacy and the high costs to ideal autonomy of doing so. Finally, and similarly, an application of the Standard Harms Analysis will often preclude criminalisation of omissions. Having exposed these underpinnings, we can discard the idea of an act requirement in the criminal law, and along with it the fraught debates about the meaning of action, and instead direct our attention to the concerns that are at stake. Husak is, therefore, correct in advocating for recognition of a control requirement in the criminal law, as opposed to an act requirement.[721] The importance of a careful application of the Standard Harms Analysis in determining the justifiability of an offence must also be stressed, particularly in relation to offences that target intentions, or omissions.

Applying these conclusions in the context of compound possession offences, we will see that it is not necessarily a problem that possession offences criminalise a state of affairs, as opposed to an act. It will, of course, depend upon the particular offence formulation, and the meaning given to possession in that context, whether or not the offence in question is justified. Some forms of possession liability should be precluded on the basis that the control requirement is not met. For example, offences where

[721] Husak, 'Rethinking the Act Requirement' (n 670) 2457.

possession of an item is presumed on the basis of the mere presence of the defendant in the vicinity of the item would fall foul of the control requirement. Without evidence that there is knowledge of the presence of the item, it cannot be said with certainty that the defendant had control over the state of affairs upon which her liability is based. Difficult questions about the precise requirements of possession, such as the specificity of knowledge required and the extent of physical control required, map onto the difficult question of just how much control is required for criminal liability to be permissible. Control as a concept permits of degrees, and there is no hard and fast way of delineating how much control is enough to allow a finding of moral and legal responsibility.[722] Nevertheless, by asking the question in terms of whether or not there is sufficient control as opposed to whether or not there is an act, the right normative issues will be addressed in each case.

In addition, compound possession offences may sometimes be criticized as akin to thought crimes, where the ulterior intention is the object of the offence and the possession requirement readily met. This raises important questions about intrusion into privacy and ideal autonomy, which must be carefully considered. Possession offences also raise issues of omissions liability. This is not immediately obvious. However, recall that possession can be consistent with the control requirement in two types of case. I might come into possession of an item by actively acquiring it. Alternatively, I might come into possession of an item by becoming aware of its presence within my sphere of control, and by then deciding not to discard it. In both cases, I have control such that I might appropriately be described as responsible for my possession. However, in the latter case my liability is, in effect, for a voluntary omission: an omission to take steps available

[722] Husak, 'The Alleged Act Requirement in Criminal Law' (n 671) 121; Husak, 'Rethinking the Act Requirement' (n 670) 2458-9.

to terminate possession. If a possession offence criminalises both active acquisition and omitting to terminate control, then the intrusion upon autonomy caused must be taken into account when applying the Standard Harms Analysis to this offence. This will weigh heavily against the criminalisation of possession. Nevertheless, the outcome of an application of the Standard Harms Analysis to possession offences cannot be fully appreciated without an assessment of the claims made about the ways in which possession causes harm or creates danger.

2.2 *Compound Possession Offences and Harm*

Possession offences are often understood as being justified on the basis that they prevent future harm. For compound possession offences this underlying motivation is evident. Compound possession offences require proof of possession, and a further intent to cause harm or commit a substantive offence. Examples of compound possession offences include: possessing a firearm with intent to endanger life[723] or with intent to commit an indictable offence,[724] possessing a controlled drug with intention to supply it to another,[725] possessing anything with intent to destroy or damage property, [726] and possessing an indecent photograph of a child with a view of it being distributed or shown to others.[727] The structure of compound possession offences, possession plus an ulterior intention, is analogous to the structure of the general inchoate offences of attempt and conspiracy. It is therefore evident on the face of compound possession offences that they

[723] Firearms Act 1968, s 16.

[724] Firearms Act 1968, s 18.

[725] Misuse of Drugs Act 1971, s 5(3).

[726] Criminal Damage Act 1971, s 3.

[727] Protection of Children Act 1978, s 1.

are inchoate in nature and are centrally concerned with the prevention of some future harm or offence.

Nevertheless, compound possession offences appear anomalous when considered alongside other inchoate offences. Recall that for attempts liability, a more than merely preparatory act is required. With conspiracy liability, the more remote act of forming an agreement is criminalised, but is only justifiably criminalised where there is evidence of a firm intention provided by a substantial overt act in furtherance of the conspiracy. With possession liability, a potentially very remote state of affairs is criminalised.[728] For example, a person can possess a gun and intend to use it to kill another person, while still being temporally and geographically remote from the intended murder. The fact of possession of an item, paired with the intention that it be used in a criminal venture, does not ensure proximity to the commission of a substantive offence.[729] The potential for possession to be very remote from the commission of a substantive offence is significant. As established in Chapter III, the earlier a criminal intervention is, the greater the impingement upon ideal autonomy it involves. This counts heavily against the criminalisation of conduct remote from the commission of a substantive crime. In addition, the more remote conduct is, the less likely it generally is to create a significant risk of harm, such that the use of the criminal law can be justified. Where conduct is remote there remain many junctures at which the criminal plan might be foiled or voluntarily abandoned. The chances of the plan coming to fruition will generally be lower at the stage of remote conduct compared with conduct that is, for example, more than merely preparatory. The lower the risk created by conduct, the weaker the case for its criminalisation. Compound possession offences, therefore, seem to face difficulties of

[728] Dubber, 'The Possession Paradigm' (n 628) 101-2; Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 248.

[729] Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (n 59) 132.

justification because of the potential remoteness of possession from the commission of a harmful offence.

This is not to deny that some instances of possession can be very dangerous indeed. A person possessing a gun with the intention to use it to kill, who is close to committing the intended murder, provides an example of extremely dangerous possession. Therefore, some instances of possession may be dangerous enough to warrant the attentions of the criminal law, but probably not all. This difficulty for justifying the criminalisation of preparatory conduct has already been discussed in the context of conspiracy law, in Chapter IV. There it was concluded that some agreements to commit a crime are dangerous enough to justify criminalisation, but not all agreements will be sufficiently dangerous. In response to this difficulty, Morrison argued that liability for conspiracy should be limited to instances that are proven to be sufficiently dangerous.[730] Ashworth has suggested a similar approach might be taken to limiting possession offences, by requiring proof of a danger that the article will be used to cause serious harm.[731] However, as discussed in relation to conspiracy, such an approach faces grave difficulties. It is very hard to specify in the abstract what level of dangerousness must be proved before the offence will apply.

Another solution to this difficulty might be to adopt a similar approach to that taken to conspiracy in the previous chapter, requiring proof of an additional overt act

[730] Morris, 'Requiring Proof of Conspiratorial Dangerousness' (n 478).

