INDIVIDUAL AUTONOMY AS A BASIS OF CRIMINAL COMPLICITY IN NEW SOUTH WALES AND JORDAN: A COMPARATIVE STUDY

By
Mouaid Al Qudah

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University of Western Sydney
School of Law

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PLEASE NOTE

The greatest amount of care has been taken while scanning this thesis,

and the best possible result has been obtained.
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CERTIFICATE OF ORIGINALITY

This dissertation has been presented in the fulfilment of the requirements of a PhD in Law at the University of Western Sydney. I certify that this dissertation is the result of my own work and that any assistance received in its preparation and all sources used have been acknowledged in the text. I also certify that the substance of this dissertation has not already been submitted for any degree and is not currently being submitted for any other degree.

Signature: [Signature]

Date: 22/6/05
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The Canadian educationist Michael Fullan (1991), in describing educational change once likened it to ‘a planned journey into uncharted waters in a leaky boat with a mutinous crew’. This could also be said about my PhD educational journey. A key component of this dissertation involves the analysis of possible restrictions on individual autonomy as a basis of criminal culpability. My PhD journey could well be described in terms of various constraints on my autonomy. First, I was ‘induced’ (or even perhaps provoked) to accept the offer by my home institution Yarmouk University (Jordan) to go across to Australia to complete a PhD. It was ‘necessary’ for me to accept the terms of agreement suggested by Yarmouk University (which involved putting myself under moral and financial obligation of approximately A$250,000) as this was the only foreseeable way available to me to do my PhD. On arrival in Australia, I was in a constant state of ‘self-defence’ against many unknowns. These included the language (which I had to acquire mastery over within an extremely short time frame before starting my research journey), a different legal system (the common law system which I knew only by name), computing skills (I had only ever previously used a computer to check my email) and so forth. The amount and degree of psychological and social stress associated with such journey has frequently driven me into a state of ‘automatism’ (although not to a state of self-induced intoxication). I was ‘coerced’ to overcome all these obstacles and difficulties to avoid the severity of the terms of my agreement and the possibility of losing my reputation if my dissertation was not finished within a limited time period. After all, I am not sure whether I was ‘legally sane’ having accepted to subject myself to such a painful and stressful journey (or perhaps a journey of intellectual gambling) coming to endure what I have endured. Therefore, I conclude, with hindsight, that the researcher lacked autonomy throughout the journey!

It is said that ‘the darker it becomes, the closer the sunrise is’. Thus, on the bright side, it has been a rewarding journey, and perhaps a wonderful journey of self-discovery. Yes, I
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ABSTRACT

This dissertation is a comparative study of the law of criminal complicity in Jordan (a civil law jurisdiction), and in New South Wales (NSW) (a common law jurisdiction). It addresses the basis of criminal culpability of individuals, and explores the extent to which the basis of such culpability rests on the autonomy and autonomous actions (or inactions) of individuals. Ideas of such autonomy have been integral to western ethical, political and legal thinking since the seventeenth century. The dissertation maps out some of the key developments of this tradition, by drawing particularly upon the work of the contemporary analytical philosopher John Searle, and moral philosophers Mappes and DeGrazia to articulate the nature and operation of such individual autonomy and autonomous action. Chapters 2 and 3 of the dissertation explore the notion of autonomy in some detail and its general significance to criminal law. The analysis reveals that the foundational components of criminal culpability, namely, the actus reus, mens rea and defences are founded on varying degrees of individual autonomy, and that to a large extent, these building blocks take into account the limits of individual autonomy as identified by a developing tradition of analytical moral and social philosophy (liberty of action, freedom of choice and effective deliberation).

This account of individual autonomy is then used as a theoretical foundation for critically analysing some difficult areas of criminal complicity, namely, of criminal actions involving more than one person under the criminal laws of NSW and Jordan in Chapters 4, 5 and 6. In particular, Chapter 4 of the dissertation critically analyses the principles governing primary criminal liability (doctrine of straightforward joint criminal enterprise and doctrine of innocent agent in NSW; principal perpetrators/accomplices, and doctrine of moral perpetrator of crime in Jordan). In Chapters 5 and 6, accessorial liability and the doctrine of common purpose are considered respectively. The comparative study reveals that the notion of individual autonomy underpins all types of criminal complicity, with the latter requiring a high degree of individual’s autonomous involvement in a criminal venture. This framework has usefully guided the development of theoretically grounded
suggestions for reform of the JPC to ensure that relevant legal principles are explicitly dealt with.

Finally, the analysis in this dissertation raises issues where the criminal law does not adequately take into account the limits on individual autonomy in relation to liberty of action, freedom of choice and effective deliberation. These issues highlight that a more serious and deeper understanding of individual autonomy as a ground of culpability must be taken into account by law-makers, to ensure that the grounds of criminal culpability more accurately reflect the limits on people’s individual autonomy in modern society today.
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CHAPTER 1: INTRODUCTION

1.1. OBJECTIVES OF THE DISSERTATION

This dissertation provides a comparative study of the law of criminal complicity in Jordan (a civil law jurisdiction), and in New South Wales (NSW) (a common law jurisdiction). It addresses the basis of criminal liability of individuals\(^1\), and explores the extent to which the basis of such liability rests on the autonomy and autonomous actions (or inactions) of individuals. Ideas of such autonomy have been integral to western ethical, political, and legal thinking since the seventeenth century. The dissertation maps out some of the key developments of this tradition, by drawing particularly upon the work of the contemporary analytical philosopher John Searle\(^2\), and Mappes and DeGrazia\(^3\), to explain the nature and operation of such individual autonomy and autonomous action. Chapters 2 and 3 of the dissertation explore this notion in some detail, and its general significance to criminal law, while Chapters 4, 5 and 6 use it as the basis to critically analyse some difficult areas of criminal complicity, namely, criminal actions involving more than one person under the criminal laws of NSW and Jordan.

The primary focus of this dissertation is to explore the extent to which the autonomy of an individual operates as a foundation for the imposition of criminal liability in both jurisdictions in relation to the principles of criminal complicity which cover three selected categories: the imposition of primary criminal liability, accessorial criminal liability and doctrine of common purpose\(^4\). This involves analysing and discussing the way in which these principles are dealt with in both jurisdictions, identifying some of the problems associated with their application, and offer some possible solutions. Central to

\(^1\) The dissertation considers human individuals rather than corporations or other non-human legal 'persons'.
\(^4\) In this dissertation, the analysis is confined to the selected categories as mentioned, and it does not deal with incitement or accessoryship after the fact.
the purpose of this comparative study is to provide insights into how both jurisdictions can inform each other with respect to any potential law reform in relation to these principles. In particular, it is expected that this comparative study will contribute to informing changes to the *Jordanian Penal Code 1960 No 16 (JPC)*\(^5\).

1.2. ORIGINS AND REFINEMENT OF DISSERTATION TOPIC

The origin of this dissertation arose from my three years’ in the Department of Public Prosecution in Jordan, during which time I became aware of seeming deficiencies in the laws relating to culpability in criminal complicity in the *JPC*. As Glendon, Gordon & Carozza (1999:7) suggest, it was my dissatisfaction with the law of complicity in Jordan which prompted me to consider how a foreign legal system dealt with such matters. As such, I embarked on a comparative study. It is well recognised by comparative lawyers that comparative study helps the comparatist to understand and evaluate his or her legal system (De Cruz, 1999:18, 29; Reichel, 1999:3-4; Glendon et al 1999:3-7). Further, the exploration of various solutions which a foreign legal system offers for a given legal matter enriches one’s own jurisprudence by reference to the benchmarks of the other (Feeley, 1997:93; De Cruz, 1999:20), and also aids the development of legislative law reform (Feeley, 1997:94; De Cruz, 1999:20; Bogdan, 1994:28-30; Grossfeld, 1990:115-18; Zweigert & Kotz, 1998:15-17; Markesinis, 2003: 114-125). In this regard, comparative study has been described as ‘a form of shopping trip’ (Feeley, 1997:94)\(^6\).

Even though for these reasons a comparative study is attractive, it is also recognised that there is no formula for undertaking a comparative analysis, beyond general guidelines. As De Cruz (1999) has observed, ‘none of the existing texts or casebooks on the comparative law actually appear to provide a plan of comparison, outlining possible methods of

\(^5\) There is no official English translation of the *JPC*. I have also not located any English writings analysing the *JPC*. I have been responsible for the translation of relevant sections of the *JPC* and Arabic texts extracted in this dissertation.

comparison’ (p233). To this effect, it has been pointed out that the process of comparison continues to consist of ad hoc ‘compare and contrast’ studies that show how legal provisions in one country are similar or different from those of another country (Feely, 1997:95). As with other research, Zweigert and Kotz (1998:33-35) note that a preliminary step in a comparative study is to identify the objective of the study, or to frame an hypothesis for the research question. Further, Kamba (1974) identifies three (not necessarily chronological) steps involved in a comparative study: the descriptive phase, the identification phase and the explanatory phase. The descriptive phase entails a description of the norms, concepts, legal principles or legal problems and solutions provided by the legal systems which are the subject of comparison. Reichel (1999:9-11) emphasises the importance of the descriptive stage for gaining an overview of the foreign legal system and for engaging in an initial classification or categorisation (Ehrmann, 1976:12) of the issues to be compared. The identification phase deals with the identification of differences and similarities between the issues being compared, and the explanatory phase entails an attempt to account for the resemblances and dissimilarities between the issues being compared.

As a preliminary step, before engaging in the comparative analysis of complicity in Jordan and NSW, it is necessary to outline the sources of the law of criminal complicity in both jurisdictions. In common law jurisdictions (like NSW), the substantive law is found in legislation and cases. Case based law, which is found in the judicial decisions and the doctrine of precedent, forms the basis of the law where no legislation exists. It is also used as a supplement to legislation as a binding source of interpretation. As far as the interpretation of statutes goes, the doctrine of precedent allows for consistency in that interpretation, rather than allowing each judge to make their own interpretation. The existence of the judicial process of distinguishing or rejecting prior authorities and the ability of judges to use the accepted process of legal reasoning to decide a case where there is no prior authority provides flexibility and contributes to growth in the common law (Terry & Des Giugni, 1997:108-109)\(^7\). In contrast, in a civil law system (like Jordan),

\(^7\) It is acknowledged that a large majority of criminal offences are prosecuted in lower courts in NSW before a magistrate few of which are appealed to appeal higher courts (Brown et al, 2001: 161, 165-6).
a code is the only authoritative, comprehensive and systematic collection of general clauses and legal principles (De Cruz, 1999: 46). Unlike the common law system, where legal principles are applied and reviewed in higher courts from time to time, legal principles encompassed in a code in a civil law system, are not subject to binding reform or clarification unless the code is revised by a legislative authority. To this extent it is inflexible and may require reform from time to time to address deficiencies.

This comparative analysis of complicity in NSW and Jordan, based on the available commentary and analysis of complicity in the JPC and at common law in NSW, initially involved describing the law of complicity in Jordan and NSW and outlining the differences and similarities between them (thus engaging in the descriptive and identification phases). This analysis formed the foundations for chapters 4, 5 and 6. Broadly speaking, in NSW, a person might incur criminal liability either because he or she personally and alone commits a crime, or on the basis of complicity. As Brown et al (2001) point out, ‘the law of complicity is a set of rules under which a person’s criminal liability is determined by reference to his/her association with a crime committed by someone else’ (pp1323-4). The principles of criminal complicity in NSW are found at common law. Despite the existence of some statutory provisions on accessorial liability, these provisions do not themselves create substantive offences. Rather, they are declaratory of the common law principles and mainly concern the procedural law.

In order to provide an accessible comparison of the principles of criminal complicity under the laws of NSW in conjunction with their correspondence in the JPC, it is useful to classify these principles into the following categories:

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8 It is acknowledged that there is a degree of flexibility for judges when interpreting the outer limits of particular code provisions, but this is subject to the rules of statutory interpretation which does not allow judges to create an offence if such an offence is not explicitly provided for in the Code. Even though cases can be appealed to higher courts, judgments in these courts are not binding on the legal interpretations of the legal limits of Code (Alseid, 1998:58-72).


10 The relevant legal provisions will be included where necessary throughout the dissertation.

1. Primary criminal liability which in turn has two subcategories:
   a) Straightforward joint criminal enterprise or acting in concert (principal/s in the first degree).
   b) Doctrine of innocent agent.
2. Accessorial liability (which is a broad term for describing principal in the second degree and accessory before the fact).
3. Doctrine of common purpose.

In Jordan, the basic principles of criminal complicity are found in Articles 75, 76 and 80 to 82 of the First Section of Part Four of the First Book of the JPC. In the JPC, it is possible to classify these principles into the following categories\(^\text{12}\):

1. The principal perpetrator of an offence (Article 75).
2. The perpetrator with others (accomplice/s) (Article 76).
3. The interferer (Articles 80, 81, 82). This corresponds to the category of accessorial liability in NSW. The Arabic word used in these articles is Altadakal. The English translation for this term is interfere, which is defined in English to mean hinder, inhibit, disturb or confuse\(^\text{13}\). However, the legal meaning of the term Altadakal is providing help to do something. In order to avoid any confusion which might result from the use of the English translation interfere for Altadakal, I use the term accessory instead of interferer in the course of dealing with the issue of accessorial liability under the JPC.

It should be noted that under the JPC there is no explicit reference to the notion of the ‘doctrine of innocent agent’ found in NSW. Also, there is no explicit guidance in the JPC with regard to the criminal liability of the accomplice and accessory for the additional or

\(^\text{12}\) In Jordan, when discussing the principles of complicity, legal commentators include ‘incitement’ (Articles 80, 81, 82) and ‘harborer of offenders and property’ (Articles 83, 84) in this category. However, in NSW, incitement is an inchoate offence. These two categories are not discussed in this dissertation on the basis that they do not raise similar need for reform in Jordan, and constraints of time and space required a more selective analysis.
alternative crime committed by their accomplices in the course of carrying out a primary criminal venture which corresponds to the category of the doctrine of common purpose in NSW.

While the commentary and analysis of the law of complicity in Jordan and NSW provide the relevant materials to engage in the descriptive and identification phases as suggested by Kamba (1974), it does not provide the theoretical tools necessary to enable me to move to the explanatory stage.

In order to better understand the law of criminal complicity (and to make a meaningful comparison between Jordan and NSW), which necessarily rests on the commission of particular crimes, I undertook a critical analysis, from an interdisciplinary perspective, of the moral foundations of criminal law, firstly by considering the moral foundations of the criminalisation of particular behaviours and consequences (broadly speaking, the actus reus of an offence, dealt with in Chapter 2) and the moral foundations of criminal culpability (the mens rea of the offence, dealt with in Chapter 3). What emerged from this analysis was the importance of individual autonomy, both to an understanding of criminalisation and as a foundation for various types of criminal culpability. This importance led me to consider the meaning of individual autonomy in more detail, in particular drawing on the work of John Searle and Mappes and DeGrazia. Their analysis provided a nuanced account of individual autonomy and highlighted the importance and complexity of such a notion which could then be used as a theoretical foundation from which to conduct the comparative analysis of criminal complicity in NSW and Jordan in chapters 4, 5 and 6 of this dissertation.

As a result of this comparative approach, this dissertation contributes to the literature on criminal law in Jordan in two important ways. First, it provides new ways of understanding the grounds of criminal culpability in general terms, as well as for the specific issue of criminal complicity. In particular, it highlights the importance, usefulness and limitations of notions of individual autonomy for analysing criminal

culpability. In doing so, it provides a more complex understanding of what individual autonomy means in the context of criminal culpability, and how such an analysis can be used to discern the underpinning tenets of criminal culpability in the JPC. This analysis will provide scholars of criminal law, and law reformers alike with new and useful theoretical tools for analysing particular criminal offences and the limits of criminal responsibility in Jordan.

Second, and based on the understanding and analysis of individual autonomy in the context of criminal complicity, this dissertation provides some theoretically grounded suggestions for law reform in this area. As Roberts (2001-2002) states, recommendations for law reform ‘should be grounded in a principled basis for criminalization, transparently argued, and accompanied by frank awareness of any compromise or sacrifice of the principle necessitated by the practicalities of criminal justice administration or the politics of law reform’ (p240). This dissertation will demonstrate that there are two areas of the law of complicity with no explicit guidance in the JPC, which emphasises the fact that legislative intervention is required to address such shortcomings. The first area relates to the commission of a crime through the use of an innocent agent (Chapter 4), and the second concerns the liability of accomplices or accessories for the commission of an additional or alternative offence by their accomplice in the course of carrying out a primary criminal venture (chapter 6).

1.3. STRUCTURE OF THE DISSERTATION

The dissertation is structured as follows. Chapters 2 and 3 set out the theoretical underpinnings of the dissertation. Chapter 2 analyses how individual autonomy and other principles and concepts form a moral foundation for criminalisation and the imposition of criminal liability through addressing the question of ‘what is a crime?’. Chapter 3 presents a theoretical account of how the autonomy of individuals provides the grounds for criminal culpability. It first considers the analyses by Searle (1999, 1983) and Mappes and DeGrazia (1996) of the way individuals are considered autonomous in their decisions
and actions (or inactions). The central tenets of criminal responsibility (actus reus, mens rea, defences) are then considered in light of these ideas.

In the absence of a standard template for conducting a comparative study (and for the purpose of providing an accessible comparison), Chapters 4, 5 and 6, of the dissertation adopt a topical and jurisdictionally based approach in analysing and comparing the respective positions of NSW and Jordan in relation to individual autonomy and the principles of complicity. In this context, chapter 4 critically analyses primary criminal liability, Chapter 5, accessorial liability, and Chapter 6 the doctrine of common purpose. Each chapter explores the extent to which ‘individual autonomy’ underpins the imposition of criminal liability in relation to the particular category discussed therein. In doing so, each chapter deals first, with the relevant category under the laws of NSW, and then with the corresponding category under the JPC, and in a concluding section tie together the main findings of the chapter by comparing and contrasting the respective positions in both jurisdictions with a view to providing insights as to how the two jurisdictions may inform each other on matters of law reform. Chapter 7 concludes with a summary of the main findings of the dissertation, and discusses issues for consideration by lawmakers in relation to autonomy as the ground for individual responsibility.
CHAPTER 2. THE MORAL FOUNDATIONS OF CRIMINAL LIABILITY

2.1. INTRODUCTION

This chapter seeks to provide a theoretical account of the moral foundations of criminal liability. It does not seek to provide a general theory of criminalisation. Rather, it aims to identify some moral principles and concepts which serve as a foundation and justification for criminalisation and the imposition of criminal liability. Central to these moral foundations are the principles of 'individual autonomy', 'individual rights', 'the principle of welfare' and the 'harm principle'. This chapter undertakes to explore this issue through addressing the general question of 'what is a crime?' This question involves examining why a particular type of behaviour is considered to be criminal by the law, or what considerations need to be taken into account in order to render a particular type of behaviour criminal, and to consequently justify the imposition of criminal liability.

It is possible to approach the answer to the question 'what is a crime?' from a variety of theoretical perspectives. Broadly speaking, differing theoretical perspectives can be divided into two categories: positivist theory and non-positivist theory. Positivist theory merely provides a descriptive answer to the question of 'what is a crime', without seeking to provide moral justifications for criminalisation and the imposition of criminal liability. In contrast, non-positivist theory seeks to provide moral justifications and explanations by considering ethical principles including individual autonomy, individual rights, the principle of welfare and the causing of harm.
2.2. THE QUESTION ‘WHAT IS A CRIME?’

2.2.1 Positivist theory

Positivist theory is mainly concerned with ‘what is the law’ and not with ‘what the law ought to be’. Davies (2002:90-92) points out that positivism pays a great deal of attention to pure legal doctrine and not the social, political and moral/ethical context of law. Positivism as a legal philosophical theory conceives law as rules created by human beings and imposed on other people. From a positivist point of view, legal philosophy should not be concerned with speculation about the morality of law, but needs to be concerned with arriving at an understanding of the nature of law as it exists. For positivism, there is no necessary connection between law and morality, even if law may sometimes accord with a moral standard. Law is pure rules formulated and applied by human beings, and these rules remain law even if they do not accord with moral principles or standards. One of the earliest exponents of the positivist view was John Austin who, in *The Province of Jurisprudence Determined* describes what the law is, and not what the law ought to be. Austin distinguishes between positive law and morality, natural law and norms associated with social behaviour. For Austin, the difference between law and the other norms or rules lies in the type of sanction or punishment applied. Austin argues that the infringement of a social rule would result in no more than social disapproval, whereas the infringement of a legal rule would result in a legal consequence such as punishment, fine or damage award. These legal

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consequences are determined and applied by courts and other legal institutions. Austin perceives law as orders or commands given to human beings by a superior sovereign. Such commands are generally obeyed by subjects, with punishment and sanctions attached for the breaching of them.

The modern exposition of positivism comes with the work of Professor H L A Hart, *The Concept of Law*¹⁸. Hart criticises the notion of sovereignty in itself as a necessary feature of the legal system, and postulates that the foundations of a legal system rest on a combination of rules which can be recognised, applied and understood by reference to other rules. Hart divides the law into two groups of rules: the primary rules which relate to the substantive law such as the road rules or the law of negligence, and the secondary rules which are procedural in nature and relate to the way in which the substantive rules can be ascertained, introduced, changed or eliminated. Hart asserts that the combination of these rules alone is not sufficient to label a certain system of rules as a legal system. He indicates that for these to be regarded as legal rules there should be a ‘rule of recognition’ which would give the primary and secondary rules their legal characterisation. For Hart, the rule of recognition represents the attitudes of officials of the legal system.

