

*The psychopath
and the hero
are twigs of the
same branch.*

—David T. Lykken,
Professor of
Psychology,
University of
Minnesota,
author of
*The Antisocial
Personality*, 1995

Law and Morality

Few people would debate the argument that people who kill or physically injure other people should be punished. We can sympathize with the victims, and we want to make sure such behaviours are prevented. However, if there is no victim, should there be no crime? Prostitutes willingly engage in sexual acts, and one might argue that the law should be involved only if one party fails to uphold the contract by refusing to pay or provide services, or by forcing the other party into non-consensual activity. Individuals who have in their possession obscene or pornographic material generally knew what they were purchasing, so they are not victims. Similarly, those who knowingly purchase illegal drugs do not meet the criteria of victim any more than the purchasers of alcohol or tobacco. Many of these offences are referred to as “victimless crimes.” However, others would argue that the victim is, in fact, society. Critics of the “victimless crime” argument would suggest that the actions of individuals always impact on society. They point to the fact that those who use or abuse drugs may be a financial burden on the health-care system. Opponents of prostitution or pornography argue that it “dehumanizes” women and others, turning them into products and commodities. They also point to the fact that young runaways and drug addicts are often exploited and coerced into prostitution.

The fact that offences regarding prostitution or drug use are found in our *Criminal Code* sends a message that such acts are not to be tolerated because they will ultimately erode the moral fabric of our society. In his essay “Morals and the Criminal Law,” English judge and legal philosopher Patrick Devlin wrote, “What makes a society of any sort is a community of ideas...about the way its members should behave and govern their lives; these ideas are its morality” (Dyzenhaus 2001). His view argues that one of the purposes of criminal law is to express public morality. The problem created by this argument is that it is an almost impossible task to define morality. At various times in the past, Canada has permitted slavery, placed Aboriginal children in residential

schools far from their families, and denied women the right to vote.

Defining morality becomes even more challenging in a multicultural society such as our own. In a democracy, should the majority dictate how all should live? Adding even more confusion to the argument is the fact that some things many people would consider immoral are not crimes—gluttony, adultery, and child poverty, for example. It is not a crime to ignore the cries of a drowning child, though many of us would consider such behaviour highly immoral. At the same time, we consider criminal the actions of people whose intentions may have been moral. Robert Latimer, who is discussed in Chapter 11, killed his daughter to end her suffering, but he was convicted of murder.

The most compelling argument that so-called victimless crimes cause social harm is also debatable. We know that drug use causes harm to the user, but we are also aware of the enormous social cost to families and our health-care system. We acknowledge the harm prostitution may do to local neighbourhoods where prostitutes ply their trade. However, the same arguments could be made regarding activities that are not illegal, such as alcohol or tobacco use.

Criminal law has always reflected the moral values of society, and when the laws are out of step with public opinion, the results are apparent. An example is the Morgentaler case, which took place in 1988. The *Criminal Code* prohibited abortion except as approved by a therapeutic abortion committee. Dr. Henry Morgentaler openly defied the law by performing abortions that were not approved. He was prosecuted and acquitted by a jury. On appeal, the Québec Court of Appeal substituted a conviction, which was upheld by the Supreme Court of Canada. A new trial was ordered, and Dr. Morgentaler was again acquitted by a jury. He was also charged in Ontario and again acquitted. On appeal, the Supreme Court of Canada held that the relevant provision of the *Criminal Code* was invalid because it conflicted with the *Canadian Charter of Rights and Freedoms* (*R. v. Morgentaler*, [1988] 1 S.C.R. 30).

CONFIRM YOUR UNDERSTANDING

1. What are the key functions of criminal law? Can you think of any others?
2. What is “legal paternalism”? Why is it controversial?
3. Is it ever necessary to take the law into your own hands? Explain.
4. What evidence is there that our criminal law reflects our moral values? Search the newspapers to find two legal cases that support your view.
5. English philosopher John Stuart Mill (1807–1873) said, “Law should not intervene in matters of private moral conduct more than necessary to preserve public order and to protect citizens against what is injurious.” Compare this view with that of Patrick Devlin on page 274. With which legal philosopher do you most agree? Why?

What Is a Crime?