[731] Ashworth, 'The Unfairness of Risk-Based Possession Offences' (n 628) 256. However, this is not the solution that Ashworth favours. He argues that many possession offences are unjustifiable but concludes that if it is politically impossible to abolish them, then requiring proof of danger would be the next best thing. Husak also argues that the most obvious change to make to possession offences to limit them to a justifiable scope would be to ensure that the individuals who are banned from owning guns or drugs are those that pose an unacceptable risk of harm. He, however, goes on to conclude that the simplest way to achieve this is to require proof of intent to commit the crime: Husak, 'Guns and Drugs' (n 662) 490-2. It is my contention that this alone is not necessarily sufficient to limit possession offences to instances that pose an unacceptable risk of harm.

which corroborates that the possessor has a firm intention to carry out the crime. The Model Penal Code criminalises some forms of possession in this way, in the context of its attempts provision. According to the Model Penal Code, a person is guilty of an attempt to commit a crime if he does an act constituting a substantial step toward the commission of the crime.[732] The Code clarifies that a substantial step is conduct that is strongly corroborative of the actor's criminal purpose.[733] It further stipulates that the following steps strongly corroborate criminal intent:

> possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose to the actor under the circumstances; or
>
> possession of materials to be employed in the commission of the crime, at or near the place contemplated for is commission, where such possession serves no lawful purpose of the actor under the circumstances.[734]

In the latter instance what is required is proof of possession plus intention, along with geographical proximity to the intended site of the crime, in circumstances where possession could not be for an innocent purpose. These additional requirements serve to ensure that the possession in question is sufficiently proximate and, therefore, dangerous to warrant the attention of the criminal law.

The rationale for the former instance of possession-based attempt in the Model Penal Code is less immediately clear. There is no requirement of proof of temporal or geographical proximity to commission of the crime. Therefore, the state of possession may be very remote from the causation of harm. Why should possession of materials specially designed for the commission of a crime be sufficient to ground liability? Ohana

[732] Model Penal Code, s 5.01(1)(c).

[733] Model Penal Code, s 5.01(2).

[734] Model Penal Code, s 5.01(2)(e) and (f).

provides a possible explanation. He notes that in some criminal ventures, specialised equipment is a necessity. This equipment, being specifically designed for criminal purposes, is unlikely to be widely available. Its acquisition may require a considerable investment of time, energy, or money, and may represent a critical step in the completion of the criminal plan. Therefore, successfully acquiring such specialized equipment can be seen to evidence a firm intention to carry out the criminal plan, and a high risk of offending.[735] This might be true, for example, of the acquisition of currency counterfeiting tools. Once a person is in possession of such a tool they can begin their criminal operation almost immediately, and they have succeeded in one of the most difficult tasks in their criminal plot. Possession of counterfeiting tools is, therefore, good evidence of a substantial risk that the crime of counterfeiting will be committed. However, possession of specialized tools will not always provide evidence of a substantial risk of harm. For example, the acquisition of tools designed for burglary may not take great effort and may, in any case, have other innocent uses, by builders for example. Further, although possession of such tools will aid in the completion of a criminal plot, there are still likely to be many difficult steps to be taken before the crime of burglary can be committed. Thus, possession of these tools paired with a criminal intention does not necessarily provide evidence of a substantial threat of offending such as to warrant the intervention of the criminal law.

The type of item possessed might also be relevant to the justifiability of a possession offence in another way. Some items are particularly dangerous, as they have the potential when used to readily cause significant harm. Guns might fall into this category. It is arguable, in accordance with the principles set out, that where a person possesses a gun and intends to use this gun to cause harm that this is sufficient, without

[735] Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (n 59) 135-7.

more, to justify criminal intervention. How is this so, if the possession is not proximate to the actual commission of the crime? The answer is that because guns are particularly dangerous items to possess, anyone who possesses a gun with ill-intent is likely to pose a substantial risk of harm. This cannot be said, for example, of someone who possesses tools for burglary with an intent to cause harm. This demonstrates that if the thing possessed is by nature a very dangerous item, its possession paired with a criminal intent, without more, may be sufficient to justify criminalisation. We might, therefore, usefully divide items possessed into three broad categories:

- Dangerous objects: Objects that have the potential, when used, to readily cause substantial harm;
- Specialist objects: Objects that are specially designed for unlawful use, and which can serve no lawful purpose (or no lawful purposes in the circumstances of the defendant); and
- Innocent objects: Objects that have innocent uses. They may also be used for unlawful purposes, but this is not the only use to which they may be put. This category excludes dangerous objects.

Our discussion has shown that the possession of dangerous or specialist objects with an intention to use them to commit a crime might, of itself, be sufficient to justify criminalisation. In the case of innocent objects, possession plus intention to commit a crime, without more, is unlikely to be sufficient. Some other, substantial overt act will be required to confirm that a firm intent to commit a crime is present. This might be provided, for example, by evidence that the defendant was proximate to the commission of the intended substantive offence. Most importantly, what this discussion has highlighted is that many instances of possession with intent cannot be justifiably criminalised on the basis that the possessor might use the item to commit a substantive offence in the future.[736]

2.3 *Compound Possession Offences as Character Offences*

Possession offences might, however, be interpreted in a different way. Instead of being viewed as inchoate offences, directed at the possibility of future harm, they might instead be understood as character offences. A 'character offence' is an offence that is not concerned with criminalising certain acts or omissions *per se*, but with criminalising certain kinds of people, because they have particular character traits.[737] Character traits are most readily understood in dispositional terms: 'to have a certain character trait is to be disposed to a certain action'.[738] Character traits, however, encompass more than a disposition to act in a certain way. A person's character traits will also include the patterns

[736] It might be argued that the justification for possession offences is that discussed in Chapter IV. Possession of a prohibited weapon is an offence because, while not every instance of possession increases the risk of harm, the general prohibition on these weapons is justified and it is wrong for a defendant to breach such a justified prohibition. However, this logic founders, as it did in the context of conspiracy, in the context of compound possession offences which involve an intent element. This is because, as in the context of conspiracy, the addition of an intent requirement makes compound offences more morally blameworthy and justifies stiffer punishments. For example, while possession of a firearm without a firearm certificate attracts a maximum sentence of 5 years (unless aggravated), possession of a firearm with intent to endanger life or injure property is punishable by life imprisonment (Firearms Act 1968, Schedule 6 Part 1). In this context, the justificatory logic which might apply to simple possession offences, sketched above, breaks down.

[737] Character theorists generally would claim that all (or most) criminal offences are concerned with character, although theorists may differ as to how character is relevant. Some, such as Bayles, would hold that the criminal law concerns itself with criminal acts only as evidence of undesirable character-traits; it is character-traits, not acts themselves, which the law condemns and punishes: Michael Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1 Law and Philosophy 5. Others, such as Tadros, argue that character theory does not shift the focus of the criminal law away from action and towards character. Action is still the focus of the criminal law, but the relationship between action and character is a condition of holding an individual responsible for her action: Victor Tadros, *Criminal Responsibility* (Oxford University Press 2007) 9. A useful overview of modern character theory is provided by Yankah: Ekow N. Yankah, 'Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment' (2004) 25 Cardozo Law Review 1019, 1034. A full discussion of the nuances of differing accounts of character theory is beyond the scope of this thesis.