Another philosopher who has attempted to define law is Hans Kelsen¹⁹. Kelsen explains the validity of law by reference to what he calls the ‘basic norm’. He argues that laws in a legal system are bound together in a hierarchical order, related to each other as parts of the system. For Kelsen, the validity of a norm/law rests upon and can only be explained by reference to another higher norm/law. This hierarchical structure continues until the

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‘basic norm’ (Grundnorm) is reached, which is the common bond of all norms in a legal system. Kelsen considers that sanctions or penalties are necessary for a norm to be regarded as a legal norm. He treats the breaching of a legal norm as a crime ‘delict’. This means, according to Kelsen, that when a certain norm is breached a type of sanction would be applied by officials against those who breached it. Namely, sanction and coercion in the form of applying sanctions by officials in the legal systems are necessary features of the criminal law\textsuperscript{20}.

Positivists define crime by the institutional and procedural responses to a particular behaviour. These responses include the prohibition of certain behaviour by criminal law in the first place, prosecution of that behaviour through certain criminal legal processes carried out by criminal legal agencies, and consequently the application of punishment by courts\textsuperscript{21} (I shall refer to this as the ‘procedural consequences criterion’). The definition of crime under this criterion was well-illustrated by the statement made by Lord Atkin in \textit{Proprietary Articles Trade Association v Attorney-General} [1931] AC 310 at p324: ‘the criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?’ Defining crime by reference to such a procedural criterion is a dominant feature of the work of many legal commentators in common law jurisdiction. For example, Kenny (1936) defines crime by reference to the criminal process, stating that: ‘crime is a wrong whose sanction is punitive, and which is in no way remissible by any private person, but is remissible by the crown alone, if remissible at all’ (p16). In a similar vein, Glanville Williams (1983) defines crime as: ‘a legal wrong that can be followed by criminal proceedings which may result in punishment’ (p27)\textsuperscript{22}. Similarly, in Jordan (a civil law jurisdiction), writings on the criminal law in general, and on the definition of crime in

\textsuperscript{20} See Hartney M (trans); \textit{General Theory of Norms} by Hans Kelsen, Oxford University Press, United State, 1991 at 3, 22-23.
\textsuperscript{21} For definition of crime which reflects this claim see Findlay M, \textit{Problems for the Criminal Law}, Oxford University Press, 2001 at 13.
particular, focus on the description of the criminal law in a positivist fashion. For example, a crime is defined as an offence which consists of two components, the actus reus and the mens rea, and deserves punishment as indicated by the Code. Under the 'procedural consequences criterion' crime has been defined by reference to two indicators. First, conduct is considered a crime because it is defined as a crime by criminal law. It is the lawmakers, whether legislators or judges, who determine what types of acts should be classified as crimes. Accordingly, it can be argued that crimes are those behaviours considered criminal by criminal law, and all that is required to identify crimes is to examine the criminal law in a given legal system to discover what behaviours are defined as crimes. For example, the JPC provides examples of the types of acts treated as crimes under Jordanian law. The JPC broadly classifies crimes into different categories. Examples of these include: crimes against the security of state such as treason; crimes against public safety such as possession of weapons and ammunition; crimes against the administration of justice such as concealing of felonies and misdemeanours; crimes against religion and family such as publicly breaking the fast in the month of Ramadan and adultery; crimes against public morality such as rape, sexual assault, soliciting of a woman for prostitution; crimes against the person such as murder; and crimes against property such as theft and fraud. Similarly, the Crimes Act 1900 (NSW) includes different categories of acts treated as crimes. These include for instance, crimes against the person such as homicide; crimes against public order such as riot; and crimes against property such as larceny. Obviously, it is easy to say that a crime is an act (or omission) that breaches the criminal law (Marsh, 1986:2). However, the question remains: does this definition provide any clue as to why criminal law has selected these behaviours and classified them as crimes? It seems the answer to this question is no.

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The second indicator of crime under the ‘procedural consequences criterion’ is the criminal-civil wrongs and procedures distinction, and the role the state plays in criminal proceedings. The following specific issues illustrate this distinction. First, the state plays a greater role in criminal proceedings than in civil proceedings. Generally, a criminal trial is seen to be a battle between the state and the citizen, whereas a civil trial is a battle between private citizens (Rush, 1997:6). Kenny (1936:14-17) states that the difference between criminal and civil processes might be discovered if the control exercised by the state over them were perceived. For Kenny, the ultimate distinction between the two kinds of processes lies in the fact that the punishment of criminal procedures is remissible by the Crown and no private person can grant a valid remission for any criminal sanction, whereas he or she can exercise the power, if any, of remitting a sanction of a civil procedure. In other words, as Rush (1997:7) points out, according to Kenny this means that the state has the authority to pardon criminal sanctions.

Second, another difference between the two types of procedures depends on the place in which they are employed. The machinery by which criminal law is applied refers to agencies of the criminal justice system such as the police, prosecutors and courts. The perception that crimes are prosecutable indicates that they are inseparable from the criminal proceedings, and the test of whether conduct is criminal is the nature of proceedings which are set to follow an allegation that this conduct has been committed (Gillies, 1993:5-6). Kenny (1936:11) argues that although criminal procedures take place in criminal courts whereas civil procedures take place in civil courts, this is not necessarily a crucial feature in defining crime, since both types of procedures may at times take place in the same court. Furthermore, it can be argued that conduct is criminal not because it is triable in a criminal court but only when the court has determined that it is. Therefore, this distinction between an act triable in a criminal court and another in a civil court fails to differentiate criminal wrong and civil wrong.

Third, punishment is the aim of criminal procedure whereas compensation is the object of civil procedure (Kenny, 1936:11-12; Rush, 1997:6; Dine, 1995:11). That is to say, if punishment was the outcome of a certain case, then this is an indicator that the behaviour-
which was the subject of that case- is criminal behaviour. In contrast, if the outcome of the case was compensation or any other civil remedy, then this is an indication that the behaviour- subject to that case- was not criminal. Punishment has certain features which would make it possible to distinguish it from other unpleasant consequences. These features include pain, retribution, rehabilitation and deterrence. However, as Kenny (1936:12-13) observes, defining crime by reference to a criminal-civil procedures distinction is inconclusive. This means that some civil processes could be brought with punitive aims, such as exemplary damages where the court might wish not only to compensate the victim of a tort, but to punish the defendant by taking into account the degree of violence or malice or oppressiveness in his or her act. Furthermore, it might be argued that the labelling of certain behaviour as criminal is not dependent on the type of procedures applicable, rather the definition of criminal proceedings is dependent on the fact that they apply following the commission of a crime.

In sum, although many commentators have defined crime by reference to ‘the procedural consequences criterion’ it is generally accepted that this definition is dogged by the problem of circularity. Williams (1983:28) defends his definition and argues that it is not circular, while others (Rush, 1997:8-9; Murugason and McNamara, 1997:1; Gillies, 1993:5) rebut this. They argue that the definition is circular, since on the one hand crime is defined by reference to criminal law, and as being subject to be followed by criminal procedures resulting in unpleasant outcomes. On the other hand, criminal law is that which defines crime, and criminal procedures and unpleasant outcomes are those which follow the commission of a crime. The ‘procedural consequences criterion’ does not reflect the moral foundations for criminalisation and the imposition of criminal liability. It provides a descriptive, rather than explanatory, definition of crime. Obviously, defining crime by reference to the ‘procedural consequences criterion does not provide any clue as to why a particular act is treated as a crime in the first place. Therefore, the answer to the question ‘what is a crime?’ should be sought elsewhere by exploring natural, social and ethical ways of defining crime. As Roberts (2001-2002) points out ‘in order to determine whether a particular form of conduct should be criminalized it is always necessary to
pose [the question]: is there a good (moral) reason to justify extending the criminal law to this particular conduct?" (p217). To this issue the following discussion now turns.

2.2.2. The natural, social and ethical way: ‘non-positivism’

As stated earlier, this way of defining crime is mainly concerned with providing moral justifications for criminalisation and the imposition of criminal liability. These involve reference to basic moral concepts and principles, including the principles of individual autonomy, individual rights, the principle of welfare and harm. As Lacey (1988) points out, ‘the criminal law can be conceived as a set of norms...the function of which is to protect the autonomy and welfare of individuals and groups in society with respect to a set of basic goods, both individual and collective’ (pp104-105). Along the same lines, Ashworth (1999:26-58) considers the principle of individual autonomy and the principle of welfare and the prevention of harm to either or both of them as the principles which ought to have a bearing in relation to criminalisation and the imposition of criminal liability. The following discussion addresses these moral foundations.

2.2.2.1. The principle of individual autonomy

One of the fundamental concepts involved in the justification of criminalisation is the principle of individual autonomy, and as far as criminalisation is concerned, a key concept here is that of individual rights. Before addressing this, it is useful to briefly explore the elements of the principle of individual autonomy.

Ashworth (1999:27) points out that the principle of individual autonomy has two elements: factual and normative. The factual element of the autonomy principle perceives individuals as having the capacity and sufficient free will to make meaningful choices.

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An autonomous person is one who has the ability to choose, formulate and carry out his or her plans along with his or her ability to govern personal conduct by rules and values (Downie & Calman, 1994:52). In principle, commentators recognise that criminal law perceives individuals as having freedom to make choices (Hodgson, 2000:655) although this might be displaced in certain circumstances by factors such as duress or necessity. In other words, with the acknowledgment of the role of influences and circumstances, criminal law regards individuals as autonomous and rational agents who have conceptions of what they are doing, generally considered as not compelled in their decisions and actions (Jacobs, 2001:10-11; Coles & Jang, 1996:64). In this regard Barbara Hudson states that:

The notion of free will that is assumed in ideas of culpability... is a much stronger notion than that usually experienced by the poor and powerless. That individuals have choices is a basic legal assumption: that circumstances constrain choices is not (p302).

The second element of the principle of individual autonomy is the normative one. That is, individuals should be respected and treated as agents capable of choosing their actions; without allowing such independence of actions it would hardly be possible to regard individuals as moral persons. The respect of an individual as an autonomous being involves taking into account that he or she is self-determining and self-governing along with his or her capability to act autonomously (Downie & Calman, 1994:54). Ashworth (1999:29) points out that in liberal theory, the principle of autonomy goes much further than this. It postulates that individuals should be left to decide for themselves in every aspect of their lives. This is well demonstrated in the statement of the liberal theorist Joel Feinberg (1986):

25 This will be further discussed in chapter 3: Individual Autonomy as a Ground of criminal culpability.
The most basic autonomy-right is the right to decide how one is to live one’s life, in particular how to make the critical life-decision -what course of study to take, what skills and virtues to cultivate, what career to enter, whom or whether to marry, which church if any to join, whether to have children, and so on (p54).

Returning to the issue of criminalisation, a key concept noted above is that of individual rights. Such rights are connected to autonomy and free action insofar as they are thought of as entitlements to avail oneself of particular resources in light of free individual decisions and choices. These rights include, among others, the right to liberty, the right of personal safety, property protection and so on. It is also worth noting that responsibility is the flip side of autonomy. That is, if a person autonomously infringes upon the rights of others, then they should bear responsibility for the infringement. Liberal theorists such as Hobbes and Locke place great emphasis on the respect of the liberty of individuals, postulating that they should be left free to choose actions or omissions without any intervention by criminal law unless necessary to prevent the causing of harm to others. From the perspective of the principle of autonomy, criminalisation is justified to prevent and punish infringements of the rights of others, including the right to life, personal safety, property and so forth.

This relationship between autonomy and rights entails providing a description of what is a right or when a person is said to have a legal right. As Freeman (2001:355-354) points out, Hohfeld’s account of rights (1913-1914; 1916-1917) is the most rigorous and remains the source to which most return. Therefore, it is important to consider Hohfeld’s analysis of ‘rights’ to provide insight into what a right is. Hohfeld (1913-1914: 28-59) distinguishes four senses in which a person may have a legal right.

29 The relation between rights and autonomy will be further developed when the notion of harm is dealt with below.
30 The way in which the autonomy of individuals operates to form a ground for criminal liability will be discussed in the following chapter.
First are, rights which correlate with duties. For Hohfeld, to say that the correlative of a right is a duty is to say that a right entails a duty: if X has a right against Y that Y shall stay off X’s land, the correlative and equivalent is that Y is under a duty toward X to stay off the land. However, Edmundson (2004:99) questions whether the entailment goes both ways between the correlatives or one way only: do duties entail rights? Freeman (2001:357) and Edmundson (2004:99) point out that whilst Hohfeld is correct to state that every right ‘stricto sensu’ implies the existence of a correlative duty, non-correlative duties do not seem to have a place in Hohfeld’s scheme. In this regard, it can be argued that a deontological and rights-based theory is helpful in providing insight into duties and their correlative rights. Ridley (1998:11, 34-38) comments that from a deontological perspective, individual acts are ethically acceptable whenever they accord with their duties and obligations, and that when a deontological theory lays down duties and obligations of certain kinds it inevitably lays down rights corresponding to these.

Broadly speaking, individuals are supposed to have some basic rights. These rights, among others, include the right to life, the right to freedom, the right to personal safety, the right to property protection and so on. Ridley (1998:43) argues that to assume that someone has a certain right is to say that he or she is owed an obligation of some kind by other persons. To that effect, Benn (1988:236) maintains that to say someone has a right to X is to say that by virtue of a set of normative relations that hold between that person and another person, there are certain demands such that his or her making them would be a reason for the other person’s acceding to them, and would put the latter in the wrong if, without some overriding reason, he or she did not accede to them. Duties and rights are like the opposite side of a coin, that is, an individual’s duty is another individual’s right and vice versa.

The second sense in which Hohfeld defines rights is those which amount to privileges or liberties and negate duties. For example, where A has a right against B that B shall stay off A’s land, A himself or herself has the privilege of entering the land or does not have a duty to stay off that land, and correlative no one has the right to demand that A stay off the land. The third sense in which a person may have a legal right according to Hohfeld is
when that right amounts to power. The power is the legal ability to bring about a change in the legal relations between the person who holds the power and another. For example, if A has the power to dissolve his or her legal interests in his or her property through abandonment, then correlative to this power is the liability of others to have their legal relations changed through its exercise. Finally, Hohfeld identifies rights which give immunity. Immunity is the negation of liability: it consists of the freedom from legal power or control of another regarding certain legal relations. The immunity of certain charitable institutions from taxation is an example.

A meaningful possession of a right entails the protection of that right in circumstances in which it is violated or appears likely to be violated. As Mill (1861) says, 'to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of' (p66). One way of achieving the protection of rights is through the intervention of criminal law to prevent the violation of rights and hold responsible transgressors. For example, X’s right to life imposes a duty on Y not to kill X, and if Y does not uphold his or her duty and kills X, Y should be liable for that actions. To assume that someone has a right entails the protection of the possession of that right. Arguably, the protection of an individual’s rights renders their possession by that individual meaningful, and contributes to the furtherance of ‘general utility’ (Wolff, 1996:130). Utilitarianism advocates the maximisation of general happiness and the minimisation of total pain. As such, the argument could be that a place where individuals are given a sphere of protected rights would be happier than one without such protection. Thus, the intervention of criminal law to protect an individual’s rights can be justified on utilitarian grounds. In order to achieve its purpose, this intervention should be subject to some limitations. On the one hand, it should be subject to the requirement of ‘rule utilitarianism’: providing a set of rules which if followed would maximise the total happiness of all (Ridley, 1998: 28-34). On the other hand, it should be a minimal

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33 For further discussion on the is-sue of the justifiable usage of force or coercion to protect rights see Hoekema D A, Rights and Wrongs: Coercion, Punishment and the state, Selinsgrove: Susquehanna University Press, London and Toronto, 1986 at 105-125.
intervention which is necessary to safeguard and protect the interest of individuals. Bentham (1948:171) asserts that if punishing particular conduct would result in more harmful consequences than those which it prevented, that conduct should be left unpunished.

Basically, the principle of individual autonomy assigns great importance to the freedom and liberty of individuals while preventing harm being caused by others. That is, individuals should be protected from the interference of criminal law through criminalisation and the imposition of criminal liability unless they can be shown to have chosen the actions for which they might be held criminally liable, and that these affect others\(^\text{15}\). The principle of individual autonomy advocates that there should be no interference with the liberty of individuals if their autonomy is to be respected, and it stands for significant protection of individual rights and interests. This emphasis on the respect of individual rights militates also against the criminalisation of behaviours on the basis of 'paternalism'. In other words, criminal law should not interfere with the liberty of individuals for their own good by criminalising behaviours which are harmless to themselves\(^\text{16}\), such as homosexual behaviours.

Wolff (1996:144) points out that communitarians maintain that liberalism conceives of individuals as isolated people having no essential attachment to the society in which they live, and thus having the right to pursue their own good however they wish. However, the question arises as to how sustainable such a claim is: that individuals are free to pursue their own good however they wish. Ashworth (1999:29) points out that the notion of liberal individualism to be free to do as one wishes is quite unsustainable without a range of qualifications. Modern liberal theorists enhance these qualifications through the development of autonomy-based theories which place emphasis on collective goals as a necessary condition for maximum autonomy. This is well illustrated in Joseph Raz's argument (1986)\(^\text{17}\):

\(^{15}\) This will be developed in more detail when JS Mill's 'harm principle' is discussed later in this chapter.

\(^{16}\) This point will be discussed further below.

Three main features characterize the autonomy-based doctrine of freedom. *First*, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. *Second*, the state has the duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy. *Third*, one may not pursue any goal by means which infringe people’s autonomy unless action is justified by the need to protect or promote the autonomy of those people or of others (p.425).

Clearly, the principle of individual autonomy assumes that one is free to make choices on how to live, and that individuals are entitled to pursue their private interests however they wish. In the same vein, the autonomy principle allows individuals to be held responsible if their actions are harmful to others. Moreover, as Raz remarks, the intervention with an individual’s liberty can be justified on the basis of promoting collective goals which considered as necessary conditions to the enhancement of maximum autonomy. This point is discussed below, as I consider the principle of welfare.

2.2.2.2. The principle of welfare

The welfare principle advocates preserving the collective good of the community, such as environmental, health and security protection and public safety. From the perspective of the welfare principle, the protection of collective or aggregate interests is necessary to enhance the general well-being of the community, and criminal law is one way of denouncing and punishing any behaviour which might threaten these interests, even if it results in the liberty of individuals being sacrificed.

The starting point for the welfare principle is the social nature of individuals. As a social being, an individual’s identity and self-understanding are bound up with the society in which he or she lives. An individual is born into a family which is itself part of a tribe or clan and a larger community. As Feinberg (1988) argues ‘it is absurd...to think of an individual as formed prior to and independently of his socialization in a particular social
group, capable of living in isolation from any community’ (p84). Wolff (1996:144) states that from a communitarian perspective, if individuals did not find themselves in a particular social setting, they would be quite different. This view was first acknowledged by Mill in his work Utilitarianism (1962), where he states:

The social state is at once so natural, so necessary, and so habitual to man, that, except in some unusual circumstances or by an effort of voluntary abstraction, he never conceives himself otherwise than as a member of a body; and this association is riveted more and more, as mankind is further removed from the state of savage independence. Any condition, therefore, which is essential to a state of society, becomes more and more an inseparable part of every person’s conception of the state of things which he is born into, and which is the destiny of a human being (pp284-5)\(^8\).

The central point for communitarian theorists, unlike liberal theorists, is their focus on the social nature of human beings, arguing that denial of the importance of the community we live in would lead to individual alienation and ultimately the dislocation of society. Ashworth (1999:30) and Findlay et al (1999:4) point out that the principle of welfare places an emphasis on the centrality of the collective goals of existing society. Nicola Lacey (1988) describes the principle of welfare as including the ‘fulfillment of certain basic interests such as maintaining one’s personal safety, health and capacity to pursue one’s chosen life plan’ (p104)\(^9\). This view is similar to that which Rousseau’s social philosophy\(^10\) postulates. For Rousseau, human beings have the right to a life of equality and liberty in a simple community. He maintains that in a free society people would gain freedom which could only be limited by what he termed the ‘general will’. In Rousseau’s view, the ‘general will’ is considered the will of the community as a unified whole, expressing its general interest since the individual’s will is contained in the general will, it cannot be limited by it (one’s own will cannot limit one’s freedom).

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\(^8\) Mill J.S, Utilitarianism, Collins Sons, Great Britain, 1962 at 284-5.
The communitarian principle of welfare then, views individuals as social beings, and entitled to liberty as described by Rousseau and communitarians41: an individual could not be made free in isolation, requiring that they be brought to a position where correct choices concerning how to live can be made. This process would teach individuals about their interests and those of their society, facilitating the realisation that it would be in no one’s interest to act so as to undermine their society and consequently their identities. Noticeably, much of the argument about the principle of welfare depends on definitions of ‘community’42, ‘collective goals’ or ‘general interests’ or ‘the common good’.