A simple legal definition of crime is anything that is defined as criminal within the Canadian *Criminal Code* and related federal statutes such as the *Food and Drugs Act*, *Youth Criminal Justice Act*, and *Controlled Drugs and Substances Act*. Even without consulting the *Code*, most people intuitively know what the serious crimes are. Offences such as murder, assault, and theft violate standards in a community to such an extent that we are prepared to impose serious sanctions on those who engage in such acts. The Law Reform Commission of Canada’s 1976 report on criminal law stated, “Criminal law must be an instrument of last resort. It must be used as little as possible.” Yet, as we have discussed, our *Criminal Code* imposes sanctions on conduct that many would argue is more annoying than criminal. For example, our *Criminal Code* includes such offences as pretending to practise witchcraft and disturbing an oyster bed. Thus defining what constitutes criminal conduct is one of the more difficult tasks of criminal law.

In addition, there are other offences that fall under provincial jurisdiction, such as failing to wear a seatbelt, speeding, or drinking under age. These offences are enforced by the courts and may result in substantial penalties, but they are not crimes. They are sometimes referred to as **quasi-criminal offences**, and although they may

be considered serious offences, they do not warrant a criminal record.

In order to be convicted of a crime in Canada, two elements must be proven: that the crime occurred—the *guilty act*—and that the defendant not only engaged in the criminal act, but intended to do so—the *guilty mind*. The Latin terms for these two elements are **actus reus** (guilty act) and **mens rea** (guilty mind).

Actus Reus

The *actus reus* of a criminal offence is found in its *Criminal Code* definition. For example, s. 265 of the *Criminal Code* defines assault:

- (1) A person commits an assault when
 - (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

To prove *actus reus*, the Crown would have to demonstrate that (a) there was no consent, and (b) force was applied.

Sometimes the *actus reus* of the offence is not in doing something, but in failing to do something that is one’s duty to do. For example, you have a legal duty to assist a police officer when required to do so. Section 129 of the *Criminal Code* states:

- Every one who
 - (b) omits, without reasonable excuse, to

assist a public officer or peace officer in the execution of his duty...., after having reasonable notice that he is required to do so (d) is guilty of an indictable offence....

The *actus reus* of a criminal act must be voluntary. For example, if someone shoots another while having a seizure or heart attack or while sleepwalking, he or she may not be criminally liable. The central issue of whether or not an action was voluntary depends on whether the accused had control over his or her actions. In 1992, the Supreme Court of Canada upheld the acquittal of Kenneth Parks, who drove to the home of his parents-in-law some 20 km away, stabbed his mother-in-law to death, and seriously injured his father-in-law. His defence successfully argued that Mr. Parks was sleepwalking at the time and thus acted involuntarily.



FIGURE 9.7 Kenneth Parks, charged with the murder and attempted murder of his in-laws, claimed to have been sleepwalking throughout the incident. His lawyer Marlys Edwardh (on the left) used the defence of automatism. "Automatism" means an action performed involuntarily. How would such an action relate to the *actus reus* component of criminal liability?

ASKING KEY QUESTIONS

Free Will, Determinism, and Criminal Law

Introduction

In the American movie *Minority Report*, the main character is able to predict crimes and prevent them from happening by accessing the visions of three telepathic muses who are able to see future potential crimes. The premise is somewhat far-fetched, but the movie asks interesting legal questions about the concepts of *mens rea* and *actus reus*. In the hypothetical world of *Minority Report*, a person could be arrested for planning to commit a crime, even though he or she had not actually carried it out. Under our current *Criminal Code*, this same person could not be convicted due to the necessity of proving *actus reus*.

The Scientific View

Advances in science may present us with an equally controversial view of the nature of crim-

inal behaviour. In his article "A Vision of the Future," Steven I. Friedland posits that breakthroughs in genetics will alter our whole system of criminal law. He points to the fact that defence lawyers are already citing genetic explanations, such as alcoholism and certain anti-social disorders, to excuse the conduct of their clients. He writes that the real question "is not whether genetic evidence will ever be admitted into court, but when and under what kinds of circumstances." Friedland argues that as the Human Genome Project advances, the focus of criminal law may change from the concept of free will, which assumes rational choice, to a return to the ideas of positivism or biological trait theory.

Friedland suggests that this will have enormous implications for criminal law, which currently determines guilt by examining "blame-worthiness." As he points out, if defendants claim their genes caused them to commit the crime, they cannot be blamed for actions over which

they had no control. His arguments suggest that our justice system, which is based on rehabilitation, may be rendered useless since these individuals cannot be rehabilitated by any of our traditional methods. If we accept Friedland's view from a legal philosophy perspective, then a "geneticized" criminal law system would challenge our concept of morality. If there is no free will, can there be a moral choice?