[738] Antony Duff, 'Choice, Character, and Criminal Liability' (1993) 12 Law and Philosophy 345, 365.

of thought and feeling that they exhibit over time, and the values that they hold.[739] In this way, character traits describe how a person is disposed to act, as well as what lies behind these actions. For example, a jealous person is disposed to abuse a colleague who is promoted before her, because she resents his success; a generous person is disposed to give when faced with another's misfortune, because she feels and is motivated by compassion; a self-centred person is disposed to ignore another's misfortune, because they fail to notice it at all.[740]

On their face, compound possession offences do not criminalise particular character traits. It seems a little odd, therefore, to regard them as character offences. Nevertheless, Dubber has mounted a compelling critique of possession offences on the basis that they are concerned with identifying and punishing those considered to be dangerous individuals.[741] Dangerousness may be considered a character trait: a disposition to act in a way that harms or risks harm to the interests of others. On this account possession offences are not really concerned with possession, nor are they concerned with the possibility of a specific harm being inflicted by a specific act. Instead, possession offences are designed to target supposedly dangerous individuals.[742] A person is presumed to be dangerousness if they are in possession of a prohibited item,[743] and this

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[739] Duff, 'Choice, Character, and Criminal Liability' (n 738) 364-6.

[740] These rather loosely framed examples are not intended as definitions of the various character traits discussed, but merely as examples of how character traits are made up of dispositions to feel, think, reason, and act in a certain way.

[741] Dubber, 'Policing Possession' (n 629) 908. Dubber's approach of looking beyond the doctrinal formulation of possession offences to consider how they function in practice is similar to the work of Lacey. As she observes, the doctrinal arrangements of substantive criminal law are in themselves rarely determinative of whether a character approach, or an alternative approach, to criminal responsibility prevails. It is not sufficient to argue that, on its face, a law is not character-based, if in fact that is how it is functioning: Nicola Lacey, 'The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation' in Antony Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 153, 175.

[742] Dubber, 'The Possession Paradigm' (n 628) 100.

[743] *Ibid* 114.

is reinforced in compound possession offences by the presence of criminal intent. For example, a person who possesses a firearm with intent to cause fear of violence, or anything with intent to destroy or damage property will be presumed to be a dangerous individual. In turn, this presumed dangerousness supposedly justifies criminal intervention. There is some intuitive appeal to this approach.

Is this, then, an alternative way of justifying possession offences? Is it legitimate to criminalise a person because they have a character trait, such as being dangerous, as evidenced by their possession of certain items with intent? An immediately obvious objection is that it might be something of a leap to presume that all those who possess prohibited items with intent are dangerous individuals. For example, it is not necessarily the case that all those who possess an item with an intent to damage property will actually pose a danger. This is an analogue of the argument made earlier about the risk posed by compound possession: it is not always the case that such possession will be dangerous; similarly, not every such possessor will be a dangerous person. Therefore, even if it is legitimate to criminalise a person because they have a particular character trait, this does not justify the current scope of some compound possession offences.

The breadth of possession offences has led to problematic outcomes in practice. The broad applicability of the offences confers on police and prosecutors significant discretion to determine who should be investigated and prosecuted for possession. Profiling plays an enormous role in the enforcement of possession offences. Possession provides the pretext for the targeting of people who are, because of their outsider status, considered dangerous.[744] If possession itself is a poor proxy for dangerousness, profiling of this sort is even worse. While it is justifiable to target someone for being dangerous, it

[744] Dubber, 'Policing Possession' (n 629) 839-40, 845, 896, 934.

is certainly unjustifiable and inexcusable to target someone for being poor or an ethnic minority. Therefore, if possession offences are to be justified on the basis of character liability, they must be narrowed to cover only those instances of possession that truly evidence dangerousness on the part of the possessor, and profiling must play no role in their enforcement.

More generally, whether the criminal law should be concerned with character traits at all is controversial. For our immediate purposes, it is important to determine whether recognising character as relevant to criminal responsibility would impact upon the justifiable scope of the criminal law. Arguably, if the criminal law were concerned with character traits, then it would not be necessary for the criminal law to wait for someone to commit a harmful or risky act before intervening. An offence that criminalised being a paedophile, for example, would allow us to prosecute, condemn, and punish paedophiles before they committed any harmful or risky acts, as long as there were some alternative evidence of their sexual deviance.[745] If it is the case that basing criminal responsibility upon character would justify offences of this sort, then it would be necessary to join the broader debate as to the role of character, if any, in determining moral and legal responsibility.[746] However, this is not the case. Recognising character as relevant to the criminal law does not necessarily open the door to broad character offences of this sort. Instead, whether or not the criminal law is concerned with character, the same principles limiting its scope will apply.

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[745] Bayles, 'Character, Purpose and Criminal Responsibility' (n 737) 19. See also: Dubber, 'Policing Possession' (n 629) 981; Yankah, 'Good Guys and Bad Guys' (n 737) 1054.

[746] See, for example: Bayles, 'Character, Purpose and Criminal Responsibility' (n 737); Duff, 'Choice, Character, and Criminal Liability' (n 738); John Gardner, 'The Gist of Excuses' (1998) 1 Buffalo Criminal Law Review 575; Yankah, 'Good Guys and Bad Guys' (n 737); Janus, 'The Preventive State, Terrorists and Sexual Predators' (n 104); Tadros, *Criminal Responsibility* (n 737); Lacey, 'The Resurgence of Character' (n 741).

To see that this is the case, it is necessary to understand more clearly the relationship between a person's character and their actions. Character traits are dispositions to feel, think, reason, and act in a certain way. It might seem that our character traits cause our actions: for example, because I am disposed to be honest, I act honestly. On this understanding, a character trait is something internal to a person, which pre-exists action. Action merely provides evidence of our character traits: because I act honestly, we can infer that I am honest. But a moment's reflection reveals that there is something odd about this: it is strange to say that I am honest, if I have never acted honestly in my life. You might predict that I will act honestly in the future, or say that I could learn to act honestly, but this is not the same as saying that, right now, I am an honest person.[747] Before a person is faced with an opportunity to act honestly or dishonestly, they cannot be said to be honest or dishonest. It is not simply that we do not know whether or not they are honest, rather it is that there is no fact of the matter to be known. This reveals that action is not merely evidence of a character trait but is constitutive of it.[748] To be an honest person is simply to be a person who tends to perform honest actions. Every honest action a person does adds up to constitute their honesty.[749] There is no free-floating state of honesty that exists independently of honest acts.[750]

This understanding of the relationship between character and action has significant implications for the legitimate scope of the criminal law. Even if the criminal

[747] Duff, 'Choice, Character, and Criminal Liability' (n 738) 372; Gardner, 'The Gist of Excuses' (n 746) 580-3.

[748] Duff, 'Choice, Character, and Criminal Liability' (n 738) 372; Gardner, 'The Gist of Excuses' (n 746) 577. Although Duff later in his work favours a more complex, Aristotelian conception of character: see Duff, *Answering for Crime* (n 38) 118-9.

[749] Gardner, 'The Gist of Excuses' (n 746) 577; Tadros, *Criminal Responsibility* (n 737) 9.