However, the aim here is not to engage in a detailed discussion of how the notion of society has developed, or to try to attempt a conclusive definition of what would constitute the common good. Rather, the aim here is to emphasise the idea that, on the one hand individuals are social beings having the tendency to live together, with each having his or her own interests in personal safety, property protection and so on. Actions which might threaten these interests would seem to affect a nameable person in advance, and consequently criminalisation could be justified on the grounds of protecting such interests. On the other hand, however, one can conceive some common interests which are perceived as a collection of certain interests possessed by a large number of individuals, belonging to everyone in the community. These include environmental protection, public safety, food safety and so on. The assumption is that although an act which threatens them would threaten no specific person nameable in advance, it may affect anyone who happened to be in a position to be affected.

As such, it is in the interest of every individual to have these interests protected in order to enhance the well-being of the community. One can conceive that injury to the good of the community is ultimately harm to the interests of its individual members (Feinberg, 1988:89). Bearing this in mind, it is possible to imagine that some people would insist on exceeding the limits, attempting to infringe on both individual and collective interests.

41 See Wolff J, 1996 supra at 145.
42 For a discussion on what community is see for example Feinberg J, Harmless Wrongdoing, Oxford University Press, New York, 1988 at 101-112.
Therefore, a need for some kind of safeguard to ensure the protection of these collective interests is necessary. The impetus for the need to protect collective interests was recognised by social philosophers\textsuperscript{43} writing about the state of nature such as Aquinas and Rousseau. Moreover, liberal theorists such as Hobbes and Locke also acknowledged this need. For example, Hobbes considers it necessary to escape from the state of nature where people are entitled to do whatever is necessary to secure their survival without regard as to whether or not this would harm others. A solution perceived by Hobbes, Locke, Rousseau, Kant and Hume was to enter into a contract and to transfer the right of punishing the transgressor to a sovereign. This sovereign would possess all the legislative, judicial and executive powers necessary to safeguard the interests of the people who had authorised this.

In sum, one can conceive of a type of symbiotic relationship between protecting the collective and individual interests in a given society from harmful actions. Arguably, the protection of the collective good is ultimately a protection of the interests of the individuals who live in that society. By the same token, the protection of the interests of individuals would ultimately promote the common good of that society. This issue is further elaborated in the next section.

2.2.2.3. The harmfulness of behaviours

The harmfulness of behaviours as a moral foundation for criminalisation and the imposition of criminal liability can be considered from two perspectives. First, harm can be considered in a ‘physical’ sense, which I refer to as the ‘harm principle’. According to this principle, the type of harm which might invoke criminalisation is defined by reference to the principles of autonomy and welfare, as discussed below. Secondly, there is an extended notion of harm as advocated by Lord Devlin, which seeks to support the criminalisation of behaviours considered by some to potentially affect the moral cohesion

\textsuperscript{43} See social philosophy of Aquinas at p 15-20; social philosophy of Hobbes at p 31-37; social philosophy of Locke at p 40-44; social philosophy of Hume at 44-46; social philosophy of Rousseau at p48-50; social
of society. According to this notion, the harm involved is perceived in a ‘non-physical’ sense, which I shall refer to as the ‘moral notion of harm’.

### 2.2.2.3.1. Harm principle

Harmfulness as an intrinsic feature of conduct is one of the starting points when discussing issues of criminalisation and the imposition of criminal liability. A number of questions will be addressed while exploring ‘the harm principle’. These include the question of when the harmfulness of certain behaviour justifies the imposition of criminal liability. What kinds of harm should the criminal law be concerned with to criminalise? When does the ‘harm principle’ fail to justify criminalisation? Is harm a justifiable criterion for criminalisation, and why?

While considering the harm principle, it is appropriate to introduce it with the statement made by its foremost historical champion, John Stuart Mill\(^4\).  

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right…to justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign (p14).

Clearly, the harm principle allows personal freedom and liberty in the absence of harm to others. Feinberg (1973) helpfully elucidates the concept of ‘harm’, stating that ‘a humanly inflicted harm is conceived as the violation of one of a person’s interests, an injury to something in which he has a genuine stake’ (p26). Feinberg (1973:25-26) points

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out that Mill must be understood as including within the harm principle not only violations of individual interests but also of public ones. Husak (1987:231) argues that unless moral reasoning exists to supplement this and explain why the violation of certain interests should be counted as harms deemed worthy of protection, the harm principle would be rendered a useless tautology. When seeking to discern which interests may or ought to be protected by the imposition of criminal liability upon those who perform acts which infringe them, it is useful to consider direct harm to others, harm to the self and harm to the public interest.

First, the criminalisation of behaviour which causes direct harm to others is justified by the protection of individual autonomy. Following Mill, the restriction of an individual’s liberty through criminalisation is justified only to prevent behaviour which causes damage or harm to the interests of others. Mill uses the term ‘interest’ in this context to mean rights-based interests maintaining that:

[Individuals] should be bound to observe a certain line of conduct toward the rest. This conduct consists...in not injuring the interests of one another; or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights (p205)45.

According to the autonomy principle, the intervention by criminal law in the autonomy of individuals is justified on the basis of protecting the rights of others. As noted above, such rights are connected to autonomy and free action insofar as they are considered as entitlements to freely dispose of particular resources in the light of free individual decisions and actions. Following Locke, the moral foundation for criminalisation was primarily theorised in terms of universal human rights, understood as private property rights or entitlements of individuals to control and benefit from particular assets without limitations or restriction up until the point where such rights of others are threatened. Locke assumed that individuals have a primary right to ownership of their bodies and bodily powers, meaning that others have no right to contravene these through killing, injuring or enslaving them. This property right of the body was in turn seen to serve as a

basis for a legitimate right of ownership of external objects. Threats or actual unauthorised damage to property, life and bodily integrity by others are therefore categorically outlawed. It is clear that the emphasis on offences against the person and property remain central to the theory of criminal law. Within the criminal law, the major crimes remain offences against the person, including assault and battery, wounding, indecent assault, murder, manslaughter, and property offences, including theft, deception, burglary and handling of stolen goods.

In his work *Harms to Others*\(^4^6\), Feinberg asserts that the legitimacy of prohibition of behaviours through criminalisation springs from the prevention of either public or private harm to parties other than the actors. However, not all harmful acts to others can rightly be prohibited, apart from those which cause avoidable and substantial harm. Feinberg remarks that the gravity and seriousness of the harm compared to the social value of the conduct should be taken into account when criminalising such conduct. He (1984:203) further states that although a certain kind of activity might have a tendency to cause harm to individuals who are affected by it, effective prohibition of that activity would tend to cause harm to those who have interest in doing it. For example, to prevent A from harming B’s interest in Y might result in harming A’s interest in X. Feinberg (1984:203) argues that it is for the legislator, using the harm principle, to find a method of comparing the relative importance of conflicting interests to decide whether B’s interest in Y is less or more important than A’s interest in X.

Feinberg (1984:204) states that to measure the relative importance of conflicting interests, legislators must consider at least three ways in which interests can differ. First, the vitality of the interest, where some interests are more important than others, such that harming them is likely to lead to greater damage to the interests of individuals and community than harming the lesser important interest. Secondly, interests differ in the degree to which they are reinforced by other private and public interests. A third factor which needs to be considered when balancing opposing interests is their inherent moral quality. Feinberg argues that in certain cases all reasonable persons can be expected to
agree that certain interests, simply by their nature, are less worth protecting than others. For example, the sadist's interests in having others suffer pain is a morbid interest, which can be overridden or outweighed to protect others from suffering such pain. Feinberg (1984:206) claims that it is unlikely to be conducive to the public good to encourage development of the character flaws from which such interests spring, and that even if social advantage in individual vices existed, there would be a case against protecting their spawned interests, based upon their inherent unworthiness.

The second type of harm concerns harm to self. As stated earlier, the principle of autonomy allows the criminalisation of an individual's behaviour only when harmful to others. This means that if a particular behaviour is not harmful to others, such as the possession of drugs and/or drug dealing and consumption, then it should not be considered criminal. However, as Ashworth (1999:54) comments, the justification for the criminalisation of such behaviours and the imposition of criminal liability are usually advanced on the basis of the remoteness of harm and the principle of '_paternalism'. Paternalism involves the interference with another's liberty based on reasons referring to his or her welfare, good, happiness, and the protection of actors from potential harm they may inflict on themselves. In his work *Harm to Self*, Feinberg rejects 'paternalism' as a relevant and good reason for criminalisation, as it rests on a lack of trust which is normally owed to adults. In a similar vein, Roberts (2001-2002) drawing on the work of Feinberg also rejects paternalism as a general basis for criminalisation stating that 'paternalism is regarded with suspicion in contemporary western culture, and with good reason, since it competes with values of liberty, personal autonomy, and individual choice that people in liberal societies hold dear' (p228).

However, in this case utilitarian justification supports the limiting of an individual's liberty on the ground of 'paternalism'. From a utilitarian perspective, it can be argued that leaving individuals to engage in harmful activities poses the risk of self-harm, possibly leading to more disadvantages than advantages to the self and the community. In other

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words, to prevent intervention in another’s liberty concerning potentially harmful behaviours such as drug dealing may in fact deprive that person of his or her autonomy and consequently affect the welfare of the community. Von Hirsch (1996:260-270) points out that the reasons for the criminalisation of remote harms lie in the likelihood and magnitude of the harmful consequences which might ensue. Von Hirsch (1996:266) states that if, for instance, widespread use of a given drug would lead to lowered social productivity which, in turn, would create a criminogenic social environment, then the prohibition of such a drug would depend on an estimate of the likelihood and magnitude of such effects. He further argues that the normative basis for the imputation of the harmful consequences to the actor lies in an obligation to cooperate: we ought to work together for the sake of our joint interests by preventing certain harmful consequences.  

Thirdly, public harm is based on the definition of the principle of welfare as outlined above, and is mainly concerned with actions which might be harmful to society, damaging its interests and consequently affecting its well-being. Food safety, health, public safety and security and pollution, are examples of collective social interests which the imposition of criminal liability might be justified in protecting. Feinberg (1984:222-223) argues that the harm principle can be used to justify the prohibition of certain conducts deemed harmful to the public interest. He acknowledges that the notion of public interest is vague and has an elastic nature, although in general there are two connected conceptions by which a public harm can be identified. According to Feinberg (1984:222-223), the first involves a collection of specific interests of the same kind possessed by a large number of private individuals. While these do not necessarily belong to everyone, they could belong to anyone. Public harm in this sense is produced by generally dangerous activities that threaten no specific person but may threaten anyone in a position to be affected. For example, poison dropped into a water supply would cause public harm in this sense; not necessarily harming anybody, but causing a common danger to all. Regarding the second conception, Feinberg (1984:223) states that public interest is common or widely shared specific interests, shared by all or most persons in a

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community. Almost everyone has an interest in the prevention of crime waves, riot, contamination of the environment, and in maintaining public services whose collapse would constitute a public harm. He (1984:225) claims that the rationale for protecting shared interests is their importance to those who share such public interests, which derive considerable weight from social reinforcement. It may be worth stating that the ranges of activities which can potentially harm the community are generally the result of corporate rather than individual activities. The practices of corporations in areas such as occupational health and safety producing, unsafe products, pollution and rendering workers redundant so as to create unemployment leading to possible criminality are but several examples.

The ‘harm principle’ offers an explanatory justification for the criminalisation of behaviours directly and indirectly harmful to individuals and community. However, it is questionable whether this principle offers a proper justification for the criminalisation of behaviours which are considered by some to be harmless. These might include so called victimless crimes such as prostitution and consenting homosexual or heterosexual intercourse between adults. Clearly, the requirement of direct harm as grounds for criminalisation does not support the criminalisation of such behaviours. In addition, the ‘harm principle’ in conjunction with the autonomy principle relates to adult individuals who are capable of choosing their actions, and therefore the criminalisation of their harmless behaviours is groundless. It bears asking whether or not the justification for the criminalisation of such behaviours lies elsewhere.

Proponents of the principle of individual autonomy might accept a degree of ‘paternalism’ through the intervention of criminal law to protect children from engaging in activities harmful to themselves such as drug and alcohol consumption. However, they reject the intervention of criminal law on the same grounds where the individuals concerned are adults (Findlay et al, 1999:3; Murugason & McNamara, 1997:5-6). Also, much of the controversy surrounding the harm requirement as grounds for criminalisation and imposing criminal liability revolves around the criminalisation of incomplete crimes.
such as attempt where no physical harm has occurred, as well as many regulatory
offences such as driving without seat belts. The difficulty is that although these types of
behaviours are apparently harmless, they give rise to criminal liability. However, the
criminalisation of these behaviours could be upheld on the grounds of the prevention of
future potential harm, along with a utilitarian ground: criminalisation in order to avoid the
visiting of hardship on both the individuals involved and the community as a whole.

In sum, this section has considered the 'harm principle' as a moral foundation for
criminalisation and the imposition of criminal liability. Distinctions between harm to
others, harm to self and harm to the community were considered. The discussion has
shown that the emphasis on individual autonomy requires intervention by the criminal
law to prevent harm to others. In the same vein, the community welfare principle allows
such intervention to protect the interests of the community. It is important to note that
considering harm beyond direct harm to individuals provides a broader understanding of
criminalisation. The justifications differ for the types of harm as outlined above. For
example, the justification for criminalising direct harm to individuals hinges upon the
protection of their rights as identified by reference to the principle of individual
autonomy. Such criminalisation also finds support by reference to community welfare
ideas in the sense that it may deter others from engaging in harmful behaviours.
Moreover, the justification for criminalising actions which are harmful to the self lies in
providing protection to the individual concerned and the community. Drug dealing and
consumption, for instance, affect both the individual concerned as well as the community,
as various resources need to be allocated to deal with such matters. However, it is worth
noting that harm is an evolving concept: what might be considered harmful today may
not have been considered so some years ago, and it may not be so in the future. Thus, it is
the legislature's task to stay alert to the relative nature of the concept of harm by revising
and updating the law accordingly.

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49 This question will be discussed further when the 'moral notion of harm' is considered.
2.2.3.2. The ‘moral notion of harm’\(^{50}\)

Much of the controversy surrounding the discussion of the moral foundations of criminalisation and the imposition of criminal liability relates to the question as to whether certain types of behaviours should be criminalised because of ‘individual intuition’ of their immorality. In other words, should criminal law be concerned with the prohibition of certain behaviours because they are offensive according to some individuals and might threaten the social cohesion of society? As will be seen below, Lord Devlin contended that society is bound by a common morality which should be preserved and protected. Is there any common morality beyond the prevention of harm to individual rights and autonomy and the welfare of the community, as discussed above, which criminal law should be concerned to preserve? And does such common immorality constitute sufficient grounds for criminalisation and the imposition of criminal liability?

The discussion of immorality as a ground for criminalisation became significant in the realm of sexual behaviour in the 1960s and was subject to a debate between Lord Devlin in his work *The Enforcement of Morals in 1965* and HLA Hart in his work *Law, Liberty and Morality in 1962*. This debate was a response to the report of what is known as the ‘Wolfenden Committee’ on homosexual behaviour and prostitution, which asserted that there should be a realm of private morality which is not the law’s business. Although the report argued for an individualistic perspective following Mill’s principle, it accepted some intervention by the criminal law to protect the vulnerable (such as children) against exploitation and corruption. This can be justified on paternalistic grounds. However, as mentioned earlier, liberals reject the imposition of criminal law on the same grounds in order to protect adults. Therefore, how can intervention in the liberty of individuals be justified in this case? It is arguable that Lord Devlin in *The Enforcement of Morals*

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in effect advocated a communitarian perspective and maintained that society is entitled to the use of criminal law to preserve its own existence. Lord Devlin argued that society means a community of ideas, and without that shared ideas on politics, morals, and ethics no society can exist. Society is not something which is kept together physically; it is held by the invisible bonds of common beliefs. A common morality is thus part of the cement holding society together. He also argued that societies disintegrate when no such common morality is observed. As deviation from common morality affects the cohesion of society, it is necessary to criminalise immoral behaviour. Lord Devlin claimed that if society has no right to make judgment on morals, then the law must find a special justification for entering the field of morality. In this context, if homosexuality and prostitution are not in themselves wrongs, it is the task of the lawmaker who wishing to frame a law against certain aspects to justify their criminalisation. However, if society has the right to pass judgment on morality, and does so, then it may use the law to prevent and punish immoral behaviours as it does to safeguard anything else necessary for its existence. The test adopted by Lord Devlin to discover common morality is what he referred to as ‘the man in the jury box’: assembling of a group of ordinary people in a form of a jury and asking them to pass judgment on certain behaviour. If the conduct arouses feelings of indignation or revulsion in these people, then it is a sufficient indication that this behaviour is immoral since it contravenes the common morality, and should thus be a proper object of the criminal law.

HLA Hart in his work *Law, Liberty and Morality*\(^2\), rejected Lord Devlin’s argument. Hart argues that the claim made by Devlin that society depends on a shared and common morality has not been proven. Furthermore, Hart contends that even if this claim were true, it is not clear that moral sentiment against homosexuality is a necessary part of the common morality. Hart asserts that as the stock of moral beliefs changes from time to


time, it is not clear whether homosexuality was simply another case of change rather than behaviour which would lead to the disintegration of morality and consequently society.

Obviously, accepting individual intuition regarding the immorality of behaviours as a sufficient ground for criminalisation is a controversial matter. However, when assessing this ground a number of observations can be made.

First, the problem with Lord Devlin’s argument is that it relies on the mere feelings of ordinary people that certain behaviours are immoral. While he acknowledges that moral judgments can be derived from religion, he points out that law can no longer rely on doctrines in which people are entitled to disbelieve\textsuperscript{53}. That is, if religion is to be taken as the source of morality, any effort to persuade those who do not hold the same religious belief of the truth of certain moral principles will meet with failure. For example, in NSW, adultery and homosexual intercourse between consenting adult are not crimes, whereas in Jordan they are, as moral judgment on what is right or wrong in Jordan is largely derived from religion. Therefore, in order to avoid the futility of religious disagreements about the description of moral principles, and as the method provided by Lord Devlin to make moral judgments rests on mere feelings of disapproval or disgust of ordinary persons, it is necessary to look for other sources to rely upon for deciding issues of morality. These sources should be grounded in reasons, consistent with other standards used by persons to make a moral judgment. In order to provide a consistent and constructive approach to making moral judgments, guidance can be sought by invoking certain basic ethical/moral theories and concepts such as deontological and rights theories and utilitarianism\textsuperscript{54}, as discussed earlier.

Secondly, as Ashworth (1999:43-44) points out, the method adopted by Lord Devlin to discover immoral behaviour, namely mere feelings of ordinary persons, would confuse


moral judgements with prejudice, and may fail to reach agreement on the criminalisation of certain behaviours. That is because neither all immoral behaviours are crimes nor all crimes immoral\(^5\). For example, although adultery, and homosexual intercourse and extra-marital heterosexual intercourse between consenting adults might be viewed as morally wrong, in NSW they are not crimes, whereas in Jordan they are. Conversely, treason and some regulatory offences such as driving without seat belts are crimes although they are not necessarily immoral. The point is that despite the fact that morality might be an element in many crimes, it fails by itself to explain criminalisation (Brown et al, 2001:100).

Thirdly, the offensiveness of behaviours is one of the factors usually associated with immorality when the issue of criminalisation of certain behaviours is discussed. The idea of offensiveness involves a public-private place distinction. Thus, what individuals may carry out legally in private might be regarded as criminal if conducted in a public place. For example, sexual intercourse between a married couple and homosexual intercourse between consenting adults are permissible if conducted in a private place, but legally prohibited if conducted in public. The criterion of offensiveness forms the basis of a range of criminal prohibitions in the area of public order offences such as indecent exposure, pornographic literature, using indecent language and public drunkenness (Brown et al, 2001:103-104). Feinberg (1999:118-122) argues that there are many human experiences which are harmless in themselves, yet offensive and so unpleasant that we can rightly demand legal protection from them even at the expense of another's liberties. Feinberg supports his argument by providing a hypothetical example of 'a ride on the bus', inviting the reader to imagine certain behaviours such as nudity and sexual intercourse which might be normal if done in private but offensive if committed in public\(^6\).

In summary, although immorality by itself does not offer a sufficient explanation for the criminalisation of all wrongdoing, it still operates to allow criminalisation of certain behaviours, and consequently justifying the imposition of criminal liability.

2.3. CONCLUSION

This chapter sought to address and identify the moral foundations for the imposition of criminal liability through exploring the answer to the question ‘what is a crime?’ The answer is not clear-cut. An exploration of the moral foundations of criminal liability through answering this question has been considered from two possible perspectives. The first is referred to as the ‘positivist theory’ and the second the ‘non-positivist theory’. It has been demonstrated that the emphasis of ‘positivism’ in defining crime and providing a justification for the criminalisation of certain behaviours and the imposition of criminal liability is on factors outside the scope of morality. On the other hand, it has been illustrated that ‘non-positivist theory’ seeks to provide a moral justification for criminalisation and the imposition of criminal liability. It has been shown that these justifications involve consideration of the overlapping and interrelated issues of protecting individual autonomy, individual rights, community, welfare and the underlying issue of harm in its various forms.