Friedland says that if the discoveries of the Human Genome Project reveal that genetics play a large role in determining criminal behaviour, our legal system may begin to emphasize a biological basis of conduct rather than our current psychological or sociological basis. His argument raises the possibility of defence lawyers and Crown attorneys arguing over not who actually committed the crime, but just how much influence an individual's genetic makeup had on the crime committed.

Friedland suggests that an even more controversial consequence of citing genetic evidence as a defence for criminal conduct may be the development of DNA Identification Cards. These cards, he says, may be developed along with Genetic Propensity Cards, which could be used to determine sentencing, among other things. "The length of the defendant's sentence might be affected by his or her dangerous quotient" (Friedland 1997).

Is there actual scientific support for this new determinism, or will we look back 100 years from today with the same sense of disbelief as we now look at the theories of Cesare Lombroso?

Research does indicate a correlation between biological conditions and criminal behaviour. Dutch researchers have been studying several generations of a Dutch family in which primarily the male members seemed to display significant levels of anti-social and criminal behaviour. The researchers found that these males were deficient in a particular enzyme in the brain associated with levels of the neurotransmitter serotonin. They concluded that there was a link between this genetic abnormality and the family's anti-social behaviour (Gallagher 2001). Other researchers have come to the conclusion that the small groups of individuals who commit the majority of crimes have a genetic marker causing them to act in a violent manner (Gallagher 2001).

Our present criminal justice system is based on the concept of *mens rea*, or guilty mind. If the Human Genome Project ultimately proves that criminal behaviour has a significant genetic component, its implications for the criminal justice system will be significant. However, Friedland suggests that criminal law should explore the ramifications of a genetically reordered system but must not use genetics and science as "a substitute for the necessary and imprecise social aspect of the criminal law" (Friedland 1997).

SOURCES: Friedland, Steven I. "A Vision of the Future." Excerpted from "The Criminal Law Implications of the Human Genome Project: Reimagining a Genetically Oriented Criminal Justice System." *Kentucky Law Journal* 86 (1997): 303-366.

Gallagher, Winifred. "How We Become What We Are." *The Atlantic Monthly*. Sept. 1994.

Form Your Questions

The information above raises many questions. For example, should individuals with a genetic propensity to violence be treated, possibly against their will, *before* they demonstrate violent behaviour?

What other questions might you ask regarding the impact of genetics on our criminal justice system? Think of three key questions. Share your questions with the rest of the class, and discuss possible answers or solutions.

The thought of a man is not triable, for the devil himself knoweth not the thought of men.
—Chief Justice Brian, 1477

Mens Rea

Some would argue that since it is impossible to prove the mental state of a person, as the margin quotation suggests, individuals who engage in criminal conduct should be judged on the consequences of their actions rather than on their intent. However, this is not the case in Canada. To meet the legal definition of a crime in this country, the guilty act must be done with criminal intent or *mens rea*. “Intent,” in the legal sense, can mean to carry out an act with intent, with knowledge, or by being reckless or wilfully blind to the consequences of the act.

In criminal law, “intent” is defined in the precise detail of each offence. For example, “robbery” is defined as “theft committed with violence.” The decision to act or threaten violence is the intent of the crime.

General Intent Versus Specific Intent

Some crimes require what is called general intent, and others require specific intent. The type of intent varies depending on how the crime is defined in the *Criminal Code*. For most crimes, it must be shown that the accused *meant* to commit the crime. This is the **general intent**. For example, if Brian swings his golf club and hits John, he is guilty of assault if he meant to hit John, but if it was an accident, there is no assault.

Specific intent involves intent in addition to the *general intent* to commit the crime. For example, burglary is the breaking and entering of a dwelling-house with “intent to commit an indictable offence.” The “break and enter” aspect requires a general intent, but the “intent to commit an indictable offence” is a specific intent.

Intent and Motive

The concept of *mens rea* and **intent** is not to be confused with **motive**. *Intent* refers to the state of mind with which an act is done or not done, but *motive* is what prompts or causes a person to act or not act. For example, in the Robert Latimer case mentioned on page 351, Robert Latimer’s motive may have been honourable—he wanted to end his

daughter’s suffering—but his intention was still to commit murder, the fact that led to his conviction. In some cases, as you will learn in Chapter 11, motive may be considered in determining if an accused has a legal defence, or it may be taken into consideration in the sentencing of the guilty party.

Mens rea also applies if the accused intended to commit a crime against one person but injured another instead. This is referred to as the **doctrine of transferred intent**, that is, the original criminal intent is transferred to the unintended victim.