[750] Some theorists argue that a person can have a disposition that may never manifest. I do not accept this view. For a brief overview of this debate, see: Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press 2015) 7-8.

law were concerned with censuring and punishing people for character traits, because character traits are constituted by actions, the criminal law could not justifiably intervene until a person actually acts.[751] We might, in the future, be able to predict with great accuracy that a person of previously good character will do a dangerous act, but until they do that act we cannot rightly call them dangerous, nor can we condemn and punish them for being dangerous.[752] Therefore, recognising character as relevant to criminal responsibility does not open the door to a criminal law based on actuarial predictions. The logic of risk assessment permits for the identification of risk before any harmful behaviour has occurred.[753] The logic of character does not permit the identification of a character trait prior to the conduct that constitutes it. A criminal law that is concerned with character traits is, therefore, necessarily concerned with conduct. There is no alternative evidence of a person's dangerousness that could be relied upon to permit intervention before the commission of a dangerous act.[754]

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[751] This is not to suggest that a focus on character in the criminal law precludes the possibility of omissions liability. A person may be considered a coward if they fail to act in the face of danger. Their omission to act in circumstances which called for action is constitutive of the character trait of being a coward. Thus, as with liability for acts, liability for omissions can only arise on the basis of a character assessment if a circumstance in which a person was expected to act arises and they fail to do so. The key question in determining omissions liability is thus the circumstances in which a person is legally expected to act such that a failure to do so will attract criminal liability. As with liability for acts, a focus on character does not change the essential enquiry necessary in determining whether criminal liability is justifiable.

[752] Duff, 'Choice, Character, and Criminal Liability' (n 738) 373. This conclusion is of significance because, as Fletcher notes, if it were possible to support an offence targeting a group of people on the basis that statistics supported the inference that they were more likely to commit crimes than others, then this would permit a criminal law that targeted those seen as the potential criminal class. It could, for example, support the introduction of racist criteria into the definition of offences, if the statistics seemed to support this: Fletcher, *Rethinking Criminal Law* (n 212) 202-3.

[753] See: Janus, 'The Preventive State, Terrorists and Sexual Predators' (n 104).

[754] If a person has previously committed a dangerous act, we might justifiably call them dangerous prior to the commission of another dangerous act. Nevertheless, if we are concerned with blaming and punishing them for being dangerous, we are necessarily referring to their previous act, not to some risk that they will do the same thing again in the future.

It is also important to understand that recognising character as relevant to the criminal law does not necessarily mandate state intervention in relation to all aspects of our characters. One common objection to basing criminal responsibility upon character is that our character traits are no business of the criminal law. The criminal law should be limited to regulating conduct, in so far as this is necessary to enable the coexistence of autonomous individuals in society. The criminal law should not be concerned with the enforcement of morality or the development of virtue in individuals. Accordingly, the criminal law should not regulate our moral character.[755] However, it is possible for the criminal law to be concerned with character traits without intruding too far into the private, moral lives of citizens. The first thing to note is that whenever we judge the acts of a person, we are necessarily making some judgment about their character. After all, acts are constitutive of character. Therefore, if I judge a person's act to be dishonest, I am also necessarily judging them to be to some extent a dishonest person.[756] It is dubious to argue that the criminal law should only assess the overt conduct of people, and not their characters; it is impossible to do the former without to some extent doing the latter.[757] More importantly, acknowledging that some character traits might be the proper concern of the criminal law is not the same as saying that the criminal law can regulate all character traits. Recognising a role for character in our accounts of criminal responsibility does not entail abandoning our liberal concern to protect ideal autonomy or privacy.[758] I have

[755] Duff, 'Choice, Character, and Criminal Liability' (n 738) 367. Duff presents this argument in order to rebut it.

[756] My assessment of a person's character will undoubtedly be influenced by whether this is their first dishonest act, or it is one dishonest act in a string of many. Nevertheless, every dishonest act casts the actor in a dishonest light: Gardner, 'The Gist of Excuses' (n 746) 577.

[757] Duff, 'Choice, Character, and Criminal Liability' (n 738) 380.

[758] The blameworthiness of a character trait may be considered a necessary condition for punishment, without it being a sufficient condition. Other factors are relevant to determining the scope of the criminal law: Bayles, 'Character, Purpose and Criminal Responsibility' (n 737) 19.

argued so far that the criminal law can only rightly be concerned with wrongful conduct that causes harm or creates an unacceptable risk of harm. To put this in character terms would be to say that the criminal law can only rightly be concerned with character traits that dispose a person to conduct themselves wrongfully in ways that cause harm or create unacceptable risks of harm.[759] There is no inconsistency in accepting the relevance of character to assessing criminal responsibility, and insisting that the scope of the criminal law be limited by, for example, the Standard Harms Analysis.

This leads us to conclude that whether or not criminal responsibility is concerned with character traits does not have significant implications for the justifiable scope of the criminal law. Conduct remains a necessary condition of criminal liability, because a person can only have a character trait that concerns the law by engaging in conduct that concerns the law.[760] In determining which character traits may rightly concern the law, the familiar question of the relationship between harm prevention, dangerous autonomy and ideal autonomy must still be confronted. This is an important conclusion, because the logic behind much modern criminal justice policy does seem to be that people who have certain character traits can be subjected to regulatory and criminal frameworks that are more onerous than those which could be applied to citizens at large. Nicola Lacey has noted a proliferation of measures targeting people on the basis of character traits, such as those concerning anti-social youth, persistent offenders, sexual offenders, and suspected terrorists.[761] Our discussion has shown that, even if character traits might rightly be relevant to the criminal law, a focus on character cannot justify an extension of the

[759] Duff, 'Choice, Character, and Criminal Liability' (n 738) 368-9; Bayles, 'Character, Purpose and Criminal Responsibility' (n 737) 13.

[760] Duff, 'Choice, Character, and Criminal Liability' (n 738) 374.

[761] Lacey, 'The Resurgence of Character' (n 741) 167-8.

criminal law beyond that which is otherwise justifiable in accordance with the principles of criminalisation.

The implication of this for compound possession offences is significant. Possession can only be criminalised if possessing a certain item with intention constitutes the possessor as an individual who is disposed to conduct themselves wrongfully in ways that cause harm or create unacceptable risks of harm. This means that possession with intention cannot be criminalised on the basis that this possession is predictive of the possessor committing a crime in the future. There will be no difference in the considerations that determine the justifiable scope of compound possession offences, whether they are conceived of as traditional, conduct focused inchoate offences, or as character offences. Framing possession offences as character offences does not provide a basis on which to justify their current scope. Similarly, focusing on character will not provide a basis for justifying other offences targeting preparatory conduct, such as grooming or preparation for terrorist acts, which could not otherwise be justified in accordance with the principles that apply to inchoate offences generally.

3. Conclusion

Five insights can be gained from this engagement with risk-focussed compound possession offences. First, that a person should not be criminally liable for something over which they had no control. Second, thoughts that are not action-oriented, such as fantasies, are private and should not attract the attentions of the criminal law. In contrast, practically-oriented thoughts, such as intentions, are not in principle beyond criminalisation. Nevertheless, the application of the Standard Harms Analysis will generally preclude criminalisation of bare intentions, due to the impact on privacy and the high costs to ideal autonomy of doing so. These considerations should also be at the fore in relation to any offence where the object of the offence is criminal intent, and this is accompanied only with a minimal act or possession element. Third, an application of the Standard Harms Analysis will often preclude criminalisation of omissions. If a possession offence criminalises both active acquisition and omitting to terminate control, then the particular intrusion upon ideal autonomy caused by the criminalisation of an omission must be considered when applying the Standard Harms Analysis to this offence. This will weigh heavily against the criminalisation of possession. Fourth, in considering whether possession with intent is sufficiently dangerous to warrant criminalisation, it is useful to differentiate between dangerous, specialist and innocent objects. The possession of dangerous or specialist objects with an intention to use them to commit a crime might, of itself, be sufficient to justify criminalisation. In the case of innocent objects, possession plus intention to commit a crime, without more, is unlikely to be sufficient. Some other, substantial overt act will be required to confirm that a firm intent to commit a crime is present. Finally, even if a character-based approach to criminal liability is accepted, this cannot justify broadening the scope of the criminal law.