It is worth emphasising that all the ethical theories, ideas, concepts and principles, discussed in this chapter have influenced criminal law in one way or another. The emphasis on the protection of individual autonomy and rights is reflected in the criminalisation of behaviours which cause or threaten to cause harm to these rights. For instance, it is a crime to infringe upon an individual’s right to life by killing, right to personal safety by causing physical injury, and right to property by stealing or causing damage to it. Furthermore, the emphasis on the prevention of harm to the general welfare and common good of the community has resulted in actions such as causing pollution and

producing unsafe products being denounced and criminalised by criminal law. Moreover, the justification for the criminalisation of certain offensive behaviours lies in maintaining the common morality of a society.

These theories which seek to address the question ‘what is a crime’ largely focus on the outcome or potential outcome of the behaviour. This is apparent from the focus on the consequences affecting an individual as a victim of crime, in terms of an interference with individual autonomy or particular rights. The theories also conceive of the community as being the victim of criminal activities, in terms of an interference with community welfare or social cohesion. However, it is clear that the focus on the consequences or potential consequences of the criminal behaviour fails to provide an adequate theory of why an individual can be convicted of a criminal offence when they may not have physically carried out the actions which in themselves caused the criminal consequence.

It is apparent that the exercise of individual autonomy to influence the individual autonomy of another (a co-offender or an innocent agent) is an important reason for criminalising complicit behaviour.

Noticeably, criminal law is not only concerned with the criminalisation of harmful conduct and its consequences (which has largely been the focus of this chapter), but also with explaining why the actor should be held accountable for such conduct and consequences. Accordingly, it is important to shift the focus from the consequences of ‘criminal’ behaviour to explore the culpability of the offender. Issues relating to notions of individual autonomy lies in the heart of exploring the moral foundations of individual culpability. A theoretical account of this issue is considered in Chapter 3.
3. **INDIVIDUAL AUTONOMY AS A GROUND OF CRIMINAL CULPABILITY**

### 3.1. INTRODUCTION

This chapter provides further theoretical foundations of the dissertation by exploring the extent to which individual autonomy forms a basis for criminal liability, and how such liability can be explained by reference to this notion in both New South Wales (NSW) and Jordan. Foundations laid here underpin the analysis in the subsequent chapters of how criminal law has come to take individual autonomy into consideration in determining criminal liability when there is more than one person involved in the commission of an offence. For that purpose, this chapter is divided into two sections. The first provides a theoretical account of the concept of individual autonomy as grounds for criminal culpability in both NSW and Jordan. The second deals with 'culpability requirements'. It considers the extent to which the criminal law in both jurisdictions recognises the autonomy of individuals as a ground for the imposition of criminal liability. It also considers the circumstances in which the criminal law is prepared to forgive individuals for their wrongdoings when they are the product of an impaired, relinquished, or neutralised autonomy. Three matters are considered in this connection. (1) The notion of voluntariness; (2) the explicit moral psychology of individuals through an analysis of the requirement of mens rea; and (3) some insight into the implicit moral psychology of individuals by considering defences.

### 3.2. INDIVIDUAL AUTONOMY AND CRIMINAL CULPABILITY

The focus upon the notion of individual autonomy is central both in determining the nature and scope of criminalisation and providing grounds for criminal culpability. The first aspect (the nature and scope of criminalisation) was addressed in the previous chapter through the exploration of the principles which underlie criminalisation and the imposition of criminal liability. This chapter presents a theoretical account of the second
aspect (the grounds of culpability), by explaining why the actor can be held accountable for engaging in harmful conduct. As far as the question of criminal liability is concerned, in both NSW and Jordan, the focus upon individual autonomy is central in providing grounds for the imposition of such liability. In the following analysis, I first consider the position in NSW, followed by Jordan.

To the extent that the criminal legal systems in the common law world, including Australia, has a principled philosophical and ethical foundation, such a foundation is provided by the classical liberal thinking that developed in England in the course of the seventeenth and eighteenth centuries. As mentioned in the last chapter, central to this tradition of thinking is the idea of individual autonomy as fact and value. On the factual side, social phenomena are understood in terms of the interaction of individual human atoms, driven essentially by the pursuit of their own self-interest, the pursuit of pleasure and the avoidance of pain. On the value side, the maximisation of the scope of free action (of such individual liberty) is seen as a major intrinsic good and primary goal of social policy. In understanding individual autonomy as a foundation of criminal liability, criminal law understands such liability in terms of free individual decision and action. Apart from ‘natural disasters’ of various kinds about which the legal system can do very little, major threats to individuals’ lives and property are seen to come from anti-social free choices of individuals. The essential role of criminal law is to protect the free action of some through punitive re-direction of the anti-social free choice of others. Actions which are not seen as resulting from such free choices due to insanity or duress, for instance, neither deserve nor could be expected to be effectively influenced by such punitive criminal intervention; they are therefore outside the scope of culpability.

The emphasis upon the free choice of individuals as the foundation of criminal culpability finds expression in the requirement to establish that the accused’s guilty mind or mens rea (whether it be subjective or objective) has caused a particular criminal action or the actus reus. Did he or she really intend to perform the action in question, and did his or her intention really cause them to perform that action? In both NSW and Jordan, the underlying assumption is that of ‘a responsible agent who has chosen to break the
rules’.\(^5\) This poses a serious question which relates to the issue of whether or not individuals are free in their decision-making and action, including the commission of a crime. The following discussion addresses this issue.

### 3.2.1. Components of autonomy in western philosophy

#### 3.2.2.1. Consciousness

##### 3.2.2.1.1. The nature of consciousness

The notion of consciousness plays a central role in the model of criminal culpability. Yet the nature of consciousness has only recently become a subject for serious philosophical and psychological investigation, and there are a number of major theoretical conflicts between the investigators.

Searle (1999:68) maintains that consciousness is treated as a metaphysically distinct, non-physical phenomenon by the dualists,\(^8\), while materialists,\(^9\) deny its existence as real and irreducible phenomenon and maintain that there is no such thing as consciousness over and above ‘material’ and ‘physical’ processes described in third-person terms. As Searle (p47) asserts, materialism comes in many different varieties. This includes ‘physicalism’ which describes mental states as simply brain states and ‘strong artificial intelligence’, with minds conceived as computer programs implemented in the brain. Furthermore, the so-called ‘eliminative materialists’ refer to our everyday vocabulary of ‘mental states’ (including beliefs, desires, perceptions etc) as ‘folk psychology’. They maintain that folk psychology as theory is now refuted and in need of replacement by a neuroscience of brain states and operations. Searle (1999:43-44) points out that others have argued that

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\(^5\) While it may be considered that offences of absolute liability, strict liability and negligence do not fall within the scope of this statement, nevertheless, the role of autonomy as a foundation for liability of such offences is discussed further below in this chapter.

\(^8\) Dualists say that mental states and physical states must be states of two quite distinct kinds of things, minds and bodies (Norman, 2004 56)

\(^9\) Materialism is defined as connoting the view that human beings are just physical systems (Norman, 2004 58)
the essential subjectivity of consciousness prevents us from producing a scientific account of consciousness, placing it beyond the reach of scientific investigation. Science is by definition objective, consciousness is by definition subjective, thus there can be no science of consciousness.

Searle (1999:47) himself argues that dualism in any form makes the status and existence of consciousness utterly mysterious. Dualists cannot explain how consciousness relates to the material world, having postulated a separate mental realm. For instance, how are we to think of any sort of causal interaction between consciousness and the physical world? Furthermore, dualism is particularly problematic insofar as it implies gaps in the physical sequence of brain states. That is, the processes in the brain must stop when they are transformed into mental processes of experiencing hunger and deciding to eat, and then start again when the mental events produce more brain processes and muscle movements. Norman (2004:68) argues that this cannot be valid, claiming there is every reason to suppose that the sequence of physical processes is continuous and uninterrupted, with each physical event causing the next, from stomach contractions to brain processes to movements of the muscles and limbs. He further acknowledges that we may not be able to describe the complete sequence in detail, but the current state of scientific knowledge in physiology and neuro-physiology can identify the kinds of physical processes taking place at each stage, thus asserting the absence of gaps in the sequence.

At the same time, eliminative materialism is equally inadequate. According to Searle (1999) 'it ends up denying the existence of consciousness and thus denying the existence of the phenomenon that gives rise to the question in the first place' (p47). Along these lines, Norman (2004:64) points out that an obvious objection to eliminative materialism is that, in abandoning folk psychology, eliminativists would be ‘depriving themselves of the very language which they need in order to state and defend their theory. They would no longer be able to talk of beliefs, claims and assertions, or reasons and the evidence of experience’.
While many philosophers today still adhere to some form of dualism, most practicing philosophers endorse some form of materialism (Searle, 1999:46). In this sense, they do not believe that there is such a thing as consciousness ‘over and above’ the physical features of the physical world. But as Searle points out, this sort of adherence is problematic in the sense that it denies any possible objective knowledge about consciousness. Searle himself argues that consciousness is both a unique phenomenon not reducible to any physical process describable exclusively in the third person terms, and at the same time an ordinary material-biological phenomenon like digestion or photosynthesis, amenable to scientific investigation and explanation. However, he states, the fact that conscious states have an essentially subjective mode of existence, as experiences of a human or animal, does not preclude objective knowledge about such states by way of description and explanation ‘true independently of the feeling or attitudes of individuals’ (p44).

In his attempt to overcome the limitations of both materialists and dualists, Searle (1999) identifies consciousness in the first instance as

Those states of sentience or awareness that typically begin when we wake up in the morning from a dreamless sleep and continue throughout the day till we fall asleep again. The essential feature of consciousness in all forms is its inner, qualitative and subjective nature (pp40-41).

At the same time, Searle argues that consciousness consists of higher level processes realised in the structure of the brain and caused by lower level neuronal brain processes ‘in the same way as digestion is a higher level feature of the stomach or liquidity a higher level feature of the system of molecules that constitutes our blood (p52).

According to Searle (1999:104), conscious states can affect the body in various ways and bodily changes can affect consciousness. For example, a lack of water in the system leads to certain actions in our kidney, which in turn secrete a substance into the blood that affects the brain in such a way as to produce a conscious desire to drink. The objects we experience cause our experience via the relevant bodily sensory systems. On the other
hand, when we consciously intend to move our bodies, this intention causes the relevant bodily movement.

As noted earlier, the physical causal sequence of events is continuous and unbroken. So too is the flow of conscious awareness. However, as Norman (2004) points out, ‘the mental sequence of sensations and desires and decisions and the physical sequence of neural events are not two separate and independent sequences’ (p69). According to Norman these sequences are correlated, so that different mental acts and experiences will involve correspondingly different brain states. He further asserts that talk of mental states and corresponding physical states are, in some sense, different ways of describing the same set of phenomena.

3.2.2.1.1. The structure of consciousness

Searle (1999:73-83) proceeds to identify what he refers to as the ‘fundamental structural features of consciousness’. These include ontological subjectivity: all conscious states exist as experienced by an agent. It is also crucial to understanding consciousness to perceive it as coming to us in unified forms. The ability of the agent to bind together all of the diverse stimuli that come into his or her body by way of the sensory nerve endings and to unite them into a unified, coherent perceptual experience is a remarkable capacity of the brain. The unity of consciousness comes in two forms. First, all conscious states are united at any given instant into a single, unified conscious field—vertical unity. And the preservation of the unity of the agent’s experience requires at least a minimal short-term memory. An agent could not have the consciousness of a coherent thought unless both a beginning and an ending of the thought were part of a single, unified field of consciousness united by memory. In short, without memory, there is no organised consciousness-horizontal unity.

The feature of consciousness considered most essential to the survival of an agent in the world is that consciousness gives the agent access to the world other than his or her own
conscious states. The two modes in which consciousness does this are through the
cognitive mode, where the agent represents how things are, and the volitive or conative
mode, representing how he or she wants them to be. In this respect, consciousness is
essentially tied to intentionality.

As Searle explains, intentionality in this first and broad form ‘is simply that feature of
mental states by which they are directed at or about objects and states of affairs other than
themselves’ (p85). As an example, Searle states that just as an arrow can be fired at a
target and miss, or fired even in the absence of a target so too can an intentional state be
directed at an object and be misdirected, or fail altogether because no object exists.
Intentional states in this sense include beliefs, desires, hopes, fears, imaginings,
perceptions and so on. They also include intentions in the narrow sense of ‘intending to
perform some action in the future’.

Although there are many unconscious intentional states and many conscious states which
are not intentional, an essential connection exists between consciousness and
intentionality. In this regard, the attribution of a mental state to an agent is either the
attribution of a conscious state or an attribution of a state that is the sort of thing that
could be conscious. For example, I can say that A believes that B is the president of X
country even if A is asleep. What is attributed to A here is not a conscious belief but
rather a brain capacity that enables A to have a conscious belief that B is the president of
X. While there may be many unconscious states, an unconscious state is mental only in
virtue of its capacity, in principle, to produce a conscious mental state (Searle, 1999:76).

An important feature of consciousness is that all conscious states come to the agent in
one mood or another. For example, we are always in some mood even if it does not have
a name like elation or depression. This mood is what one might refer to as a certain
flavour of the experience. Any conscious state a person may have always comes with
some sort of coloration, and this becomes clear during a dramatic shift. If a person
suddenly receives some bad news causing a state of depression, or receives some good
news sending him or her into a state of elation, then he or she will become aware of the
shift in his or her mood (Searle, 1999:77).

Another feature of conscious states is that in their non-pathological forms they are always
structured. Namely, an agent structures his or her conscious experiences into coherent
wholes in one aspect, and in the other, he or she has his or her experiences of any
intentional object as a figure against the background. This is obvious in the case of
vision. For example, the agent sees a book against the background of a desk, and can see
the desk against the background of the room.

Consciousness comes in various degrees of attention. In any conscious experience, it is
necessary to distinguish the center from the periphery of our attention within the field of
consciousness, and a person is typically able to shift his or her attention at will. For
example, a person can pay attention to a computer screen and ignore the pressure of his
or her body against the chair. This is not to say that he or she is unconscious of the
pressure, but it is just that the pressure is on the periphery of his or her consciousness.
Peripheral consciousness is not the same as unconsciousness, which explains why the
person can shift his or her attention away from the computer to the pressure of his or her
body on the chair. Conscious states are always pleasurable or unpleasurable to some
degree. For any conscious experience, there is always a question: did you enjoy it? Was it
fun? Were you happy, unhappy, and pleased? Although conscious experiences range in
differing degrees of pleasantness and unpleasantness, the same conscious experience can
of course contain both pleasant and unpleasant aspects.

Explaining the difficulties involved in describing consciousness and how it fits into the
world in his book Mind, Language and Society (1999), Searle points out that:

Any attempt to describe consciousness, any attempt to show how consciousness
fits into the world at large, always seems to me inadequate. What we are leaving
out is that consciousness is not just an important feature of reality. There is a
sense in which it is the most important feature of reality because all other things
have value, importance, merits, or worth only in relation to consciousness. If we
value life, justice, beauty, survival, reproduction, it is only as conscious beings
that we value them. In public discussions, I am frequently challenged to say why I think consciousness is important; any answer one can give is always pathetically inadequate because everything that is important is important in relation to consciousness. As far as coping with the world is concerned, the important feature of consciousness is that it is essentially connected to intentionality (p83).

3.2.2.1.1.1. Problems of conscious will

Although we have begun to clarify issues of the nature of conscious awareness, there are further questions associated with the idea of causation of action by conscious will or intention. Recently a number of people, particularly psychological researchers, have vigorously challenged the idea that human action generally or ever results as a causal consequence of such conscious intention. In his book *The Illusion of Conscious Will*, psychologist Daniel Wegner (2003) describes the research of Benjamin Libet and others involving individuals asked to move a finger spontaneously while wearing EMG electrodes on the fingers and EEG scalp electrodes. They were asked to report the position of a moving spot of light on a screen, as an accurate time measure, when they experienced ‘conscious awareness of wanting to perform the finger movement’ in question (p52). In another experiment, they were asked to report the location of the dot when they became aware of actually moving the finger (p53). The research showed that ‘the conscious willing of the finger movement’ occurred at a significant interval after the onset of electrical brain activity known as ‘readiness potential’ and previously identified as a necessary neuronal precursor to action. Thus, Wegner argues ‘it seems as though a general readiness for voluntary action resolves into a more localised activation of the area responsible for the specific action just as the action unfolds’ (p50).

Wegner (2003) argues that as the research showed, ‘the experience of conscious will kicks in at some time after the brain has already started preparing for the action’ (p54). He further points out that Libet sums up these observations by saying that ‘the initiation of the voluntary act appears to be an unconscious cerebral process. Clearly, free will or free choice of whether to act now could not be the initiating agent, contrary to one widely held view’.
As Wegner says

If conscious will is an experience that arises from the interpretation of cues to cognitive causality the apparent mental causation is generated by an interpretation process that is fundamentally separate from the mechanistic process of real mental causation...because we have thoughts of what we will do, we can develop causal theories relating those thoughts to our action. The co-occurrence of thought and action may happen because thoughts are normally thrust into mind as previews of what will be done... the engines of causation operate without revealing themselves to us and so may be unconscious mechanism of mind (pp96-7).

If Wegner were right, this would pose major problems for criminal law, insofar as the law presupposes mental-intentional causation of action. However, the work of Searle suggests that there are alternative explanations for the genesis of human behaviour, and it is to these I now turn. An application of Searle’s analysis casts serious doubt on Wegner’s conclusions.

3.2.2.2. Intentionality in the narrow sense

Searle states that intention, in the narrow sense, refers to a mental state that is both a reason for action and a cause of action. We intend to achieve X, we believe that we can achieve X by performing action Y. This desire and this belief together provide at least part of the cause of our deciding and hence intending to perform an action. And this intention becomes at least part of the cause of our performing action Y, along with actual access to relevant material means. Thus, the paradigm case involves what Searle (1983) calls ‘prior intention’ where the agent has the intention to perform the action prior to the performance of the action itself, where, for example, he ‘knows what he is going to do because he already has an intention to do that thing’ (p84). However, it also involves the intentional action itself, which includes an ‘intention-in-action’ as cause of a particular bodily movement. The prior intention causes the action which itself involves the intention-in-action causing a particular bodily movement. Often the prior intention will be of quite high order such as getting to work, and requires a complex sequence of specific subsidiary actions for its achievement such as opening the car’s door. In fact, intentions come in nested hierarchies, with some higher order ‘plans’ possibly taking
years to unfold, through innumerable more specific sub-plans and intentional actions. At the other end of the scale, there is often no prior intention at all. Searle (1983) states that ‘many of the actions one performs, one performs quite spontaneously, without forming, consciously or unconsciously, any prior intention to do those things’ (p84). Yet even spontaneous actions still involve the causation of bodily movement by intention-in-action.

Prior intentions can be at least in part preconscious in the sense of involving abiding beliefs and desires accessible to conscious introspection and deliberation, while not actually accessed. They also can be unconscious in the form of repressed beliefs and desires of the kind investigated by psychoanalysis. We might form, for example, a desire to hurt our boss, but this desire might then be subject to repression or intentional forgetting and might later emerge through internal mental transmutation of displacement in the intention-in-action of hitting our child. In this case, we might well rationalise such an action by reference to a supposed prior intention of recognising the need to discipline the child for their own good. Obviously, this would not be the real prior intention.

So just because people do not always deliberate prior to engaging in conscious action does not mean that such action is not intentional. Prior intention can be non-conscious i.e. pre-conscious or even unconscious and just because the intention is not immediately present to consciousness as a representation does not mean that it is non-mental or mechanistic. Intentional bodily movement can still be seen as caused by intention-in-action, whether or not such intention-in-action is caused by prior intention. It is true that unconscious intentions, like conscious intentions, must be both produced by and released in the electrochemical operation of the brain and the operations producing all mental phenomena presumably commence prior to the production of the phenomena in question. This is indeed an alternative explanation of the ‘readiness potential’ referred to by Wegner. It is the beginning of the neurological process of the production of intention.

It is true that in some cases ‘moral responsibility’ seems to be as much concerned with prediction of our likely or possible spontaneous response as with decision alone. We
choose to avoid situations in which we know there is a risk that we will respond in some undesirable fashion. Here, we treat ourselves as an object in the world rather than a subject, where memories of our past behaviour act as material for inductive generalisation and causal explanation. Nevertheless, we are still choosing an action in the light of such understanding, and this is not so different from action directed by belief about the likely behaviours and responses of other subjects and objects in our environment.

We now see that the phrase ‘resulting from conscious intention’ is crucially ambiguous. It could mean action which is intended and conscious in Searle’s sense of an intention-in-action as the cause of bodily movement. It could refer to the existence of a conscious or non-conscious prior intention as the cause of intention-in-action. Or it could refer to the intervention of conscious deliberation between reason and decision or between decision as prior intention and action or intention-in-action. For criminal legal purposes, it is possible to interpret the expression ‘action resulting from conscious intention’ as conscious action resulting from intention. This is because the action which is not conscious is not an action (rather a bodily movement), and intentionality is crucially connected to consciousness as it operates to direct individual behaviours.

3.2.2.3. Free will

Human behaviour, where rational, functions on the basis of reasons which explain the behaviour only if the relation between reason and behaviour is logical and causal. In other words, intentional causation explains human behaviours. In explaining the relation between intention and action, Searle (1983:79-101) states that prior intention causes intention-in-action which causes the bodily movement. But the intentionalistic explanation of behaviour does not imply that the action had to occur. When a person explains his or her own behaviour by stating the beliefs and desire that motivated their actions, he or she does not normally imply that they could not have done otherwise. This
is because there are some volitional gaps\(^60\) between the stages of deliberation up to the completion of the action (Searle, 2001:40-50). The name usually given to these gaps is ‘freedom of the will’.