Knowledge

In order to have the requisite *mens rea* to commit a crime, the courts assume a person must have some knowledge of the *actus reus* of the crime. This is sometimes indicated by the words “knowing” or “knowingly” in the definition of the crime. For example, s. 251 of the *Criminal Code* says:

- (1) Every one who knowingly
- (b) sends an aircraft on a flight or operates an aircraft that is not fit and safe for flight
- ...is guilty of an indictable offence....

Recklessness and Wilful Blindness

Recklessness and **wilful blindness** are also types of *mens rea*. A person is said to be reckless when he or she is extremely careless or heedless of apparent danger. Some *Criminal Code* offences clearly require recklessness by including the words “reckless” or “recklessness” in the definition of the crime. For example, s. 219 on criminal negligence states:

- (1) Every one is criminally negligent who
- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives and safety of other persons.

For a person to be convicted of reckless conduct, it must be shown that the accused was aware of the danger involved even if he or she did not intend the consequence. For example, if someone were to shoot a pellet gun into a crowd of children, injuring one seriously, that person

may not have intended harm but should have foreseen the possibility and was taking a risk.

Wilful blindness is related to recklessness but is a somewhat more complex concept. A person could be said to be wilfully blind when he or she suspects a harmful or criminal outcome but prefers not to ask the questions that would confirm these suspicions. For example, in *R. v. Blondin*, [1970] 2 C.C.C. (2d) 118 (B.C.C.A.), the accused was charged with importing narcotics. The drugs were found in scuba-diving equipment that the accused was trying to bring into Canada. The accused admitted he knew there was something illegal in the tank but did not attempt to find out what it was. The courts found him guilty of the offence even though the *actus reus* of the offence requires knowledge that the substance being imported was a narcotic. The court found that the accused was wilfully blind to what was in the tank, and therefore the knowledge requirement was satisfied.

Mens Rea and the Subjective/Objective Distinction

As a result of many *Charter* challenges, there is still ambiguity and confusion about the definition of *mens rea*. A central issue is whether the intent meets the **subjective** or **objective standard**. The Supreme Court judgments you read in *R. v. Vaillancourt* (p. 15) and *R. v. Martineau* (p. 39) make it clear that there should be a clear distinction between the *subjective* standard—did the accused know the consequences of his or her actions?—and the *objective* standard—measured against a reasonable person, should the accused *ought* to have been able to foresee the consequences of his or her actions? It is more challenging for the Crown to prove the subjective standard since it is difficult to know what is in a person’s mind at any given time. For most criminal cases, the circumstances make it clear that the conduct was deliberate. However, in borderline cases, such as *R. v. Tutton and Tutton*, it is more difficult to determine whether or not the conduct was deliberate.

Mr. and Mrs. Tutton were charged with crim-

inal negligence causing death (*R. v. Tutton and Tutton*, [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129). Their young son was a diabetic in need of insulin, but the Tuttons believed he would be cured by faith and stopped giving him his medication. The child died and the parents were charged with criminal negligence. Lawyers for the parents argued that the parents were acting in the best interests of their child and were therefore not negligent. The Crown argued that any reasonable parent would have been able to foresee that without his required medication, the child would die, and since the parents failed to provide medical treatment for their child, they were guilty of negligence. The case was appealed to the Supreme Court of Canada, and the fact that the judges were split three to three on their decision indicates the complexity of the concept of *mens rea*. The following excerpts are taken from the decisions given by the concurring and dissenting judges:

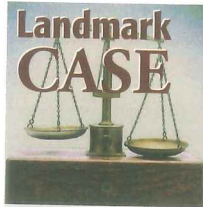
The Objective Argument (McIntyre, Lamer, L’Heureux-Dubé JJ.)

The words of s. 202 of the *Criminal Code* make it clear that one is criminally negligent who, in doing anything or in omitting to do anything that is in his duty to do, *shows* wanton or reckless disregard for the lives and safety of other persons. The objective test must therefore be employed where criminal negligence is considered for it is the conduct of the accused, as opposed to his intention or mental state which is examined in this inquiry.... The attribution of criminal liability without proof of such a blameworthy state raises serious concerns. Nonetheless, negligence has been accepted as a factor that may lead to criminal liability and strong arguments can be raised in its favour. It must be observed at once that what is made criminal is negligence. Negligence connotes the opposite of thought-directed action. This leads to the conclusion that what is sought to be restrained by punishment, under s. 202 of the *Criminal Code*, is not the state of mind, but the consequences of mindless action.