VI

Conclusion

Liberal legal scholarship on the criminal law is now well developed and has achieved some measure of consensus as to its legitimate limits. However, the application of these limits to preventive offences is deeply contested. This calls into question their usefulness in reigning in legislative excesses. In response to this lacuna in liberal criminal law theory, this thesis provides a carefully reasoned account of the constraints on the criminal law and how to apply them to preparatory offences. This chapter draws together the insights gained from a critical evaluation of the law and theory of attempts, conspiracy and compound possession offences.

This thesis demonstrated the value of a methodology that considers different preventive offence types separately, here focussing on preparatory offences. By looking at offences in the criminal law that are structurally analogous to preparatory offences, this thesis links the broader criminalisation debate with more detailed debates in the criminal law literature, engaging moral philosophy, political philosophy and criminological research. The thesis contributes new insights to the broader criminalisation debate and provides a basis on which to make headway on the difficult question of how constraints should be applied to preparatory offences. Reasoning by analogy from the application of constraints to more familiar and less contentious offences provides the basis for a rigorous approach to the application of constraints on the criminal law. This thesis thus anchors its arguments as to the limits of the criminal law in an account of the appropriate limits of attempts law, conspiracy law and compound possession offences. It argues for a consistent approach to be taken to novel offences, which aligns with the theoretical approach taken to the justifiability of these anchoring offences: attempts, conspiracy and compound possession offences. Further, this thesis opens up the possibility of fruitful future work. For example, the same methodology might be deployed in considering preventive offences which lack an ulterior intent element. There is a rich pre-existing literature as to the justifiability of strict liability offences that should be drawn upon to inform debates about the limits of preventive criminalisation.

1. Liberal Criminal Law Theory at the Outset of this Thesis

Chapter II surveyed the modern literature on the limits of the criminal law, drawing together a list of constraints that were common amongst most liberal accounts. These were: the wrongfulness constraint, the harm constraint, the direct proscription constraint, the fair imputation constraint, the least restrictive approach constraint, the burden of proof constraint, and the rule of law constraint. Chapter II canvassed the difficulties in applying these constraints to preparatory offences. All preparatory offences satisfy the fair imputation constraint, by dint of their inclusion of an ulterior intention element. In addition, preparatory offences usually target harmful conduct which is itself justifiably criminalised, such that the direct proscription constraint is satisfied. The least restrictive approach constraint cannot readily be applied without a prior determination of what an appropriate level of risk reduction is, and how much autonomy should be sacrificed in pursuing this. Only then can it be determined if the criminal law, and a particular offence formulation, represents the least restrictive means of achieving this level of regulation. The rule of law constraint is also of limited use without a prior determination of what mischief the offence is designed to avert; that is, what level of wrongdoing and risk creation is to be targeted by the offence. Only then can questions of clear drafting and avoidance of over-inclusion be tackled. The burden of proof constraint is procedural in nature and does not provide guidance on core substantive questions as to the limits of the criminal law. Therefore, central to the justifiability of preparatory offences are the wrong constraint and the harm constraint. Unfortunately, the application of these constraints is highly contestable in the context of preparatory offences. This thesis directly engaged with this central difficulty of liberal criminal law theory. The next section outlines the key insights gained.

2. Lessons Learned in this Thesis from Attempts, Conspiracy and Compound Possession Offences

2.1 *A Focus on Character Does Not Justify an Extension of the Criminal Law*

An important overarching conclusion reached in Chapter V was that the possible role of character assessments in the criminal law is irrelevant to determining the limits of the law. This is because character traits are constituted by actions. Therefore, even if character is the focus of the criminal law, a character trait cannot be identified prior to the conduct that constitutes it. A criminal law that is concerned with character traits is necessarily also concerned with conduct. This means that the core challenge for criminalisation theorists is to identify the kind of conduct that should attract the attentions of the criminal law. This is the case regardless of the position a theorist takes on the role of character in the criminal law. Accordingly, the wrong and harm constraints, focussed as they are on the wrongfulness and harmfulness of conduct, remain an appropriate starting point when considering the limits of the criminal law.

2.2 *The Wrongfulness Constraint*

2.2.1 *Wrongdoing is Assessed Objectively*

A critical refinement of the wrongfulness constraint is the endorsement of an objectivist account of moral culpability, as set out in Chapter III. According to an objectivist account, the intentions and beliefs of a person are relevant to an assessment of her culpability, but so too is the effect she has had on the world. It is relevant whether she causes harm, or risks harm, or has some other objective effect on the world of normative relevance. Accordingly, an objectivist account of a preparatory offence would describe the culpability of a person who commits that offence in terms of the intentions and beliefs she held, but it would also take into account the risk she created that the target offence would be committed in the future. This impacts significantly on how the wrongfulness constraint should be applied.

This insight highlights the interconnected nature of the wrong constraint and the harm constraint. As shown in the discussion of the conspiracy offence in Chapter IV, it is not possible to assess how wrongful an act is without knowing the extent of the risk of harm it causes. This is because the harm caused by an act is often partly constitutive of what makes it wrong. This is particularly true of preparatory conduct. While it is the case that intending to commit a crime is itself a wrong, the greater the risk of harm created by the person with this intention, the graver the wrong. In turn, the graver the wrong, the stronger the case for criminalisation. Therefore, on an objectivist account, the level of risk caused by a type of conduct becomes central to an assessment of whether this conduct can be justifiably criminalised.

2.2.2 *It is Not Useful to Consider Whether Conduct Constitutes a 'Public Wrong'*

At the outset this thesis also rejected claims that the criminal law should only be concerned with 'public wrongs'. This conclusion has been bolstered by further insights gained in Chapter III. This chapter considered the claim that preventive offences sometimes target conduct because it causes feelings of insecurity, as opposed to the risk of a particular harm. There are clear parallels between this characterisation of preventive offences and accounts of 'public wrong'. For example, some accounts argue that a wrong is public if it causes social volatility or undermines collective values which are necessary for the functioning of a community. A foray into political philosophy highlighted the centrality of feelings of security and trust in a liberal democratic polity, and the role of the criminal law in maintaining this security and trust. Nevertheless, Chapter III also established that attempts to provide for security by directly targeting conduct that causes citizens to feel insecure is self-defeating and a danger to a healthy liberal democracy. This further underlines the conclusion that the concept of 'public wrong' is unproductive in debates of criminalisation. While the criminal law plays an important role in providing for social order, the maintenance of social order should not be a central consideration in criminalisation decisions.