First, a gap exists between deliberation and the prior intention that is the result of such deliberation. When a person reasons from his or her desire or belief as to what course of action should be taken, there is a gap between the causes of his or her decision in the form of beliefs and desire and the actual decision. This gap provides a space not just for adjudicating between conflicting reasons for action, but for re-thinking the nature of our obligations and commitments in the light of new information and experience. Such re-thinking need not just be a matter of internal thought process; it can also involve external discussion and debate with others.

Second, there is a gap between the prior intention and the intention-in-action. That is, the gap between the decision and the performance of the action. Thirdly, in the course of the performance of the action, gaps may exist between the original initiation of the action and its completion. Just as the gap between desires and decision allows for the possibility of moral/legal decision and action, so does the gap between decision and action (and gaps within ongoing sequences of actions) allow for further reconsideration and changes of mind and action. Gaps do not always exist, as individuals do not always form intentions to perform actions prior to the actual performance of the action themselves. Often, an individual merely responds to external or internal stimuli of some kind without deciding before hand that he or she would respond in this way or knowing that he or she was going to do so.

But, as Searle (1983:84) argues, it is important to recognise that this does not render our actions unintentional. For example, even in the case of a quite spontaneous response of hitting someone who has hit you, you would, in many cases, say that you still hit that person intentionally and the action was done with the intention of hitting. Here, the

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\(^{60}\) The gap is that feature of conscious decision-making and acting where a person can sense some alternative future decisions and actions as causally open to him or her (Searle, 2001:62).
intention and action are inseparable, but the intention-in-action as Searle calls it can still be distinguished from the bodily movement which it causes.

Furthermore, it is also possible that the action in question can be traced back to some earlier decision-situation involving a choice or decision to put oneself in a situation or type of situation or not to avoid a situation in which such a spontaneous action was possible or likely. More broadly, in some sense, individual actions result from deep structures of thoughts and personality which themselves, to some extent, are products of conscious decision-making. Individuals are sometimes in a position to choose a particular ‘pattern of life’ through self-commitment to a period of education, training or psychotherapy, through moving into a radically different social environment or failing to make such changes.

3.2.2.3.1. ‘Inaction’

Criminal lawmakers in the common law systems have been anxious to clearly distinguish ‘action’ (as a source of moral and legal responsibility) from ‘inaction’ (which incur no such responsibility). From this perspective, everyone is responsible for looking after themselves alone, with no one bound to be ‘their brother’s keeper’. Thus, the common law recognises no general duty to rescue others in distress, for example, even where this can be accomplished with ease and minimal threat to the rescuer. This distinction has traditionally been defended by the assertion that it is the law’s business to ‘arrest acts of positive harm’ but not to ‘encourage or require acts of positive good’. So it is supported by the classical liberal conception of society as no more than an aggregate of competing individuals, each of whom is responsible to the other to the extent they have voluntarily entered into legally recognised contractual relations with the individual in question. Without such freely undertaken contractual arrangements, relations of responsibility or commitment between individuals do not exist.
A closely related issue is that of medical personnel causing death by ‘failing to administer’ necessary medication or nutrition at the request of the patient or their representative to terminally ill adults or seriously handicapped new born babies. This is radically distinguished, as lawful, from ‘active’ and unlawful administration of a lethal injection at the patient’s or their representative’s request. Here, the causal efficacy of ‘inaction’ is vigorously denied, with death attributed rather to the natural course of the illness. Yet it is far from clear that such an idea actually makes much sense in practice. Thus, it has frequently been pointed out that failure to take action in these sorts of cases of rescue and treatment is in fact a form of action, since individuals actively restrain themselves from taking the apparently ‘correct action’ or actively withdraw treatment, in the latter case. As Norrie (2001) says:

An omission can be described as a negative act, a description which indicates that omissions are in their essence similar to rather than different from acts. Omissions can be conscious decisions either not to do something or to do something other than the thing that is not done... either way, to describe a failure to act is as much to describe a practical orientation to the world as is the description of an act (p121).

If the real moral and legal issue is ‘free decision’ to do ‘the right thing’, then there is really no moral distinction between the two sorts of cases. Definite causal consequences including ‘positive harm’ and ‘good’ flow from the free decision not to take action as much as from the decision to act. Once again, as Norrie argues ‘omissions can be as much the cause of an event as acts. An omission can serve just as well as an act as a necessary and sufficient condition for any particular outcome’ (p121).

In terms of Searle’s analysis, we can see how ‘inaction’ in specific situations can result from a particular prior decision producing a prior intention. One may decide to refrain from action in some particular future situations with a view to producing particular causal consequences of such inaction. Perhaps this involves ‘actively restraining ourselves’ from performing some action we might otherwise feel constrained to undertake. Similarly, we can see how past decisions could contribute to cases of ‘spontaneous inaction’ without any such ‘direct’ prior intention. Failure to take steps to prepare ourselves to help others
in need (as such occasion might arise) could contribute to our ‘freezing up’ when encountering situations in which we might otherwise have averted very substantial harm to others with minimum harm to ourselves for example.

3.2.2.3.2. Autonomy and the limits of free will

So far I have mapped out only the barest of necessary conditions for free decision and action. I now consider some more concrete conditions for, and possible restrictions upon such free action.

In the western moral philosophical tradition individuals are deemed to act autonomously when they, and not others, make the decisions that affect their lives and act on the basis of their decisions. Mappes and DeGrazia (1996:25-28) distinguish three different ideas or dimensions of autonomy which go along with different sorts and degrees of possible obstacles and restrictions to free conscious actions.

First is autonomy as liberty of actions, which is close to the traditional criminal legal conception, where an individual is autonomous if his or her action results from his or her conscious intention rather than external coercion or duress. In this sense, autonomy connotes the individual’s conscious intention to voluntarily act or refrain from action. Where A sits under a tree not having been forced by anyone to do so, and if A is free to leave at any time, A can be said to be acting autonomously insofar as his or her action is intentional and voluntary. But if A were physically forced to sit under the tree, then A’s autonomy would be violated, meaning A could not be deemed to have acted autonomously (Mappes and DeGrazia, 1996:25).

Second is autonomy as freedom of choice, which refers to the range of choices actually available to an individual in terms of access to material means for the realisation of particular goals or desires. Suppose A wants to undergo a vasectomy, and there is only one surgeon who can perform that surgery in A’s area of residence. The surgeon refuses
to perform the surgery based on the conviction that it is an unwise decision for a young man like A, and A’s financial status does not allow him to travel in search of surgery elsewhere. In this example, A’s lack of freedom is not due to any coercion; his autonomy is limited since his choices are narrowed (Mappes and DeGrazia, 1996:25-26). As noted earlier, intention is a part of the causation of action but such intention only ever becomes ‘operative’ in effective causation of action if the actor has effective control of the necessary resources of strength, skill, knowledge, tools, machines, assistance and opportunity.

Third is autonomy as effective deliberation, which refers to internal rather than external resources available for, or restrictions upon, the exercise of individual autonomy. In particular, it refers to the individual’s ‘capacity’ for making rational and informed decisions. In this sense, autonomy is allied with rationality, and an individual is characterised as one who is capable of making rational and unconstrained decisions and acting accordingly. On the one hand, an individual is described as rational when he or she is capable of choosing the best means to some chosen ends and capable of reasoning well on the basis of good evidence to choose the best means to achieve such ends. It also entails a capacity for choosing the appropriate timing to achieve any chosen goals. On the other hand, an individual is described as rational if he or she is capable of choosing appropriate ends, although what counts as appropriate ends is a notorious matter of dispute. As Mappes and DeGrazia (1996) point out,

These abilities can be limited in many ways. When they are, decisions and actions may be less than fully rational. First, some individuals may not have sufficiently developed the necessary abilities or may even be incapable of sufficiently developing them. Second, even individuals who have the requisite abilities may be unable to exercise them on a particular occasion due to various internal factors. For example, emotions such as fear may make the impartial weighing of information impossible...the presence of pain or the use of drug may also affect the exercise of reasoning abilities. It may be best, therefore, to speak of degrees of rationality and irrationality since many factors can make decisions and actions less than fully rational without pushing them to the irrational end of the spectrum. Furthermore, autonomy as effective deliberation may be constrained in ways that do not affect the “rationality” of the decision. Lies, deception, and a lack of appropriate information can all limit the effective exercise of the abilities required for rational deliberation (p27).
In sum, an individual is autonomous only to the extent that he or she possesses the abilities necessary for effective deliberation and reasoning free of internal constraints to exercise those abilities (autonomy of effective deliberation), and is neither coerced by others (autonomy of liberty of actions) nor has his or her range of options narrowed by material constraints (autonomy as freedom of choice).

3.2.2. The position in Jordan

So far the theoretical analysis of individual autonomy in conjunction with criminal liability is based on literature of ethics and philosophy from the western world including Australia. In Jordan three possible theories can be considered in the analysis of the basis of criminal liability, with the third being that which the JPC adopts, elaborated below (Alseid: 1998:515-523; Najem, 1988:176-183).

The first theory is that of freedom of choice (Alseid, 1998:515-518; Alshtheli, 1997:7-10), in which individuals are regarded as free agents, aware of what they do and their freedom of choice underpins their criminal liability. Alseid (1998:515) argues that historically the harshness and cruelty of responses to the commission of an offence resulted in criminal liability being expressed as based around the idea of moral fault. Thus, moral responsibility was seen as forming the basis of criminal liability, so before a person can be held criminally liable, he or she needs to commit a morally sinful or wrongful act. The advantage of such articulation is to restrict the reach of criminal liability only to those who, while consciously aware of and with the ability to distinguish morally wrongful and sinful acts from right acts, choose to commit the former. Under this theory, criminal liability is considered as a means of responding to a sinful act committed by a conscious individual, where the imposition of such liability is intended to deter the offender and others (Alqalali, 1948:3). Alseid (1998:516) points out that this theory considers individuals as possessing absolute and equal freedom of choice in relation to their decisions and actions, such that they should be held liable for sinful acts. However,
if an individual lacks freedom of choice because of insanity, for example, then he or she cannot be considered to have committed any wrongful or sinful act and consequently no criminal liability should be ascribed to that individual. Alqalali (1948:5-9) and Alseid (1998:517) criticise this theory on the grounds that it assumes the individual’s capacity for absolute free decision-making and actions; ignoring the fact that individuals’ decisions and actions can be influenced or directed by many circumstances, including psychological and social factors.

The second theory postulates that individuals are not free but subject to or compelled by the circumstances of their lives (Alseid, 1998:518-520; Alshtheli, 1997:10-13; Mosa, 1985:26-27). From this perspective, the actions of individuals are not the product of their freedom of choice but of many factors including social, natural and other factors. This theory argues that the accumulation of such factors compromises individuals’ choice and consequently leads to the commission of crime. This does not mean that the offender can escape criminal liability, but that his or her liability is articulated around the idea of social defence and the protection of society from criminal danger. In other words, criminal liability is seen as a means to defend the society against crime, and every individual who commits a crime is regarded as a source of criminal danger who needs to be responded to even in the case of insanity. According to this theory, the basis of criminal liability is not the freedom of choice of an individual, but the desire of the society to protect itself from crime.

Alseid (1998:519-520) notes that this theory divides criminals into different groups or categories, and assigns certain treatment to each one with a view to protecting society. There is a criminal ‘by nature’ who represents a great danger to the society, and should therefore be isolated from the society or executed. There is also the ‘insane criminal’ whose criminality is related to mental illness, for whom psychiatric treatment rather than punishment is recommended. There is the ‘habitual criminal’ who should be locked into a special place indefinitely unless proven he or she has changed or been rehabilitated. There is also the ‘criminal by chance’ who should be prevented from re-offending by preventing contact with the habitual criminal. Alseid (1998:520) criticises this theory on
the grounds that it is difficult to accept the claim that the offender is merely a victim of his or her circumstances, devoid of 'will'. He further argues that although the commission of an offence might be influenced by many factors or circumstances, the 'will' of the offender may well be one of these.

A third theory which tries to explain the basis of criminal liability seeks to reconcile the above two theories (Alseid, 1998:520-521). As with the first, this theory argues that the basis of criminal liability is freedom of choice, although this freedom is neither absolute nor equal for all persons. It is not so since individual freedom can be affected by many factors including 'who you are' (the individual's physical and psychological composition), and the circumstances surrounding you (the environment you live in). In addition, freedom of choice is also not equal for all individuals owing to reasons including one's own desires or beliefs, which may produce different choices concerning good or bad deeds. Thus, this theory posits individual autonomy as the basis of criminal liability. However, from the perspective of the individual's awareness and freedom of choice comes the recognition that such autonomy can be influenced or compromised by many other factors which need to be considered while determining the question of culpability. Article 74 of the JPC states that 'no-one shall be punished for an act unless he or she consciously and voluntarily has committed that act'. Therefore, the criminal law in Jordan construes and understands criminal liability in terms of free individual decisions and actions, and to some extent leaves outside the scope of criminal culpability actions which are not the result of such free choice. (This issue is further developed in the following sections).

3.3. Culpability Requirements

So far, the analysis shows that any philosophical discussion concerning the ethical foundations of criminal liability involves consideration of the notion of individual autonomy as a central theme. That is, the principles of criminal liability should be constructed around the idea of free individual decisions and actions, and to some extent,
locating outside the scope of such liability, actions which are not seen to result from the 
exercise of one’s autonomy. In this section, I provide a theoretical account of the way 
individual autonomy has been recognised as a basis of criminal liability in the criminal 
laws of NSW and Jordan.

Broadly speaking, the requirements of awareness, rationality, will and capacity on the 
part of the individual as a precondition for criminal liability is grounded in the principle 
of individual autonomy. This involves the idea that no criminal liability should be 
imposed on individuals unless they have acted freely, and that they can only be held 
liable on the basis of their choices. The essence of criminal culpability is the 
establishment of fault on the individual’s side before holding him or her criminally liable 
for the bringing about of the harmful wrongdoing. Much of the discussion surrounding 
the requirement of fault is focused on the establishment of one or more of the different 
types of mens rea as a prerequisite for an individual’s criminal liability, such as intention, 
recklessness, knowledge and so on. Nevertheless, as Ashworth (1999) points out, ‘the 
notions of fault and culpability go beyond and deeper than mens rea and require a 
discussion of other doctrines broadly termed ‘defences’’ (p209). However, the law 
requires that when establishing that the actus reus of an offence has been performed by 
the offender, the offender did so in a voluntary or conscious state. This becomes 
particularly important for offences of absolute liability and negligence which do not 
depend on the establishment of a subjective state of mind of the offender. Thus, before 
considering the various forms of mens rea and defences, I first consider the notion of 
‘voluntariness’ in criminal law.
3.3.1. Voluntariness

Individuals are deemed to have acted freely and autonomously so long they are conscious. An act committed while unconscious is necessarily involuntary. Consciousness offers individuals the possibility for moral deliberations, where they choose freely whether or not to moderate their behaviours in light of such deliberation. As Clarkson (1995) states, ‘the notion of responsibility involves being able to choose to commit a crime or not’ (p86). And this is pretty much how the criminal law views the matter. In traditional commentaries on criminal law it is said that the basic minimum requirement of moral responsibility in general and criminal liability in particular is voluntariness (Wilson, 2002:103; Ashworth, 1999:100; Safwhat, 1986:119; Duff and Von Hirsch, 1997:109-110). Basically, in order to claim that an individual has acted voluntarily, it is essential to establish that the wrongdoing is attributed to his or her action, rather than something else or a natural occurrence (Wilson, 2002:104).

The term involuntariness is used to denote the inability of an individual to direct personal conduct or exercise control over one’s bodily movement (Mousourakis, 1998:138). Bodily movement is voluntary to the extent that it is intentional and volitional: a voluntary action is more than muscular contractions which cause part of the individual’s body to move. It is considered to be the product of the individual’s conscious mind, through the exercise of what is often described as the exercise of ‘will to act’ (Brown et al, 2001:365; Gillies, 1997:27; Seago, 1994:32). Correspondingly, if the individual’s action is not willed, it cannot be designated a voluntary action, and consequently no criminal liability should be attributed to that individual (Wilson, 2002:106; Allen, 1991:20). As Clarkson (1995:38-39) points out, criminal law requires ‘a very significant

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62 Jiminez v R (1992) 173 CLR 572 at 577 per Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.
loss or absence of conscious control of behaviour, as in sleep walking or epileptic fit’ to render the action non-voluntary. Voluntariness, in this sense, plays a central role in the model of criminal culpability in NSW and Jordan.

In the Australian High Court case *Ryan v R*63, Barwick CJ at pp207-217 observed that an act which would constitute the physical element of an offence must be willed and voluntary. A person is not guilty of committing an offence if the deeds which constitute it were not done in the exercise of his or her will to act. He further indicates that the lack of exercise of will which precludes criminal culpability may result from many causes such as convulsion, epileptic seizure, sleepwalking, spasm, reflex action, automatic reaction or falling asleep64. In the same vein, Windeyer J at p244 in *Ryan* held that defining a voluntary act is complex, partly because of the ambiguity surrounding the term ‘voluntary’. However, he then notes that the term ‘involuntary’ is sometimes used to refer to an act done without the exercise of the will, and that an ‘unwilled act’ sometimes used as meaning an act done unwillingly: that is, by the reluctant exercise of a will under duress so that it was not a wilful act. He further asserts at p245 that examples of involuntary acts which involve the actor’s absence of will include an act done while in convulsions, during an epileptic seizure, when sleep-walking or while rendered unconscious for some reason. Windeyer J further states that such situations differ from ‘the case of a fully conscious man who has put himself in a situation in which he has his finger on the trigger of a loaded rifle levelled at another man. If he then presses the trigger in immediate response to a sudden threat or apprehension of danger...his doing so is...a consequence probable and foreseeable of a conscious apprehension of danger, and in that sense a voluntary act’ (p245). This implies that if the individual is to contend involuntariness, it is important to establish that there is no prior fault attributable to him or her in creating a course of events which could lead to causing harm. This type of reasoning reflects the notion of spontaneous action involving the causation of bodily movement by intention-in-action as discussed by Searle above. Where the person freely

63 (1966) 121 CLR 205.
64 See *Jiminez v R* (1992) 173 CLR 572. In that case the majority at pp577, 581 held that to constitute culpable driving the relevant driving must have been voluntary and driving while asleep is not a conscious or voluntary act.
chooses to put himself or herself in situations where it is possible or likely to be drawn into involuntary movements with criminal consequences such as unintentionally discharging firearms during an armed robbery, that person can thus be held liable for such consequences.

In order to hold individuals responsible for their actions, they must be conscious, capable of understanding what they are doing, and capable of controlling their bodily movement. It is an accepted moral principle that criminal liability should be imposed only with regard actions over which an individual has control or is capable of exercising control (Fitzgerald, 1962:102). Similar to the position in the common law in NSW, the JPC in Jordan regards voluntariness as a condition for criminal liability. Article 74 of the JPC states that 'no-one shall be punished for an act unless he or she consciously and voluntarily has committed that act'. However, there is no further exposition in the JPC as to when conduct is regarded as voluntary or involuntary.

Much of the discussion surrounding the requirement of voluntariness on the part of an individual when a crime is committed involves reference to issues which relate to intoxication and automatism.

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65 The Criminal Code Act 1995 (Cth) defines voluntariness and provides examples where conduct is and is not considered to be voluntary. Section 4.2 (1)-(5) of that Code provides:

4.2(2) Conduct is only voluntary if it is a product of the will of the person whose conduct it is.

4.2(3) The following are examples of conduct that is not voluntary: a) a spasm, convulsion or other unwilled bodily movement; b) an act performed during sleep or unconsciousness; c) an act performed during impaired consciousness depriving the person of the will to act;

4.2 (4) An omission to perform an act is only voluntary if the act omitted to be performed is one which the person is capable of performing.

4.2(5) If the conduct constituting an offence consists of nothing other than a state of affairs, the state of affair is only voluntary if it is one over which the person is capable of exercising control.
3.3.1.1. Intoxication

As noted above, for an action to be regarded as voluntary it needs to be the product of the conscious exercise of the individual’s will. Intoxication can affect both the consciousness and will of an individual so as to render his or her action involuntary. In this regard, intoxication\(^{66}\) is considered to be a relevant issue in determining the voluntary nature of an act and deciding criminal culpability in NSW and Jordan. In NSW at common law, a distinction is made between self-induced and involuntary intoxication and crimes of basic\(^{67}\) or specific intent\(^{68}\). This distinction was raised in the English case Majweski\(^{69}\) and later discussed in the Australian High Court case O’Connor\(^{70}\). In Majweski, it was held that self-induced intoxication is irrelevant to rendering the conduct of an individual involuntary if the crime committed is one of basic intent. Yet if the offence involved is one of specific intent, self-induced intoxication which raises doubt as to the voluntariness of the individual’s conduct can serve as a ground for exculpation.