The Subjective Argument (Dickson C.J. and Wilson, Le Dain JJ.)

I wish to deal with the implication of my colleagues' approach in this case. By concluding that s. 202 of the *Criminal Code* prohibits conduct and the consequences of mindless action absent any blameworthy state of mind, they have in effect held that

the crime of criminal negligence is an absolute liability offence.... The presumption when we are dealing with a serious criminal offence should be in favour of a requirement of some degree of mental blameworthiness. The phrase "wanton and reckless disregard for the lives and safety of other persons" signifies more than gross negligence in the



R. v. Hamilton, 2002 ABQB 15

Read the following case analysis. The facts, issue, and *ratio* have been provided for you. Assume, however, that you disagree with the decision. Write a possible dissent for this controversial case.

Facts: Mr. Hamilton was charged under s. 464 of the *Criminal Code* with counselling four indictable offences that were, in fact, not committed. Mr. Hamilton had purchased a Web site called "Top Secret Files." This site included titles such as *How to Break into a House* and *An Anarchist's Guide to Airports*. The key issue dealt with credit card fraud. Part of the Web site offered a program that generated credit card numbers. Mr. Hamilton sent ads to a large number of computer users offering to sell these files. The ads included the following statements:

Produce credit card numbers! All valid and fully functional. Imagine the things you could do with this program.... This software is for educational purposes only and is to be treated as such. If you use the software, you take full responsibility for your actions. Looking forward to seeing you well on your way to a wealthy lifestyle.

Although some people had purchased the program, there was no evidence of any actual fraud using the instructions in the program. Credit card company officials pointed out that the numbers alone would not be sufficient to be able to use the cards. However, "Top Secret Files" did contain information explaining how to commit offences.

Criminal Code: At trial, the Crown and defence agreed that statements such as "looking forward to seeing you well on your way to a wealthy lifestyle" constituted the *actus reus* of the offence. They disagreed on the *mens rea* of the offence.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable....

Issue: Must the subjective standard be applied to "intent to counsel"?

Held: The accused should be acquitted.

Ratio Decidendi: (Smith J.) "I find that Mr. Hamilton ought to have known he was counselling fraud. The teaser and his subjective knowledge that the use of the false credit card numbers is illegal make this conclusion irresistible. However, I have a doubt that Hamilton had subjective intent to counsel

fraud. His motivation was monetary, and he sought to pique the curiosity of readers who might acquire the information in the same way that he was initially attracted to the information. Further, he struck me as utterly unsophisticated and naive to the point that he cannot be said to have been wilfully blind or reckless. I also find that Mr. Hamilton did not intend the fraud be carried out nor was he wilfully blind or reckless as to the risk of deprivation which would result. In my view, the evidence points to a conclusion that Mr. Hamilton was inviting others to do as he had done—to satisfy their curiosity by seeing how easy it is to generate numbers and to expect that they cannot use them without the expiry date. In other words, he did not specifically intend that the fraud would be carried out. Nor, in all of the circumstances, ought he to have known that the fraud would be carried out. It follows that there could not be a conclusion that he was wilfully blind or reckless as to the consequences of the fraud. In my view, on all of the evidence, it cannot be found that he counselled fraud."

objective sense. It requires some degree of awareness to the threat to the lives and safety of others or alternatively a wilful blindness to that threat which is culpable in light of the gravity of the risk that is prohibited. In the absence of clear statutory language and purpose to the contrary, this court should, in my view, be most reluctant to interpret a serious criminal offence as an absolute liability offence.

Strict and Absolute Liability

For the most part, the two elements—*mens rea* and *actus reus*—must be present to secure a conviction in criminal law. However, some crimes defined by statutes do not require *mens rea*. For these offences, the Crown need prove

only the *actus reus* of the offence. In the case of **strict liability** offences, the accused will be convicted unless they can demonstrate that they acted with **due diligence**, that is, they acted as any reasonable person would under the circumstances. Strict liability offences generally deal with health and safety issues or offences dealing with the general welfare of the public.

Absolute liability offences allow for no defence, fault is not an issue, and the accused will be convicted based on the *actus reus* of the offence as defined in the statute. In *R. v. Pontes*, [1995] 100 C.C.C. (3d) 353 (S.C.C.), the accused was convicted of driving while prohibited, that is, he had already had his licence to drive removed due to a previous conviction. The *British Columbia Motor Vehicles Act* provided that