2.2.3 *Uncertainty in the Meaning of 'Intending to Commit an Offence'*

Another important insight was gained in Chapter IV when considering what it means for a person to intend to commit an offence. This discussion highlighted the uncertainty inherent in the apparently clear *mens rea* requirement of ulterior intent, and the impact that this has on moral culpability. Uncertainty as to the meaning of an ulterior intent arises whenever the target offence contains a circumstance element which a person need not intend in order to commit the target offences. If a preparatory offence requires proof that the defendant intended an offence with a circumstance element of this sort, the question is whether the defendant needs to have intended the circumstance element, or whether something less will suffice. In assessing the wrongfulness of a person's conduct, in light of their ulterior intent, it is necessary to consider carefully the precise nature of that intent. When determining whether to criminalise preparatory conduct, the differing possible interpretations of the intention element embedded in the offence must be considered. Generally, the broader the meaning given to 'intention' in a preparatory offence, the less wrongful the targeted conduct will be and the weaker the case for criminalisation.

2.3 *The Harm Constraint*

2.3.1 *Respect for Autonomy*

A critical insight gained in Chapter III was the centrality of respect for the autonomy of citizens in determining the justifiable scope of preventive offences. At Stage 2 of the Standard Harms Analysis, it is necessary to consider the extent to which the proposed prohibition limits the liberty of citizens. A key way in which preparatory offences limit liberty is by intervening early, thus removing the opportunity for the defendant to change their mind and voluntarily abandon their criminal plan. As set out in Chapter III, such early intervention fails to respect individual autonomy. According to an ideal account of autonomy, citizens are rational, guided by reasons, and so can be trusted to conform with the law. Chapter III showed that the criminal law also recognises dangerous autonomy. According to this account, citizens have free choice and are responsive to reasons, but they are fallible and cannot always be trusted to conform with the law. While both ideal and dangerous autonomy have a role to play in accounts of the criminal law, Chapter III established that ideal autonomy should play the dominant role in determining whether conduct can be criminalised. To focus on dangerous autonomy was shown to be self-defeating and detrimental to representative democracy, by institutionalising distrust between citizens, undermining citizens' trust in the authority of the criminal law and narrowing space for political discourse and dissent. Therefore, when considering the scope of the criminal law, citizens should be treated as trustworthy. When the criminal law intervenes early and targets preparatory conduct, this manifests distrust and is at odds with ideal autonomy. This is a significant intrusion on the liberty of the citizen and a very weighty factor against criminalisation.

Chapter III concluded that preparatory offences are only legitimate if there are very strong reasons in favour of criminalisation which outweigh the infringement of ideal autonomy that they entail. An extension of the criminal law, recognising the fallibility of citizens, must be needed so clearly that a failure to permit this would undermine basic respect for the criminal law. These insights in relation to autonomy provide critical guidance as to the application of the Standard Harms Analysis. Significant weight should be attached to the infringement of liberty involved in preparatory offences. Further, Chapter III provides a new perspective, linked to respect for the criminal law, as to when such infringement on liberty might nevertheless be justified. Chapter III considered attempts and concluded that, given the risk of harm posed by attempts, balanced against the need to respect ideal autonomy, the correct approach is to criminalise only more than merely preparatory acts. A person moves from mere preparation to a criminalisable attempt when they engage in conduct that is more than merely preparatory.

Chapter IV considered conspiracy. Conspiracy liability arises earlier than attempts liability, representing a greater infringement on ideal autonomy. It was concluded that it is not possible to justify the conspiracy offence in its current form, as there is insufficient evidence to ground the claim that all conspiracies pose a significant danger. Instead, the conspiracy offence should be reformulated so as to require proof of an overt act on the part of a conspirator, which strongly corroborates the firmness of that conspirator's intent that the target offence be committed. This addition narrows the conspiracy offence's application to criminal agreements that are likely to pose a significant danger, because of the firm intent of those involved. This represents the appropriate balance between a concern for the risk of harm created by criminal agreements, and the need to respect the ideal autonomy of citizens.

Chapter V considered compound possession offences. It concluded that whether possession of an object with an intent to commit a crime creates a risk of harm that is significant enough to warrant the intervention of the criminal law depends on the type of object possessed. It proposed a taxonomy of objects: dangerous objects, specialist objects and innocent objects. Chapter V concluded that the possession of dangerous or specialist objects with an intention to use them to commit a crime could be justifiably criminalised. In the case of innocent objects, possession plus intention to commit a crime, without more, would not be sufficient. To justify criminalisation a substantial overt act would also be required to confirm that a firm intent to commit a crime was present. This restatement of compound possession offences was argued to represent the appropriate balance between a concern for the risk of harm created by possession with intent and the need to respect the ideal autonomy of citizens.

These three examples of application of the harm constraint provide useful comparators which can be considered when determining whether other preventive offences might be justified. In providing carefully argued examples of the application of the harm constraint this thesis has moved the debate forward from a discussion of abstract principles that were contested in their application to a defensible account of precisely what application of these principles entails in relation to specified offences.

2.3.2 *Intentions and Privacy*

Chapter V considered objections to the criminalisation of thoughts, on the basis that they are private. Stage 3 of the Standard Harms Analysis includes a consideration of whether a proposed offence infringes upon the right to privacy. Chapter V concluded that most thoughts in and of themselves, will have no impact on the world and are therefore rightly treated as private. They will not cause any harm, nor create a risk of harm that warrants the attention of the criminal law. However, Chapter V acknowledged that the picture becomes more complex in relation to action-oriented thoughts, such as intention. A firm intention to commit a crime may create a risk that harm will be caused; it increases the likelihood that the intention holder will commit the intended crime. Therefore, Chapter V acknowledged that intentions are arguably not wholly private, despite being a species of thought. It nevertheless concluded that even if a principled ban on the criminalisation of intentions, on the basis of privacy, is not accepted, it is likely that the risk of harm created by a bare intention will fall far below the level required to warrant the intervention of the criminal law. Given the highly intrusive nature of imposing liability for bare intentions, or even intentions paired with very minimal acts, and the extreme incursion upon ideal autonomy that this would represent, it is unlikely criminalisation will be justified. Therefore, any application of the Standard Harms Analysis (Stages 2 and 3) must recognise the deep intrusion into the *prima facie* private realm of thought that is involved in any offence that has intention as its object. This will weigh the scales heavily against criminalisation. The addition of a minimal act requirement will do little to mitigate concerns that the offence's focus on intention is a significant infringement of ideal autonomy and an unwarranted intrusion into the private realm.

2.4 *The Rule of Law Constraint*

Chapter IV made an important contribution to understanding the rule of law constraint, in relation to when it may be justifiable for an offence to be over-inclusive; that is, to capture conduct that is not the intended or justifiable target of the offence. It argued that the current conspiracy offence is over-inclusive, because it captures criminal agreements that are not sufficiently dangerous to warrant the attentions of the criminal law. It considered whether, nevertheless, the current conspiracy offence could be defended. In particular, it acknowledged that attempts liability, driving offences, and weapon possession offences are justified, despite being over-inclusive. Nevertheless, it concluded that analogies with these offences could not be drawn to justify an over-inclusive conspiracy offence. Specifically, for preparatory conduct earlier in time than an attempt, the variation in the moral culpability and level of risk involved is too great to warrant an analogy with attempt law. While the combination of wrongfulness and the risk involved in an attempt is sufficient to justify criminalisation of all instances of attempt, this cannot be said of offences that intervene earlier.