The majority of the High Court of Australia in O’Connor rejected this approach\(^{71}\). Barwick CJ at pp70-74 held that if a person becomes intoxicated such that his or her personality is changed, will warped, disposition altered or self-control weakened, then although whilst intoxicated to this degree the person might become less aware of actions and their nature, such actions remain his or hers whether the state of intoxication is self-induced or results from the activity of another. Should the state of intoxication be so severe as to divorce the individual’s will from his or her bodily movement such as to render it truly involuntary, the person cannot be found guilty of any common law offence, provided the state of intoxication was caused by another person’s act. Barwick CJ says that in this situation what a person’s ‘body has done, he had not done, or what he had

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\(^{66}\) Intoxication is also relevant to the question of forming intention, and will be considered below.

\(^{67}\) Basic or general intent is defined as a mental state which relates to the doing of the act involved in an offence: He Kau Teh (1984) 157 CLR 523 at pp569-570 per Brennan J.

\(^{68}\) Specific intent is a state of mind which relates to the result's caused by the act done: He Kau Teh (1984) 157 CLR 523 at pp569-570 per Brennan J.

\(^{69}\) [1977] AC 443.

\(^{70}\) (1980) 146 CLR 64.

\(^{71}\) (1980) 146 CLR 64 per Barwick CJ, Stephen, Murphy and Aickin JJ judgments.
done had not been done with intent to do it’ (p73). He then proceeds to consider the case of self-induced intoxication involving deliberate self-intoxication (which can be understood by reference to Searle’s analysis of prior intention) as a means of performing an intended act.

Barwick CJ asserts that ‘the formation before intoxication of the requisite intent and the deliberate induction of a state of intoxication for the performance of...the act...makes that act when done...both a voluntary act and an act done with the requisite intent’ (p73). Barwick CJ refers to the division of crimes into those of ‘basic intent’ (the intent required in a crime in which the actus reus does not require the physical act involved to have been done to achieve a stated purpose) and ‘specific intent’ (the intent to do an act of a purposive kind) as ‘not...only inappropriate but it obscures more than it reveals’ (p81). This is the case as he says since ‘the purpose with which a proscribed act must be done in order to be relevantly criminal is...part of the description of the actus reus’ (p82). At p85 he concludes that if the evidence of intoxication is sufficient to raise doubts as to the voluntariness of the act, there is no logical ground for determining its relevancy based on the distinction between a crime which specifies only the immediate result of the act and a crime which in addition requires a further result dependent on purpose. Stephen J in O’Connor also refers to the arbitrary nature of the division of crimes into those of specific and basic intent. As he says, this division

Seems to be unfortunate. It is a point neither clearly defined nor easily recognizable, the selection of which does not reflect or give effect to any coherent attitude either as the relative wrongfulness of particular conduct or the degree of social mischief which that conduct is thought to involve; it seems an inappropriate response to natural concern lest intoxication be used as a device to escape punishment for crime (p104).

In New South Wales, the law governing intoxication in relation to the requirement of voluntariness is now found in Part 11A of the Crimes Act 1900 which overrules the common law position. As far as voluntariness is concerned, section 428G makes no distinction between crimes of specific and basic intent. Section 428G states that (1) self-induced intoxication cannot be taken into account in determining whether the relevant
conduct of a crime was voluntary and (2) if the intoxication was not self-induced, then a person cannot be held criminally responsible for that crime. According to section 428A of the same Act, intoxication is not self-induced if it was involuntary, resulted from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force or the administering of a drug.

In Jordan, Article 93 of the JPC explicitly exculpates those who commit offences while in a state of involuntary intoxication, making no distinction between crimes of specific or basic intent. Article 93 states:

There shall be no punishment for those whose actions at the time of the commission of an offence, were unconscious or unwilled because of the consumption of alcohol or any drugs without their consent or knowledge.

This formulation does not explicitly exculpate crimes committed while a person is in a state of voluntary intoxication, including those situations (1) where a person who while sober ingests alcohol so as to gain courage and strengthen resolve to commit a crime; and (2) where a person who, although contemplating the possibility of committing an offence on becoming intoxicated, nevertheless becomes intoxicated. Alseid (1998:622-623) argues, in these situations the offender does not escape liability, since they consciously became intoxicated with the intention of committing a crime. Arguably, in these two specific examples, Searle's analysis of prior intention is useful: if the individual knows that he or she is going to, or is likely to commit the crime when in a state of intoxication, the individual is considered to have formed the prior intention to commit that crime, and that intention is put into action when he or she ingests alcohol, which the person knows will increase the likelihood of the crime being committed.

3.3.1.2. Automatism

As noted above, in order to establish the liability of an individual, it is necessary to prove that his or her act was voluntary. A failure to prove the voluntariness of the actus reus
will result in the failure to prove the offence. When a person acts in a state of automatism his or her act cannot be regarded as a voluntary act. As noted above, while the *JPC* requires an act to be voluntary, there is no explicit reference to situations which are defined as involuntary. Thus, there is no explicit reference to the doctrine of automatism in the *JPC*. In contrast, in NSW (and other common law jurisdictions), there has been significant judicial discussion and academic consideration of automatism as a state which negates the voluntary nature of the conduct. As a preliminary issue, in NSW it has been questioned whether the question of automatism relates to the actus reus or mens rea of an offence. Gillies (1997) points out that

Some judges have discussed [the doctrine of automatism] in such terms as to indicate that it concerns the mens rea, viz, the automaton does not incur liability because he or she lacks the element of criminal intent or recklessness or knowledge required by the definition of the crime. Others have seen it as being concerned with the actus reus, viz, the automaton does not incur liability because her or his conduct does not reveal an actus reus...the more common view is the latter (p256).

As Gillies (1997:257) states if the actus reus is conceived as involving not simply a muscular movement but a willed muscular movement, then automatism goes to the actus reus. Similarly, Ashworth (1999:101) argues that automatism is not so much a denial of fault, as a denial of authorship: a claim that the link between mind and behaviour was absent means that what occurred was a set of involuntary bodily movements rather than the acts of an individual.

Gillies (1997:252,261) points out that the doctrine of automatism ‘might more aptly have been termed that of sane automatism’ in that where the automatonic act was the product of a disease of mind, the offender is classified insane and can plead insanity rather than automatism. The essence of automatism lies in the individual’s being incapable of controlling his or her bodily movements at the time of the commission of the crime to the

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72 See Keogh [1964] VR 400 at 401.
73 See Tsigos [1964] NSWLR 1607 at 1629 per Moffitt J; Ryan v R (1967) 40 ALJR 488 at 492 per Barwick CJ.
extent as not to conceive his or her action as the product of his or her conscious will (Ashworth: 1999:102-03; Gillies, 1997:252). Automatism relates to a defect of volition, that is, an ability to control one's actions, rather than involving a defect of consciousness, that is, a lack of cognition. However some cases exist which equate automatism with a complete lack of consciousness. Other cases suggest that automatism relates to the concept of involuntariness rather than consciousness and therefore a degree of awareness is not necessarily fatal to automatism being accepted by the jury. To this effect, Barwick CJ in Ryan v R (1966) 121 CLR 205 at p214 when considering Bratty v Attorney-General for Northern Ireland [1963] AC 386 at 481-2 said:

The involuntary quality which was claimed for the deed in that case was said to be due to psychomotor epilepsy and was described as automatism. But it is important...not to regard this description as the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack which is the relevant determinant...it is of course the absence of the will to act or, perhaps, more precisely of its exercise rather than lack of knowledge or consciousness which...decides criminal liability.

Thus, automatism operates to excuse the individual whose action was non-volitional from criminal liability even if the act was done while the person was partially conscious. States of automatism which might serve to negate voluntariness may be caused by concussion from a blow to the head, sleep disorder, dissociation arising from extraordinary external stress, dissociation resulting from severe psychological trauma produced by external factors, or a state of spasm, convulsion, epileptic seizure or reflex action.

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75 See Tsigos [1964] NSWLR 1607 at 1629 per Moffitt J referring to 'reduced consciousness'; Bratty v Attorney-General Northern Ireland (1963) AC 386 at 410 per Lord Denning referring to 'clouded consciousness'.
76 Re Wakefield (1958) 75 WN (NSW) 66.
77 Jiminez v The Queen (1992) 173 CLR 575.
80 See Ryan v R (1966) 121 CLR 205 at 215.
In sum, insofar as criminal liability is constructed around the notion of individual autonomy, it is necessary to establish the voluntary nature of a person's criminal action in the sense that it was the product of his or her conscious will. In this regard, criminal law accounts for the fact that when a person is involuntarily intoxicated or is acting under a state of automatism, he or she cannot be regarded as acting voluntarily, and therefore autonomously and is thus not subject to criminal liability. Criminal law does not however provide such an escape route in cases involving voluntary intoxication, or when the person consciously puts himself or herself in a situation which could lead to the commission of an offence while not autonomous. It is considered wrong that a person should escape criminal liability for actions whilst so intoxicated or in a state of automatism that his or her action is not willed, when voluntary choices have created the course of events which have led to such intoxication or automatism.

### 3.3.2. The requirements of mens rea

In both NSW and Jordan, it is trite law that the prosecution must prove both the actus reus and mens rea of an offence. In NSW, the term mens rea is used to connote both subjective forms (intention, recklessness, knowledge) and those which are not dependent on the subjective state of mind for all elements of the actus reus (negligence, strict liability, absolute liability). In Jordan, the various forms of mens rea are articulated in Article 64 which distinguishes between intention and fault. Fault is defined to include recklessness, negligence and non-observance of the laws and regulations.

In this section, I consider how the principle of individual autonomy, as developed in the first section of this chapter is embodied in the various forms of mens rea which underpin criminal culpability in NSW and Jordan. It is not the purpose of this section to critically analyse the application of these various forms of mens rea for particular offences. Rather, it is merely to consider each form of mens rea and the way in which individual autonomy underpins it, to provide these underpinning principles of criminal culpability in NSW and
Jordan. This analysis is further used to inform the discussion of the mens rea for crimes of complicity discussed in part two of this dissertation (Chapters 4, 5 and 6).

3.3.2.1. Subjective standards of mens rea

The subjective standards of mens rea usually refer to the individual’s actual state of mind when committing an offence. These standards include intention, knowledge and recklessness (each of which is considered in turn), and correspond to Mappes and DeGrazia’s definition of autonomy as liberty of action, as outlined earlier. According to these standards, the imposition of criminal liability depends on proving that the individual has consciously chosen to bring about the harm in the sense of intending it or at least being aware that it might occur. The subjective standards of mens rea play a central role in the model of criminal culpability in both NSW and Jordan.

3.3.2.1.1. Intention

Intention is the first subjective standard of mens reas, and frequently defined as the state of mind of an individual towards the act and consequence constituting the physical elements of a crime (Brown et al, 2001:376; Lacey, Wells & Meure, 1990:31). In both NSW and Jordan, intention can be actual or direct in that it connotes an individual ‘decision to bring about an act of a particular kind or a particular result’. Thus, intention

82 It is acknowledged that subjective forms of mens rea are often not used for more recently enacted statutory and regulatory offences.
83 He Kau Teh v The Queen (1985) 157 CLR 523 at 569 per Brennan J; Mohan [1975] 2 WLR 859 at 864; Article 63 of the JPC. Article 63 states that ‘intention is the will to commit a crime as defined by the law’. This formulation defines intention by reference to the will, but as Alseid (1998:279-80) points out, knowledge plays a crucial role in forming one’s intention. It is implausible to define intention by reference to the will only, and as he argues, Article 63 should be construed as requiring both will and knowledge as components of intention, since it is hard to conceive a person forming intention in relation to something he or she does not know.
involves a desire or wish to do an act or bring about a certain result, connoting both knowledge and the will to do so. As Brennan J in *He Kau Teh* 84 states, when A strikes B, his action can be divided into A’s voluntary movement and the presence of B in the path of A’s movement. Although A’s movement may be voluntary, he is not said to strike B intentionally unless he knows that B is in the path of his movement. In both jurisdictions, intention is taken to include the doing of an act (or omission) by an individual knowing that an event will follow, that is, the person foresees the occurrence of that event as a ‘certain’ result of his or her conduct85.

At common law in NSW there is authority to support the existence of so-called ‘constructive intention’ which corresponds to the formulation of Article 64 of the *JPC*. Although this form of intention encompasses foreseeable but unintended consequences, the offender is treated as if these consequences were intended. Article 64 defines constructive intention as: ‘a crime is intentional even though the result has exceeded the intention of the offender if he or she has expected its occurrence and accepted the risk...’. In *Stone* 86, the Court of Criminal Appeal of NSW commented that if a person ‘applies his mind to the consequences, and without concluding that they would probably happen (which is criminal intent) his state of mind was that he did not care whether they happened or not, that is recklessness’ (p34). Similarly, in *Crabbe* 87, the High Court of Australia noted that ‘on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequence to occur’, and held ‘if an accused knows when he does an act that death or grievous bodily harm is a probable consequence...That state of mind ‘is comparable with an intention to kill or to do grievous bodily harm’ (p469).

84 (1985) 157 CLR 523 at 569.
85 Hurly [1967] VR 526 at 540; Brown (1975) 10 SASR 139 at 154; Article 63 of the *JPC* encompasses this form of intention as it states ‘intention is the will to commit a crime as defined by the law’.
86 (1955) 56 SR (NSW) 25.
87 (1985) 156 CLR 464. The Court consisted of Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.
In determining whether a person has formed the required intention, it is relevant to consider whether he or she was intoxicated since the formation of intention presupposes consciousness and awareness. If a person becomes intoxicated to the extent of losing consciousness or awareness, it would be difficult to regard that person as having formed intention. In NSW, Part 11A of the Crimes Act 1900 regulates this matter and distinguishes between crimes of specific intent and others as far as intoxication is relevant to the formation of intention\textsuperscript{88}. Section 428C states that evidence a person was intoxicated at the time of committing a crime of specific intent can be taken into account in determining whether the relevant intention existed and whether the intoxication was self-induced or otherwise. However, the section makes an exception to this principle the case where the person shows moral culpability by becoming intoxicated to strengthen his or her resolve to commit the crime, or had resolved to commit a crime before becoming intoxicated. In line with Searle’s notion of prior intention, intoxication is considered irrelevant to negating intention in such cases. With regard to offences other than those of specific intent, section 428D of the same Act states that evidence a person was intoxicated at the time of the relevant conduct cannot be taken into account in determining whether they had the requisite intent if such intoxication was self-induced. However, if the intoxication was not self-induced, evidence that a person was intoxicated at the time of the relevant conduct can be taken into account for the purpose of determining whether he or she had the requisite intent.

In Jordan, Article 93 of the JPC states that ‘there shall be no punishment for those who, at the time of the commission of an offence, their actions were unconscious or unwilled because of the consumption of alcohol or any drugs without their consent or knowledge’. An unconscious person cannot form intention, and thus, evidence that intoxication was not self-induced can be taken into account to negate the formation of intention.

\textsuperscript{88} On the merit of distinguishing between crimes of specific and basic intent, see the above section on Voluntariness and intoxication.
3.3.2.1.1.1. Motive

Generally speaking, while considering the relevance of intention to the question of individual criminal liability, criminal law does not allow the broader context of that individual's life to be taken into account in determining his or her culpability. Structuring the legal doctrine around the essentiality of intention and the irrelevance of motive to the question of criminal liability is evident in the approach taken by criminal law in both NSW and Jordan. In Jordan, Article 67 of the JPC defines motive as the ultimate reason for acting and states that it is irrelevant to criminal liability unless otherwise provided by the law.

In *Hyam v DPP* [1975] AC 55, Lord Hailsham observed that:

> The motive for [a crime]... may be jealousy, fear, hatred, desire for money, perverted lust, or even, a so-called 'mercy killing', compassion or love. In this sense motive is entirely distinct from intention or purpose. It is the emotion which gives rise to the intention and it is the latter and not the former which converts an actus reus into a criminal act (p73)."  

It has been argued that the concepts of intention and motive are distinct in that the former involves aims or goal-directedness, conscious deliberation and purposefulness whereas the latter denotes the reason or impetus behind the action (Tebbit, 2000:139-140; Gardner & Anderson, 2000:41). Alternatively, motive is concerned with why individuals act whereas intention is concerned with whether they intended to act (Hall, 1996:71). However, the distinction between motive as the reason for action and intention where only the latter is relevant to criminal liability represents a shortsighted approach to understanding autonomy. It is often the prior intention of an individual which is identified as the reason for an action. A's prior intention was to kill B by shooting him and this was the reason why A fired at B. At the same time, the reason why A's body moved in the way it did (A's finger squeezing the trigger) was his intention-in-action to shoot B. A's prior intention to kill B was the reason for (and cause of) the intention-in-action of firing.
the gun. A wished to kill B and believed that shooting was an effective way to achieve this. But this prior intention is itself the product of some sort of process of deliberation or reasoning, and it is this which provides the real reason for the action in question. Clearly, this will include various beliefs, desires and thought processes. Most obviously, there will be some idea of goal or purpose which the individual aims to achieve through shooting B, together with reasons why such a goal is worth pursuing. There will also be beliefs relating to appropriate or possible means for achieving such a goal. The process of deliberation will also involve objective social facts or circumstances that have caused the relevant perceptions, beliefs and desires facilitated or triggered the reasoning processes.

As Fisse (1990) argues, although motive and intention are known to criminal law, sometimes it can be difficult to distinguish between them:

The difficulty is that we tend to call a given purpose either an intention or a motive according to the context. The choice seems to depend on whether the purpose in question is an end in itself or only a means to another end. In the former case we call it a motive and in the latter an intention. Any sequence of purposeful actions rests on a series of intentions related to each other in such a way that if we wish to contrast intention with motive each intention constitutes a motive for the one before. As an example take a breaking, entering and stealing by D in order to pay for an operation on his sick child. At the outset D intends to break, to enter, to steal, and to use the proceeds to pay the doctor’s bills. These are by no means all his separately identifiable intention (p485).

Fisse (1990) further states that

It is apparent that each intention after the first one can be referred to either as an intention or as a motive for the intention before. This is particularly obvious if we say that D intends to pay doctor’s bills and that his intention is his motive for stealing, but it makes equally good sense to say earlier in the sequence that D intends to enter and that this intention is his motive for breaking. As a matter of legal relevance, however, the intention to break, enter and steal have to be proved as ends in themselves in the satisfaction of the requirement of burglary, whereas the intention to pay doctor’s bills can be proved only if it in some way assists proof either that D committed the burglary or that he did so with any or all the

89 See McKay [1957] VR 560 at 562.
intentions required by the offence. The conclusion is that there is no factual difference at all between intention and motive, the distinction being of a linguistic convenience only. On this view the significance of referring to a given purpose as an intention instead of a motive, or vice versa, is to indicate the relevance of that purpose in law (p485)\(^9\).

Norrie (2001:36) points out that in the context of the law of criminal liability, the law claims to be based on individual justice through the operation of a fault requirement on the part of an individual, yet it completely ignores motive even though motive is a normal mental element in human conduct. The fundamental importance of motive as a vital part of an individual's state of mind which drives his or her actions is well encapsulated by Norrie A in his work *Crime, Reason, and History: A Critical Introduction to Criminal Law* (2001) when he argues:

Human agency is essentially composed of motives and intentions. Human beings conceive desired ends by a complex psychological and sociological process (the creation of motives for actions), and formulate intentions and perform actions designed to achieve those ends. It is as impossible in practice to imagine people forming intentions without having motives as it is to imagine them developing motives without creating intention to put them into effect...People act from motives and intention, and it is indeed 'childish' to imagine that the culpability can be properly evaluated with reference to intention alone. Motive is crucial, in terms of our evaluation of the goodness or badness of a person (pp 36, 44).

Norrie (2001:37-38) has explained the reasons behind the exclusion of motive from the consideration of criminal culpability. He argues that there is a link between motives and the social causes. That is, motives are generally generated by social circumstances, and a person might claim a good motive in seeking to justify his or her actions. For example in the case of theft, a person might seek to justify stealing on the ground of acute personal need. Therefore, allowing motive to be taken into account when determining the culpability of an individual would open the door for a wide range of justifications.

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\(^9\) On the same argument see Howard C, 1982 supra at 353.
In his work ‘Simulcra of Morality’/-Beyond the Ideal/Actual Antinomies of Criminal Justice’\textsuperscript{92} Norrie states that:

All people form intentions to act regardless of who they are, whence they come, what they experience; everyone experiences the force of desires and fears and is motivated by them to action. But motive could go further. It could contextualise the subject in his or her social and political environment. The poor and dispossessed could say that their motive was need, or could claim that they acted on right. Motive represented a threat to legal control and was therefore excised from legal subjectivity, from the juridical attributes of responsible citizenship. Abstract mental states of intention, recklessness, and agency were constructed as the moments of liberal legal subjectivity, to the exclusion of motive (pp120-121).

In his work ‘Principles and Contradiction in the Criminal Law: Motives and Criminal Liability’\textsuperscript{93} at pp170-189, Duff argues that the allegation that motive is irrelevant to criminal culpability is simply false. He says on any plausible interpretation of the concept of motive, motives are relevant to criminal liability. In support of his argument, Duff provides as an example: if the motive for picking up a wallet is to return it to its owner, there would be no theft. However, if the motive is to keep it, the action will constitute a theft. In addition, if the motive behind carrying what would count as an offensive weapon is to use it for self-defence against a threatened and imminent attack, a person might avoid conviction for carrying that weapon. Under the existing criminal law motive is recognised in certain substantive areas such as the law of defences, which serves either to exculpate or reduce the liability of persons (Cairns-Way & Mohr, 1996:277). For example, the motive of self-protection through the use of force is recognised in the context of self-defence and duress, and the defence of provocation focuses upon motivations to hurt others in response to what are seen as their hurtful actions (Brown et al, 2001:378). Furthermore, motive may count as circumstantial evidence which helps to establish that the individual has committed the prohibited conduct with the requisite state


of mind. In general, the individual's motive might be relevant at the stage of sentencing, as judges may take this into account when determining punishment (Murugason & McNamara, 1997:27).

Thus, while particular motives are taken into consideration in the context of some defences (which are discussed further below), there are some limits on individual autonomy which may explain certain actions which are not recognised by the criminal law. For example, as Mappes and DeGrazia point out, limited access to material means is a limit on autonomy of freedom of choice. Yet, the criminal law does not generally recognise this when determining criminal culpability.

3.3.2.1.2. Knowledge

Another version of the subjective state of mind of an individual seen as relevant to criminal culpability is knowledge. In NSW, certain offences at both common law and statute require proof of knowledge of the prescribed facts on the part of the offender. For example, where the actus reus of an offence involves a certain circumstance such as absence of consent in the course of committing sexual intercourse, it is necessary to establish that the individual had knowledge of that circumstance. Knowledge requires positive and correct belief by the individual that the relevant circumstance exists; suspicion that it does or will exist is not sufficient (Simester & Chan, 1997:716)\(^ 94 \). It has also been held that for certain statutory offences, such as possessing prohibited drugs, that proof of knowledge or awareness that the accused had in his or her control prohibited drugs is a means of establishing an intention to possess that prohibited drugs\(^ 95 \). According to section 5.3 of the Criminal Code Act 1995 (Cth) knowledge as to the circumstance or a

\(^{94}\) As in the case of intention, it is often the case that where the mens rea of the particular element of a statutory offence is knowledge of a fact or circumstance, recklessness, as in foresight of the possibility of the existence of that fact or circumstance will often suffice. This is discussed further below.

\(^{95}\) *Saad* (1987) 29 A Crim R 20 where at 21,23 per Mason J, Deane and Dawson JJ. See also *He Kau Toh v The Queen* (1985) CLR 157 523 and *Kural v R* (1987) 162 CLR 502 dealing similarly with the offence of importing a prohibited drug.
result is satisfied if the individual is aware of its existence or that it will exist according to the ordinary course of events.

In Jordan, the requirement of knowledge of the proscribed facts on the part of the offender is understood from the wording of Articles 86 and 87 of the JPC, which lay down the effect of mistaken facts in relation to criminal liability.

Article 86 states:

(1) Whoever commits an intentional offence under a mistake in one of its components shall not be punished as a perpetrator or inciter or accessory;
(2) If the mistake is related to one of the aggregative circumstances, the offender shall not be responsible for that circumstance.

Article 87 specifies:

A mistake which relates to the act of an unintentional offence precludes liability provided it is not the production of the offender’s fault

Considering one’s knowledge or awareness of the prescribed facts of an offence as a relevant matter in determining criminal culpability shows respect to individual autonomy. A human being’s behaviour should not be subject to criminal punishment unless it is the product of a conscious and meaningful choice. An individual who possesses such a highly blameworthy state of mind (knowledge) and employs it to infringe on another’s rights and liberties is to be conceived as an agent of his or her acts who deserves to be held responsible.

3.3.2.1.3. Recklessness

In relation to recklessness, criminal law in both NSW and Jordan provides that although an individual might commit an offence without the required actual intention or knowledge, they may still be held criminally liable for the offence on the ground of recklessness. The question is, how does an individual’s foresight render that individual
criminally culpable? Generally, a single act or a particular course of actions may have multiple effects or results, some of which are less connected with the act than others (Tebbit, 2000:141). When an individual chooses to engage in a certain course of actions with certain outcomes in his or her mind while understanding in advance that these actions may also cause other consequences and yet proceeds to continue, then in one way or another he or she should be responsible for those consequences (Tebbit, 2000:141). This is because, as Simester (1999) argues, 'both intended and foreseen wrongful actions are chosen, and merit blame because their doing reflects bad deliberative preferences' (p71). Wilson (1999) also points out that 'the accused acts recklessly by consciously disregarding the existence of a relevant circumstance or the risk that the conduct may bring about a forbidden consequence' (p5).

However, an individual may not foresee each particular potential or unintended consequence of a particular act, and for those consequences which the individual does foresee, such consequences may not be foreseen with the same degree of clarity. If criminal culpability is to be grounded in what the individual was aware of at the time, then where the consequence was not foreseen by that individual, he or she should not be held responsible for it. Conversely, if the consequences of an individual's conduct were foreseen, he or she should bear responsibility for their occurrence (Tebbit, 2000:142). The rationale for holding an individual criminally responsible on the ground of recklessness relates to a subjective attribution of awareness of risks on the part of an individual which reflects a high level of blameworthiness (Murugason & McNamara, 1997:27; Bronitt & McSherry, 2001:181; Alseid, 1998:316).

In NSW, criminal law takes into account an individual's awareness of the likelihood of causing harm when determining criminal culpability. Recklessness is regarded as advertent risk-producing conduct. Where an offence requires proof of recklessness, it

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96 Unintentional offences includes any offence for which the mens rea is not intention.
97 If the consequences were not foreseen, but were foreseeable, this might furnish a basis for culpability on the grounds of negligence, and will be discussed below.
98 In R v Kitcheher (1993) 29 NSWLR 696 Kirby P at 697 asserted that it is also reckless if the accused failed 'to give a moment's thought' or completely failed to advert to the possibility of non-consent in the
must be proven that the accused foresaw the occurrence of harm subject to a certain test of eventuality (Gillies: 1997:63). At common law, the accused’s perception of the occurrence of harm is constructed around whether that harm is foreseen as a possible or probable outcome of their conduct. For example, in the case of reckless murder, the courts have imposed the higher test of eventuality; ‘foresight of probability’. In a joint judgment in Crabbe⁹⁹, the High Court held that:

It should be regarded as settled law in Australia, if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results. It is not enough that he does that act knowing that it is possible but not likely that death or grievous bodily harm might result (pp469-470)¹⁰⁰.

In relation to other offences, the test of eventuality is foresight of the possibility¹⁰¹ of the occurrence of harm. In Coleman v R¹⁰², for example, the New South Wales Court of Criminal Appeal considered the definition of recklessness in relation to the offence of inflicting actual bodily harm with intent to have sexual intercourse and held that recklessness for all statutory offences other than murder is defined as foresight of possibility rather than probability.

crime of sexual assault. While at first blush, it may appear that this form of non-adventent recklessness is arguably more akin to notions of negligence than recklessness, Kirby P clarified in R v Tolmie (1995) 37 NSWLR 37 660 at 668-9 that non-adventent recklessness is limited to cases in which the accused did not consider the question of consent at all, and that the only examples which could be pointed to were where such inadvertence was caused through intoxication or lack of intellect.

⁹⁹ (1985) 156 CLR 464. In NSW, the law of reckless murder is now found in section 18 of the Crimes Act 1900. According to this section, the mens rea of reckless murder is foresight of the probability of death: Solomon [1980] 1 NSWLR 321 at 327 per Street CJ. The difference between the reckless murder found in section 18 and the common law is that the latter extends to include both foresight of the probability of death and grievous bodily harm, whereas foresight of the grievous bodily harm is not sufficient under section 18.

¹⁰⁰ In Royall v The Queen (1990) 172 CLR 378, the High Court held that the mens rea for murder in NSW should adopt the mens rea of murder at common law with the qualification that due to the statutory formula of 'reckless indifference to human life' in s18 of the Crimes Act 1990, the prosecution has to prove that the accused foresaw the probability of death, and that foresight of grievous bodily harm is not sufficient mens rea for murder.

¹⁰¹See, for example, Hemsley (1988) 36 A Crim R 334; R Coleman (1990) 19 NSWLR 467.

¹⁰² (1990) 19 NSWLR 467 at 471-476. see also R v William (1990) 50 A Crim R 213. In that case the New South Wales Court of Criminal Appeal considered the meaning of recklessness in relation to assault and Badgery-Parker J at 222 stated that in ordinary speech a person is said to be reckless when he acts without
As noted above, Article 64 of the JPC distinguishes between 'intention' and 'fault' as forms of mens rea. Notions of recklessness as understood in NSW fall within both categories. Further, the first part of this Article treats recklessness (referred to above as constructive intention) on the same footing as intention, namely, 'a crime is intentional even though the result has exceeded the intention of the offender if he or she has expected its occurrence and accepted the risk...'. The second part of the same Article explicitly provides that recklessness forms a basis of criminal liability, but not in terms of intentionality rather than fault. It states that '...if the harmful consequences are the result of negligence, recklessness or non-observance of the laws and regulations on the side of the accused, then the form of mens rea is fault'. The JPC does not define 'recklessness', but it is understood to mean any type of foresight that a particular consequence will occur short of that considered in the first of the article, will constitute recklessness.

3.3.2.2. Objective standards of mens rea

3.3.2.2.1 Negligence

Negligence is referred to as an objective standard of mens rea because the criminal law does not seek to discover what was going on in the mind of the accused at the time. Rather, it seeks to consider the hypothetical question of what the state of mind of a reasonable person would be if he had found himself in the accused’s position. Negligence may apply to any aspect of the physical element of an offence, such as conduct, consequence or circumstances. The formulation for the test of criminal negligence at common law for manslaughter by criminal negligence is expounded in Nydam [1977] VR 430 and has been codified in the Criminal Code Act 1995 (Cth) section 5.5. This section provides that a person is negligent with respect to the physical element of an

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regard to the possible consequence of the act, and in most contexts the law gives to the word recklessness the same meaning that it has in ordinary speech.  
13 This formulation was approved by the High Court in Wilson v The Queen (1992) 274 CLR 313. See Mason CJ, Toohey, Gaudron and McHugh JJ at 333.
offence if his or her conduct involves such a great falling short of the standard of care a reasonable person would exercise in the circumstances, and such a high risk that the physical element exists or will exist that the conduct merits criminal punishment for the offence.

Negligence is a recognised basis for criminal liability in both NSW and Jordan, and offences of negligence exist in both jurisdictions. For example, in NSW, section 54 of the Crimes Act 1900 states that

Whosoever by unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years.

In Jordan, Article 343 of the JPC states that

Whosoever causes the death of another negligently or recklessly or by not observing the law or regulations, shall be punished by imprisonment for a period of six months to three years.

Where the requisite mens rea for an offence is negligence there is no need to establish intention, knowledge, recklessness or any state of mind on the part of the accused. In this respect, as Ashworth (1999:197) points out, opposition to the imposition of criminal culpability on the basis of negligence comes from the fact that it derogates from subjective standards of culpability: there is no need to prove that the accused adverted to the consequence so long as a reasonable person would have done so. To have negligence as a standard of criminal liability therefore moves away from the subjective standards, and in doing so shows insufficient regard to the principle of autonomy (Ashworth, 1999:197). It may be asked how the imposition of criminal liability on the basis of negligence conforms to the notion of individual autonomy.

According to Ashworth (1997:197), the answer to this question may lie in a form of capacity theory. In principle, the assumption in criminal law is that the actions of individuals are free rather than determined\textsuperscript{104}, and to say that an individual has acted

negligently does not necessarily mean that the action was an unconscious or involuntary. On the contrary, as Ashworth (1999:198) points out, it can be argued that a person who negligently causes harm could have done otherwise so long as that person had the capacity to behave differently by taking the necessary care, given the existence of sufficient signals to alert a reasonable person under the same circumstances. However, the objective standard in negligence might pose some problems for those unable to reach the standard of reasonableness because of some physical or intellectual disabilities. As Hart (1968:154-55) in his work *Punishment and Responsibility* points out, in this case exceptions for individuals of this type may pertain. Hart states that this can be achieved by supplementing the question ‘did an individual fail to attain a reasonable standard of care in the circumstances’? with a further question: ‘could the individual given his or her mental and physical capacities have taken the necessary precautions’? This formulation of negligence as encompassing an element of capacity of the offender, is in line with Mappes and DeGrazia’s definition of autonomy as effective deliberation which recognises that if an individual is not capable of making rational and informed decisions due to, for example, restrictions caused by an intellectual disability, then that person ought not be considered a rational person for the purposes of criminal culpability.

Liability on the basis of negligence is objective in so far as it holds liable those who, although capable, fail to take precautions when they could reasonably have done so, which Ashworth (1999:198) terms as ‘the culpability of unexercised capacity’. Furthermore, criminal law imposes duties and obligations on individuals who engage in various activities. Should they fail to observe these duties by not taking reasonable precautions when they having the capacity to do so, they should bear the responsibility for their actions (Ashworth, 1999:198-99). In this case the attribution of criminal liability to an individual for negligent action may exert a general deterrent effect by alerting individuals to the need to take care in certain situations (Ashworth, 1999:199-200).


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3.3.2.3. Strict and absolute liability

At the outset, it is worth noting that, unlike NSW, in Jordan no offence of strict or absolute liability exists. A close look at the JPC, particularly Articles (63-67) which lay down the principles in relation to mens rea, reveals that proving mens rea is required before holding anyone criminally liable for the commission of any offence. There is no explicit Article in the JPC to the effect that a person can be held liable without proof of one of the forms of mens rea articulated in the JPC.

In NSW, the issue of strict and absolute liability arises in situations where statutory offences have been enacted without any reference to the mens rea of the offence. At face value, such offences could be considered to require no mens rea requirement, and thus be offences of strict and absolute liability. However, in *He Kaw Teh* (1985) 157 CLR 532 the High Court held that where a statutory offence does not explicitly provide the mental element of an offence, there is a presumption of mens rea in a subjective sense. That presumption may be rebutted by a consideration of such issues as the words of the statute and the subject matter with which it deals, in which case the mens rea of the offence may be one of strict or absolute liability. In *Wampfler* (1987) 11 NSWLR 541, Street CJ summarised the categories of mens rea for statutory criminal offences as follows:

1. Those in which there is an original obligation on the prosecution to prove mens rea.
2. Those in which mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question in not criminal in which case the prosecution must undertake the burden of negating such belief beyond reasonable doubt.
3. Those in which mens rea plays no part and guilt is established by proof of the objective ingredients of the offence (p546)

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103 See Alsied, 1998 supra at 341-342.
Crimes of strict and absolute liability share common features. First, both types of crimes are creatures of statute, as there is a presumption of mens rea at common law. Second, both depart from the requirement to prove state of mind; it is the commission of the physical element of the offence which needs to be proved. Third, if the offence is defined as being one of strict or absolute liability, as noted above, there is still a requirement that the actions constituting the offence are performed voluntarily, and thus, there is an at least an element, albeit limited, of individual autonomy being exercised by the accused.

In relation to strict liability offences, criminal liability can be imposed irrespective of whether the accused has acted with fault, however the accused is permitted to avoid liability if he or she can adduce evidence of an honest and reasonable mistake of fact, and the prosecution is unable to negative this. Once the accused satisfies the evidential burden of proof, the prosecution must prove beyond reasonable doubt that the accused lacked an honest and reasonable belief concerning the fact asserted. According to the *Criminal Code Act* 1995 (Cth), if the law that creates an offence provides that it is one of strict liability, no fault element is required for any of the physical elements of that offence, and the defence of honest and reasonable mistake of fact is available for that offence (6.1(1)). The Code also provides that the existence of strict liability does not make any other defences unavailable (s 6.1(3)).

With regard to offences of absolute liability at common law and according to the *Criminal Code Act* s6.2(1), criminal liability is imposed without requiring proof of any fault on the part of the accused, who cannot make use of the defence of honest and reasonable mistake of facts. The Code also provides that the existence of absolute liability does not make other defences unavailable (s 6.2(3)).

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106 *He Kow Teh v The Queen* (1985) 157 CLR 523.
107 Although as acknowledged below, if the accused raises an honest and reasonable mistake of fact, the prosecution bears the burden of disproving this.
108 *Proudman v Dyman* (1941) 67 CLR 536.
109 *He Kow Teh v The Queen* (1985) 157 CLR 523.
To the extent that respect for individual autonomy requires that no criminal liability be imposed on an individual unless he or she freely, consciously and voluntarily has chosen to cause harm, the imposition of strict and absolute criminal liability does not conform to this. However, as noted above, if an individual commits a crime of strict or absolute liability, when acting unconsciously or involuntarily, he or she will not be liable for that offence. In this sense, absolute and strict liability requires a degree of individual autonomy, albeit limited.

Crimes of absolute or strict liability raise issues considered in Chapter 2, namely the type of conduct to which criminal liability is directed. As has been noted by Gillies (1997:85), most offences of strict liability are concerned with the regulation of areas of social and economic activity such as driving a vehicle, processing and selling foodstuffs, the conduct of licensed premises, the management of work places and so forth. Gillies (1997:86) argues requiring the prosecution to prove mens rea may well render such legislation wholly or partially unworkable or nugatory given the type of offences involved and their numbers before the courts. Arguably, the justification for the imposition of strict or absolute liability lies in favouring the preservation of social welfare at the expense of respecting broader notions of individual autonomy as encompassed in subjective forms of mens rea. Offences which focus on public safety and welfare demand a high standard of care which needs to be observed to avoid causing harm to individuals and society (Scanlan & Ryan, 1985:94). Such a standard may be encouraged by imposing more exacting forms of mens rea such as absolute and strict liability. In this way, the balance between social welfare and respect for individual autonomy of the offender is arguably tipped towards social welfare.

In sum, this analysis of the forms of mens rea recognised in both NSW and Jordan has demonstrated that all forms of mens rea require at least some degree of individual autonomy. The analysis reveals that there are varying degrees of individual autonomy required for different types of mens rea. Subjective forms of mens rea respect individual autonomy to the greatest extent in the sense that they focus on the subjective state of mind of the offender, and in effect require prior intention, intention-in-action (or at least
subjective awareness of the likelihood of a certain outcome). Objective standards of mens rea in the form of negligence, respects notions of individual autonomy in the sense that it treats the offender as being able to exercise such autonomy to the same degree as that expected of the reasonable person. Further, notions of negligence may also allow limits on individual autonomy to be recognised by taking into account the capacity of the individual to achieve the standard of the reasonable person when considering their liability. Notions of strict liability also encompass the notions of individual autonomy to the extent that the defence of an honest and reasonable mistake of fact is available as a defence. Finally, offences of absolute liability, do require at least a limited degree of individual autonomy in the sense that the prosecution is required to prove that the accused's act was voluntary.

As a final point, even though there are these different types of mens rea which encompass varying degrees of individual autonomy, in any particular case, an individual committing a particular crime may have engaged in autonomous acts which exceed the autonomy required by the mens rea. Thus, a person engaging in a crime of absolute liability, may well exceed the limited autonomy requirement of voluntariness. Such a person may well have intended the outcome, or fell well below the standard of care required by a person of his or her capacity.
3.3.3. Defences\textsuperscript{110}

As noted above, individuals are considered autonomous in one sense when their actions are the result of conscious intention rather than external coercion or duress (autonomy as liberty of action). In a second sense, they are autonomous when free to choose from a range of alternative options available (autonomy as freedom of choice). And in a third sense, they are autonomous as long as they have the capacity to make rational and informed decisions (autonomy as effective deliberation). On the one hand, to predicate an individual’s autonomy suggests that the person can be held responsible for harmful

\textsuperscript{110} Gillies (1997:203) points out that the term ‘defence’ is employed in the criminal law and a broad distinction may be made between two of its applications. First, the term defence is used informally when it refers to evidence adduced by the accused to refute the prosecution case and not to denote any recognisable legal doctrine. Thus, it is common to speak of ‘alibi defence’ (that is, the accused was not present at the time the offence was committed but was in the company of another person in another place). Second, the term defence is applied formally in the context of criminal law when employed to refer to a legal doctrine (that is a body of common law or statutory rules or both, which govern the adducing of evidence by way of defence and the precise effect of this material. In this section, I use defence in the latter sense. Gillies (1997:203) states that the formal or legal defence can be divided into two categories. First, the primary defences which comprehend the defences that go to refute the prosecution case by way of denial that one or more of the elements of criminal liability was present in the accused’s conduct, and as such they might be called ‘primary’ defences. An example of a defence of this kind is intoxication and automatism. Gillies (1997:204) points out that strictly speaking it is a misnomer to describe intoxication and automatism as defences, as the burden is always on the prosecution to prove the element of the offence, and all the accused is doing by adducing evidence of involuntariness or lack of mens rea owing to intoxication or automatism is to make it less likely for the jury to find the prosecution proved the offence beyond reasonable doubt. However, Gillies (1997:204) states that intoxication and automatism may be discussed under the rubric of criminal defences, given that the courts at common law have evolved a discrete doctrine of intoxication and automatism consisting of rules of law governing the adducing of evidence of this type and its effect. The second category is what Gillies (1997:204) refers to as the secondary or exculpatory defences which function to relieve the accused from liability which has been proven. That is, these defences become relevant for the jury to consider when it is found that the offence charged has been proven. Defences of this kind include self-defence, provocation, necessity, duress, insanity and diminished responsibility.