In relation to over-inclusive driving and weapon possession offences, Chapter IV acknowledged that these could be justified. However, it concluded that the logic underpinning their justification could not apply equally to offences which included an ulterior intent element, such as conspiracy and preparatory offences. First, it argued that over-inclusive laws should only be tolerated when they advance substantial state objectives that cannot be attained in their absence. Second, it argued that where an offence includes an ulterior intent element, and thus attracts high levels of moral disapprobation and punishment, it is very important that the offence accurately track moral culpability. This is to be given priority over efficient enforcement. Therefore, it was concluded that an over-inclusive conspiracy offence could not be justified. Similarly, over-inclusive preparatory offences could not be justified.

2.5 *The Least Restrictive Approach Constraint*

In determining whether a proposed offence is the least restrictive approach available for achieving an appropriate level of regulation of the conduct in question, it is necessary to consider the likely use of the offence in practice. Chapters IV and V provided an important insight in this regard. They demonstrated that both the conspiracy offence and possession offences have been used in an unequal fashion, being enforced disproportionately against minority populations and also those considered to be 'public enemies' of the time. This suggests that any overly broad preventive offence has the potential, and is likely to be, enforced in a discriminatory manner. This should weigh against the use of a broad preventive offence when considering whether other options are available which might sufficiently regulate the conduct in question. In addition, this discriminatory application undermines arguments that overly broad laws are no cause for concern, because police and prosecutorial discretion will ensure that they are enforced sensibly. The insights gained from a consideration of conspiracy and possession offences gives us reason to reject such claims.

This thesis has thus moved the debate on the liberal limits of the criminal law forward by refining the constraints on criminalisation already identified by other theorists and, more importantly, by beginning the difficult work of demonstrating how those constraints should be applied to specific offences: attempts, conspiracy and compound possession offences. The insights gained from the application of the constraints to these specific offences provides a firm basis on which to reason by way of analogy and thus to determine the limits of the criminal law when faced with novel preparatory offences. A worked example of how my account can profitably be applied to a specific offence is provided in Appendix 1, in relation to the offence of grooming of children for sexual offending. This thesis has further demonstrated the value of the methodology of linking broad criminalisation debates with discrete debates on particular offence types, as a means to further develop the criminalisation debate and to provide concrete examples of the application of constraints on criminalisation. This methodology can and should be used as a more widely applicable framework to determine the legitimate limits of and place constraints on the criminal law in relation to preventive offences, beyond the preparatory offences which were the focus of this thesis.

Appendix 1

An Application of the Refined Constraints to a Case Study: Grooming

To demonstrate the practical value of the contributions to criminalisation theory made by this thesis, the refined constraints on the criminal law that this thesis articulated are applied here to a case study: grooming of children for sex offending. This example was chosen because there is already a preparatory offence targeting grooming in England and Wales, which intervenes at a very early stage. This offence has been the subject of criticism and was described by the rights organisation Liberty as a 'thought crime'.[762]

Grooming is 'the preparation of a child for sexual abuse'.[763] Grooming generally involves establishing a relationship of trust with the child, so that they will comply with sexual requests and keep the nature of the relationship with their abuser secret.[764] Some instances of grooming are overtly sexual: for example, an adult may seek to normalise sexual conduct in the eyes of the child by talking about sexual activities, sending the child pornography (adult or child), or expressing romantic and sexual intentions.[765] But most instances of grooming are not overtly sexual. Grooming is not a tool unique to internet predators: grooming can be engaged in both on- and off-line.[766] The majority of child sex abuse victims are abused by family, family friends or those who are otherwise in some

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[762] Liberty, 'Liberty's Second Reading Briefing on the Sex Offences Bill in the House of Lords' (n 36) §18.

[763] Council of Europe, 'Explanatory Report to the Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse CETS 201' (2007) < https://rm.coe.int/16800d3832> accessed 8 January 2019, [156]. This Convention was signed by the United Kingdom on the 5 May 2008 but has not been ratified.

[764] Anne-Marie McAlinden, '*Grooming' and the Sexual Abuse of Children: Institutional, Internet and Familial Dimensions* (Oxford University Press 2012) 3; Sharon McLaughlin, 'Online Sexual Grooming of Children and the Law' (2009) 14 Communications Law 8, 8.

[765] Alisdair Gillespie, 'Indecent Images, Grooming and the Law' (2006) Criminal Law Review 412, 413.

[766] McLaughlin, 'Online Sexual Grooming of Children and the Law' (n 764) 8.

prior close relationship to them.[767] Grooming in this context can be very subtle. An abuser may simply pay special attention to the child; becoming their primary emotional support, giving them gifts, or taking their side in conflicts. Through such apparently innocuous conduct sufficient trust can be built to enable sexual abuse to take place. Any legislative response to grooming faces the difficult task of capturing conduct that is by its nature extremely subtle, and often indistinguishable from innocent behaviour.

The Patrick Green case, with which this thesis began, acted as a catalyst in the United Kingdom. It exposed what was perceived to be 'an important loophole' in the criminal law's response to child sex offending and paved the way for the enactment of section 15 of the Sexual Offences Act 2003. Section 15 does not criminalise grooming *per se*. Instead, section 15 makes it an offence for an adult:

> To meet or communicate with a child on one or more occasions. This communication need not be overtly sexual; [768] and
>
> Subsequently to intentionally meet the child; travel with the intention of meeting the child; arrange to meet the child; or have the child travel with the intention of meeting the adult;
>
> in circumstances where the adult intends at the meeting or sometime thereafter to sexually abuse the child.

An adult for the purposes of this provision is anyone 18 or over, and a child is anyone under 16. It is also an element of the offence that the adult must not reasonably believe the child to be 16 or over. The possible range of intended sexual offences to which section

[767] Recent studies suggest that the number of children abused by family or those otherwise known to them is as high as eighty to ninety percent of total abuse: McAlinden, '*Grooming' and the Sexual Abuse of Children* (n 764) 29.

[768] Home Office, 'Sexual Offences Act 2003: Explanatory Notes' (2004) <www.legislation.gov.uk/ukpga/2003/42/notes> accessed 8 January 2019, [27]; *R v G* [2010] EWCA Crim 1693; [2011] Crim LR 339, [16].

15 applies is broad, including rape, sexual assault, sexual activity with a child, causing or inciting a child to engage in sexual activity, causing a child to watch a sexual act, paying for sexual services of a child, causing or inciting child prostitution or pornography, sexual communication with a child, administering a substance with intent to commit a sexual offence, trespass with intent to commit a sexual offence, exposure, or voyeurism.[769]

Section 15 clearly intervenes very early in the preparations of an intending child sex-offender. All that must be shown to establish liability is that the defendant has communicated with the child once and has arranged to meet that child. It is not necessary that the defendant intend that sexual offending occur at the meeting that has been arranged. It is quite possible, therefore, that section 15 will capture conduct that is not proximate in time or place to the intended sexual offending.

The wrongfulness of intending to sexually offend against a child is unquestionable. Just how wrong the preparatory acts of a defendant are will depend not only on her intention to sexually offend and her beliefs, but also on the risk she creates that a sexual offence will actually be committed. Critical to assessing the level of wrongdoing involved is clarification of what it means for the defendant to intend to commit a relevant offence against a child. As has been shown, there is uncertainty as to what this means in relation to offences that contain a circumstance element. The implications of this uncertainty in the meaning of 'intention' is extremely significant in the context of grooming, in particular, given that the range of sexual offences a person may be liable for intending to commit are laden with circumstance elements, such as the age or lack of consent of the intended victim. These circumstance elements transform otherwise legal sexual interactions into criminal conduct. The mental state a defendant

[769] Sexual Offences Act 2003 s 15(2).

has in relation to such circumstances, when she is thinking about future sexual conduct, alters our assessment of her moral blameworthiness and the risk she poses and, accordingly, the appropriateness of criminalising his preparatory conduct. While section 15 provides that the defendant can only be liable if she lacks a reasonable belief that the child is 16 or over, it does not tell us anything about the necessary mental state of the defendant in relation to the consent of the child, or the age of the child should the intended offence be in relation to an under-13-year-old. There is thus a central vagueness in the offence definition, which has significant implications for just how wrongful the conduct of a defendant is.

It is difficult to accurately assess the risk of harm posed by a defendant captured by section 15. Conduct that is merely preparatory to a substantive crime may create differing levels of risk, depending on the circumstances in which the conduct occurs. A defendant who has communicated with a child once and arranged to meet her, with the intention of sexually offending against her at some time in the future, may pose an acute risk of harm to that child or very little risk of harm at all. This is in part a function of the conduct being remote from the commission of the substantive crime, with there being a broad window in which the defendant may change their mind and choose not to sexually offend. Further, it is a function of the range of circumstances in which grooming can occur. The acts of establishing communication with a child and arranging to meet them are arguably significant steps toward offending against that child, if the defendant was previously a stranger to that child. However, most child sex offending occurs in the context of pre-existing relationships. For a defendant to communicate with a child once and arrange to meet them, in the context of a family relationship or friendship, tells us very little about how committed that defendant is to sexually offending against that child in the future. In the context of such relationships, these acts might be committed for innocent reasons. The defendant may, then, have taken no significant steps toward committing a sexual offence against a child, but will be captured by the offence by dint of their intention. In these circumstances, the offence becomes very close to a 'thought crime'. This creates difficulties for the justification of section 15, as arguably not all instances of the conduct captured by the offence will be sufficiently dangerous to warrant criminalisation.

Where an offence includes an ulterior intent element, as section 15 does, it is very difficult to justify an over-inclusive offence. *Prima facie,* section 15 should thus be redrafted to capture, as accurately as possible, the dangerous conduct at which it is targeted. One possible way to do so would be to add a requirement of an overt act which strongly corroborates the firmness of that defendant's intention to commit a sexual offence against the child. This would align the offence's scope with that of the reformulated conspiracy offence, as argued for in Chapter IV. Any overt act which strongly corroborates the firmness of the defendant's intention to commit a sexual offence against the child would suffice. This might take the form of sexualised communications or deception. It might be evidence that the adult has made a hotel reservation that coincides with the arranged meeting and is travelling to meet the child with condoms and lubricant. The evidence that would be sufficient to corroborate intention would vary depending on whether the defendant was a stranger to the child or had a prior relationship with the child. There would be flexibility in such a reformulation to capture a range of grooming behaviour, while nevertheless narrowing the offence to focus on those who have evidenced a firm intention to sexually offend against a child and therefore likely pose a significant risk of harm.[770]

[770] In this I differ from Ohana. He argues that for extra-familial child sex offenders, grooming follows a sufficiently predictable script that we can define offences with greater specificity than I have proposed here, by targeting particular acts commonly engaged in by offenders: Ohana, 'Responding to Acts Preparatory to the Commission of Crime' (n 345) 30. I am less optimistic about the prospects of

A potential objection to this approach is that, given the grave harm that is caused by child sexual offending, any slight increase in the risk of that harm should justify criminalisation. It is inappropriate to take the same approach to the grooming offence as to the conspiracy offence, in adding an overt act requirement. This is because the conspiracy offence applies to all indictable offences, which vary considerably in terms of how harmful they are. In contrast, the grooming offence applies to serious sexual offences. When considering the gravity of the risk caused by any conduct, the likelihood that the harm will occur must be multiplied by the severity of the harm should it occur. Where the potential harm is very severe, even a small increase in the likelihood that it will occur can represent a significant increase in the overall magnitude of the risk posed. It is arguable that all those who hold an intention to commit a sexual offence against a child and have arranged to meet them increase the risk of offending against that child a small amount. This should be sufficient to warrant criminalisation of all instances of the conduct covered by section 15.

There are a number of difficulties with this argument. The first is that, while it is true that section 15 is not a general inchoate offence, it does apply to conduct preparatory to a wide range of sexual offences. It applies to the very serious offences of rape, sexual assault, sexual activity with a child, causing or inciting a child to engage in sexual activity. However, it also applies to the less serious offences of sexual communications with a child, exposure and voyeurism. It is arguable that a small increase in the likelihood that a child will be raped constitutes a significant increase in the overall magnitude of the risk posed. It is harder to argue that a small increase in the likelihood that a child will be the object of a voyeur's attention or the recipient of a sexual message is likewise a significant

adequately capturing all forms of grooming behaviour in a specifically defined offence. Notably, Ohana himself limits his proposal to extra-familial child sex offenders. Section 15 applies to all sex offenders and so must grapple with the extreme subtlety of grooming within the familial context. For this reason, a more flexibly drawn offence as proposed here should be favoured.

increase in the overall magnitude of risk. Therefore, if such early intervention is truly desired, the offence should be redrawn to focus only on very serious sexual offences.

The second difficulty is that it is unclear whether any important preventive gains are made by section 15 that would not be made by an offence reformulated so as to include an overt act requirement. Certainly, in the Green case, the proposed offence would have applied to capture his conduct. The Explanatory Note to the Act itself included examples of the kind of evidence that would be required to prove the requisite intent. These examples were of acts which would satisfy the overt act requirement as proposed here. Therefore, prosecutions could still be successful in cases envisaged by the Explanatory Note. It is unclear whether section 15 has actually been used to prosecute any cases where there was no further conduct which would have qualified as an overt act. As has been shown, the full breadth of the conspiracy offence is rarely used, with prosecutions only brought once conspirators are well on their way to committing the target offence. It is reasonable to suspect that section 15 might also be used more often than not to prosecute those who have already gone further toward executing their criminal intent than the current offence definition requires. The effect of the burden of proof constraint in combination with the least restrictive approach constraint, places the onus firmly on those who support the current section 15 to justify its broad scope in terms of preventive gains. If it can be reduced, by the addition of an overt act requirement, without significant preventive losses then the current section 15 cannot be justified. This is further bolstered by an emphasis on the significant infringement of ideal autonomy that the current section 15 offence involves. Section 15 represents a grave intrusion into the private realm, due to the centrality of the ulterior intent to the offence. Further, there must be concerned that the breadth of section 15 may enable it to be enforced in a discriminatory manner. These features make the current section 15 offence very difficult to justify.

Therefore, applying the theoretical framework developed in this thesis, the current formulation of the section 15 offence is not justifiable. It should be reformulated so as to require an additional overt act, which strongly corroborates the firm intent of the defendant to commit a sexual offence against the child in question.

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