In Jordan, the \textit{JPC} distinguishes between defences which go to negate the criminality of the actus reus, referred to as justifications, and those which go to the mens rea, referred to as excuses. If a justification is established, it means the actus reus has not been proved and the accused will be acquitted. There are four types of justification under the \textit{JPC}: exercise of right (Article 59) (for example a parent’s right to admonish a child), self defence (Article 60), performance or execution of duty (Article 61) (for example the actions of a police officer performed in the course of duty) and the permission of the law (Article 62) (for example performance of medical operations in cases of emergencies). Excuses can be either exculpatory or mitigating. Exculpatory excuses include insanity, duress and necessity. The consequence of establishing an exculpatory excuse is acquittal in the case of duress and necessity, and confinement in a mental institution in the case of insanity. Mitigating excuses include provocation, and the consequence is a reduction in penalty.
action. On the other hand, if the action did not result from the exercise of such autonomy, it should be located outside the scope of culpability.

As Pettit (2001) says:

You are a free agent and your action is a free action just to the extent that you are capable of being held responsible in the relevant choice. More specifically, you are free just to the extent that you are capable of being held rightly responsible...you will not be fully free in respect of a choice between A and B, if you are not aware of the availability of those options in your environment of choice, do not have the conceptual resources to evaluate them, or are not functioning in a way that would allow that evaluation to affect what you do. You will not be fully free if, as a self, you are subject to problems that makes it impossible for you—or just particularly difficult for you—to claim A and B as something you did. And you will not be fully free if, as a person, you are the victim of an unwelcome form of pressure or duress or coercion that makes it difficult to do one or other of those things. Such conditions generally serve to exculpate or at least excuse an agent; they remove or reduce the responsibility (pp 12-14).

Within this framework, criminal law in both NSW and Jordan recognises the limitations of autonomy and allows individuals to partially or completely avoid liability when their actions are not the product of their autonomy, by resorting to defences. As the defences of intoxication and automatism were considered above, the primary focus here is to deal with others including insanity, diminished responsibility, provocation, self-defence, necessity, and duress. However, although a detailed analysis of these defences is beyond the scope of the present work, this section aims to illuminate what, in the eyes of criminal law, resides in these defences that would affect the individual autonomy to render action fully or partially outside the scope of criminal liability.

3.3.3.1. Insanity

The insanity defence allows the individual’s psychiatric and psychological make up to be taken into account in determining culpability. As noted above, individuals are considered
autonomous to the extent that they can make and act on rational and informed decisions. In essence, the defence of insanity exonerates from liability the individual who, at the time of the commission of an offence, was incapable of making rational decisions and acting rationally because of a mental illness (Murugason & McNamara, 1997:263; Howard, 2003:57). Thus, criminal law in both NSW and Jordan allows the defence of insanity to exist. At common law, the origin of this defence is to be found in what is known as McNaghten's Rule. The core of McNaghten's formulation is contained in the following passage as expressed by Lord Tindal CJ:

Every man is presumed to be sane, and to avoid criminal responsibility for a criminal act it must be shown that at the time of the committing of the act the accused was suffering from such a defect of reason from disease of mind, that he did not know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong. In respect of a person suffering from insane delusion as to some particular fact but in other respects sane, he should be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real (pp210-11).

For an individual to be considered insane such that no criminal liability can be attributed to him or her, he or she needs to prove (on the balance of probabilities) that at the time of the commission of an offence he or she was suffering from a disease of mind which affected his or her cognition. In R v Porter (1933) 55 CLR 182 Dixon J defines the 'disease of mind' in the following terms:

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112 McNaghten case (1843) 10 Cl & Fin 200 at 210-11; 96 ER 718 at 722. In NSW the defence is renamed the defence of mental illness in Part 4 of the Mental Health (Criminal Procedure) Act 1990 (NSW). However, the defence of mental illness is not defined in the legislation and the elements are derived from the common law McNaghten rules. The Criminal Code Act 1995 (Cth) section (7.3) has adopted the defence of insanity as laid down by McNaghten rules with several amendments. These include renaming the defence as the 'defence of mental impairment'. This Code adopts the rules established in the McNaghten case with regard to the requirement of knowledge of the nature and quality of an act or its wrongfulness, and adds to it the individual's inability to control their conduct. By this amendment the Code now places the conduct that resulted from a volitional impairment within the scope of the insanity defence. Further, the requirement of a defect of reason due to a disease of the mind is replaced in the Code by defining mental impairment to extend to include senility, intellectual disability, mental illness, brain damage and severe personality disorder.

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[The defendant’s] state of mind must be one of disease, disorder or disturbance. Mere excitability of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness, are quite different things from what I have attempted to describe as a state of disease or disorder or mental disturbance arising from some infirmity, temporary or long standing. If that existed it must then have been of such a character as to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong (p188).

While the disease of the mind need not be permanent\textsuperscript{113}, it needs to result in a malfunctioning of the individual’s mind such as to cause a defect of reason at the time of committing the offence\textsuperscript{114}. This entails depriving the individual of reasoning powers, and it is not enough that he or she failed to use these powers at the time because of a temporary absent-mindedness or confusion\textsuperscript{115}. The absence of cognition was interpreted as referring to the individual’s inability to understand the nature or quality of his or her conduct, lacking cognisance of its physical nature\textsuperscript{116}. In \textit{R v Porter}\textsuperscript{117}, Dixon J explains this by saying that where a person

Intentionally destroys life he may have little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object. In such a case he would not know the physical nature of what he was doing (p188).

In addition, the defect of reason may prevent the individual from knowing that what he or she was doing was wrong according to the ordinary standards adopted by a reasonable person\textsuperscript{118}. Dixon J in \textit{R v Porter}\textsuperscript{119}, explains this in the following terms:

The question is whether he was able to appreciate the wrongness of a particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the

\textsuperscript{113} See for example, \textit{R v Porter} (1933) 55 CLR 182 at 187; \textit{R v Kemp} [1957] 1 QB 399 at 407.

\textsuperscript{114} See for example, \textit{R v Porter} (1933) 55 CLR 182; \textit{R v Sullivan} [1983] 2 All ER 673 at 677.

\textsuperscript{115} \textit{R v Clarke} [1972] 1 All ER 219.

\textsuperscript{116} \textit{R v Cole} (1916) 12 Cr App R 21.

\textsuperscript{117} (1933) 55 CLR 182.

\textsuperscript{118} \textit{Stapleton v R} (1952) 86 CLR 358 at 367.

\textsuperscript{119} (1933) 55 CLR 182. The evaluation of whether or not the accused can reason about the wrongness of the act ‘with a moderate degree of sense and composure’ was favored in subsequent cases: see \textit{Mathies} [1958] SR (NSW) 321; \textit{Willgoss v R} (1960) 105 CLR 295 at 301; \textit{Fleeton} [1964-1965] NSWLR 63 at 64.
mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by “wrong”? what is meant by wrong is wrong having regard to the everyday standards or reasonable people...if...at the time...he was incapable of reasoning about the right and wrongness, according to ordinary standards, of the thing which he was doing, not that he reasoned wrongly, or that being a responsible person he had queer or unsound ideas, but that he was quite incapable of taking into account the considerations which go to make right and wrong, then you should find him not guilty upon the ground that he was insane at the time he committed the acts charged (pp188-190).

In Jordan, the JPC adopts similar rules in relation to the defence of insanity as those laid down in McNaghten’s Rule. Article 91 states that

Every person is presumed to be sane at the time he or she commits a crime until proven otherwise.

Article 92 states that

(1) No one shall be punished for the commission of an offence if at the time of his or her act or omission, he or she was unable to understand the nature and quality of that act or omission or if he or she was unable to know that it was prohibited to do that act or omission because of a disease of mind\(^{120}\).

In both NSW and Jordan, the consequences of successfully raising the defence of insanity is that the offender is found not guilty on the grounds of mental illness or a disease of the mind. In NSW, such an outcome results in a special verdict\(^{121}\) and the person is detained in custody for an indeterminate period\(^{122}\). Similarly in Jordan Article 92(2) provides:

(2) Whoever is exempted from punishment according to subsection one is to be committed to a hospital for mental illness until it is proven by way of medical reports that he or she has been cured and no longer constitutes a danger to public safety.

\(^{120}\) ‘Disease of the mind’ is not defined in the JPC. In practice, the court seeks medical advice to establish whether or not the person was insane at the time of committing the offence.

\(^{121}\) See s38 Mental Health (Criminal Procedure) Act 1990 (NSW).

\(^{122}\) See s39 Mental Health (Criminal Procedure) Act 1990 (NSW).
In sum, the defence of insanity recognises Mapes and DeGrazia’s definition of autonomy as effective deliberation, by not holding a person criminally responsible for actions which were committed when they did not have the capacity to make rational and informed decisions. However, as Howard (2003:51-67) and Norrie (2001:179-182) have recognised, the scope of the defence may not include all situations in which a person’s capacity to make rational and informed decisions is affected because the defence is constructed around the disturbance of the cognitive process to the exclusion of any other impairment of the mind’s function. Further, the severe consequences of successfully arguing this defence, namely indefinite detention in a mental health institution, may make the defence unattractive in practice. This may affect the exercise of the autonomy of the offender when choosing whether or not to rely on the insanity defence. In situations where the choice is made not to rely on the defence so as to avoid detention in a mental health institution, the accused will have little if any scope to rely on arguments that his or her autonomy was limited in ways which fall within the scope of the defence.

3.3.3.2. Diminished responsibility

If a person suffers from some kind of mental abnormality which does not amount to the defence of insanity, a defence of diminished responsibility\textsuperscript{123} may be argued. However, this defence is not a general one, and is only available when the offence charged is murder. The effect of this defence is to reduce the individual’s responsibility from murder to manslaughter upon proof of mental abnormality. While this defence does not exist in Jordan, in NSW, it is found in section 23A of the \textit{Crimes Act 1900}, and is known as the defence of substantial impairment by abnormality of mind. According to this section, for the culpability of an individual to be reduced from murder to manslaughter, he or she has to prove two elements. The first involves establishing that at the time of the commission of the offence the person’s capacity to understand events, or to judge whether the

\textsuperscript{123} Generally see Tebbitt M, 2000 supra at 159-60; Brown et al, 2001 supra at 652-664; Murugason and McNamara, 1997 supra at 96-101.
person’s actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from a prescribed cause (s 23A(1)(a)).

Abnormality of mind is not defined in the Act, however a useful definition is found in the English case of Byrne [1960] 2 QB 396 (which was approved in NSW as correctly explaining this elements of the defence)124. In Byrne, Lord Parker CJ held that:

‘Abnormality of mind’ which has to be contrasted with the time-honored expression in the M’Naghten Rules ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, but also the ability to exercise will power to control physical acts in accordance with that rational judgment (p403).

The abnormality of mind must arise from an underlying condition (s 23A (1) (a)), which is defined as a pre-existing mental or psychological condition of a non-transitory kind (s 23A (8)). Examples of abnormality of mind may include post-traumatic stress disorder125, anxiety and depression126. An abnormality of mind which results from self-induced intoxication is irrelevant to the defence of diminished responsibility (s 23A (3)).

The second element is that the abnormality of mind has resulted in substantial mental impairment so as to warrant liability for murder being reduced to manslaughter (s23A(1)(b)). Substantial mental impairment does not mean a total impairment but one which needs to be more than trivial or minimal127.

As with insanity, the defence of diminished responsibility recognises Mappes and DeGrazia’s limits on autonomy of effective deliberation. The type of situations encompassed by the defence of diminished responsibility are broader than insanity in the sense that the abnormality of the mind arising from an underlying condition encompasses

124 Byrne was approved by the Court of Criminal Appeal of NSW in Purdy (1982) 2 NSWLR 964 at 965 per Glass AJ at 966 per Maxwell J as correctly explaining this element of the defence.
125 R v Nielsen [1990] 2 Qd R 578.
a broader range of mental conditions than those allowed under the defence of insanity, and the impairment on rational decision encompassed in the defence of diminished responsibility extends further than the defence of insanity to the accused’s capacity to control him or herself.

3.3.3.3. Provocation

As mentioned earlier, the attribution of criminal culpability requires proving the accused was autonomous at the time of committing the wrong-doing. However, given the nature of human frailty, the individual might lose self-control to the extent that his or her choice becomes impaired and his or her actions become guided by passion rather than reason (Mousourakis, 1998:137). It serves as a concession to human frailty in circumstances where individuals are deemed to be captive to emotional states, resulting in a loss of self-control. Contrary to this view, Neal and Bagaric (2003:243-248) argue that the defence of provocation is founded on the flawed assumption about human nature that individuals are captive to some of their emotional states. They argue that individuals are not captive to their emotions and there is always a meaningful element of choice involved. Even though there may be some choice, it is arguable that such choices are limited by the emotional states. This recognition of limited choice is reflected in the limited way in which the defence operates as a partial rather than a complete defence to murder in NSW.

In NSW, the defence of provocation is found in section 23 of the Crimes Act 1900. The statutory formulation of the defence in NSW draws on the principles of common law to allow an individual to use the defence of provocation, provided that three requirements are established.

The first concerns the provocative conduct. Section 23 (2)(a) requires there to be an act or acts of provocation which caused loss of self-control in the accused. In dealing with the requirement of provocative conduct, the courts consider the immediate act that caused the individual’s loss of self-control, as well as the relevant circumstances preceding or
surrounding that act. In other words, it is considered that the cumulative effect of circumstances might amount to provocation\(^{128}\). The loss of self-control may be induced by any conduct of the deceased including grossly insulting words or gestures, towards or affecting the accused (s23(2)(a)). Thus, it is not necessary that provocative deeds or words were directed at the person himself or herself\(^{129}\).

Secondly, the loss of self-control is required according to the statutory formulation. For the acts or words to amount to provocation they must satisfy a subjective test. As subsection (2)(a) stipulates, the killing must be ‘the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased...towards or affecting the accused’; and subsection (3) states that ‘there is no rule that provocation is negated if...the act or omission causing death was not an act done or omitted suddenly’\(^{130}\). In determining the gravity of provocation and its effect on the provoked person, several matters need to be taken into consideration in assessing whether that person has lost his or her self-control, including the person’s ethnicity, age, sex, origin, temperament, state of intoxication and physical characteristics\(^{131}\).

The third requirement involves the objective test. Subsection (2)(b) provides that to amount to provocation, it is necessary to establish that the provocative ‘conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon the deceased’\(^{132}\). Subsection (3)(a) stipulates that the fact that there was no reasonable proportion between the act or omission causing death and the conduct of the deceased does not negate provocation. The extent to which the ordinary


\(^{129}\) R v Terry [1964] VR 248 at 250.

\(^{130}\) At common law, the reaction to the provocative act need not to be immediate as the cumulative effect of the provocative incidents might be taken into account while establishing provocation: see Chhay v R (1994) 72 A Crim R 1 at 13-14; Moffa v R (1977) 138 CLR 601; Parker v R (1963) 111 CLR 610.


\(^{132}\) The same test is applied in the common law: see Johnson v R (1976) 136 CLR 619; Stingel v R (1990) 171 CLR 312; Mascliantonio v R (1995) 183 CLR 58.
person in the position of the accused should be invested with the personal characteristics of the accused such as age, gender and ethnicity remains a contentious issue\textsuperscript{133}, but has been held by the High Court to be limited.

In Stingel \textit{v} R\textsuperscript{134}, only the age of the accused was allowed to be credited to the ordinary person when applying the objective test to determine whether that person would have lost self-control as a result of the provocative conduct. This was affirmed by the majority in \textit{Masciantonio \textit{v} The Queen}\textsuperscript{135}. However, in \textit{Masciantonio \textit{v} The Queen}, McHugh J delivered a dissenting judgment rejecting the majority’s view that only the age of the accused be deemed relevant to the objective test, stating:

In determining the extent to which the conduct of the deceased would have provoked an ordinary person, the jury is entitled to consider all “the attributes of or characteristics” of the accused and “the totality of the deceased’s conduct”. The accused’s age, sex, ethnicity, personal characteristics and physical features are only some of the matters that the jury can consider in determining the nature, extent and the gravity of the provocative conduct of the deceased. Because the doctrine of provocation is the product of “the mercy of law [interposing] in pity to human frailty” it is natural that the law should regard as relevant any circumstance that throws light on the effect of the deceased’s conduct on the accused. Such a circumstance may arise from the personal history of the accused or his or her relationship with the deceased or otherwise (p71-72).

He further says that

The ordinary person test would not become meaningless… if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue…unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law (p73).


\textsuperscript{135} (1995) 183 CLR 58. In \textit{R \textit{v} Khalouf} (unreported, NSWCCA) 179, 8 July 2003, only the age and sex of the accused was allowed to be taken into consideration while applying the objective test.
As the work of Mappes and DeGrazia demonstrates, individual autonomy is not abstract, nor does it exist in a vacuum, but is influenced by a variety of factors, which should be recognised by the law if it is to adequately respect such autonomy as an underlying principle of criminal liability. Even though it is not the law in Australia, McHugh J’s approach to the objective test is to be preferred because it encompasses a more meaningful recognition of the limits on individual autonomy. As noted above, when discussing negligence as a mens rea requirement, an objective standard should take into account the capacity of a person to achieve such a standard. Such capacity may well be influenced by a person’s ethnicity, age, sex, origin, temperament, state of intoxication and physical characteristics. Therefore such characteristics should be taken into account when determining the objective test in a way which maximises the recognition of the autonomy actually being exercised by the accused.

In NSW, provocation is not available as a defence to any offence other than murder. However, provocation may be taken into account as a mitigating factor at the sentencing stage\textsuperscript{136}.

In Jordan, it is arguable that the JPC distinguishes between murder, wounding or causing injuries, and all other types of offences for the purposes of the defence of provocation. Article 340 deals with the former, and Article 98 with the latter. These Articles must be read in light of Articles 95, 96 and 97 which indicate that two forms of excuses (exculpatory and mitigating) exist in the JPC.

Article 95 provides:

There is no excuse for any crime except in the situations as provided by law.

Article 96 provides:

An exculpating excuse relieves the offender from any punishment\textsuperscript{137}, but where necessary, that offender may be subject to precautionary measures\textsuperscript{138} such as financial bonds.
Article 97 outlines the reduction in punishment available when a 'mitigating excuse or circumstance', is established. It provides:

When the law enacts a mitigating excuse or circumstance
(1) if the offence is a felony punishable by death, penal servitude for life or life imprisonment, the punishment should instead be at least one year imprisonment;
(2) if the offence is any other felony, then the punishment is imprisonment from six months to two years;
(3) if the offence is a misdemeanour, then the punishment should not exceed six months imprisonment or a fine of 25 dinar.

Article 340 provides:

(1) Whoever suddenly finds his wife or one of his female descendants or ascendants or sisters committing adultery with another man or in an unlawful bed and kills either or both of them or assaults either or both of them in a way that causes either death or wound or injury or a permanent disability, can benefit from a mitigating excuse;
(2) A wife shall benefit from the same excuse if she suddenly finds her husband committing adultery with another woman or in an unlawful bed in their martial home and kills either or both or them or assaults either or both of them in a way that causes death or wound or injury or a permanent disability;
(3) It is not allowed to use self-defence against the person who can benefit from this excuse and the rules of the aggravating circumstances are not applicable to him or her.

Articles 98 provides a mitigating excuse for any crime. It states that:

The perpetrator of an offence can benefit from the mitigating excuse or circumstance if he commits the offence while in a severe state of anger which was induced by unlawful and dangerous acts of the victim.

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136 See *R v Ho* (unreported, NSWCCA) 60499, 28 February 1997; *Fontin v Katapodis* (1962) 108 CLR 177.
137 The types of punishment under the *JPC* are outlined in Article 14-16. Article 14 sets out the punishment for felonies (death penalty, penal servitude for life, custody for life, temporary penal servitude, temporary custody), Article 15 for misdemeanours (imprisonment, fine and financial bond), and Article 16 for contraventions (upsetting imprisonment and fine). Articles 17-20 define the different types and extent of punishment for felonies. Article 21 and 22 define the types and extent of punishments for misdemeanours. Article 23 to 25 defines the type and extent of punishments for contraventions.
138 Precautionary measures are set out in Article 28 and include deprivation of liberty, confiscation of proceeds of crime, financial bond, closure of premises, and suspension or cessation of business activities. Each of these terms, and when and how each measure may be used are further defined in Articles 29 to 39.
139 Adultery is defined as having consensual sexual intercourse between a man and a woman outside matrimony.
140 The expression 'unlawful bed' covers situations of consensual sexual interaction between a man and a woman outside matrimony, short of sexual intercourse.
The scope of the defence of provoked in Jordan differs from NSW in several ways which impinge on the recognition of the individual autonomy of the offender. In Jordan, the *JPC* defines adultery as a special type of provocative conduct, which will result in mitigating the punishment of a man who murders, wounds or inflicts injuries on either the man or woman involved as defined in Article 340. The statutory formulation also allows the wife who is faced with her husband infidelity to make use of the same excuse. Other sexual interactions short of adultery, are also explicitly recognised as a form of provocative behaviour which if proved, will serve as a mitigating excuse which will result in a reduction of penalty for the perpetrator whether a man or a woman. The *JPC* also allows mitigation for an unlawful and dangerous act. Therefore, in Jordan, unlike in NSW, mere words would not be sufficient to amount to provocation. Thus, in NSW the law recognises a broader array of behaviours of the victim which are recognised as limiting the offender’s autonomy as deliberative action.

Another major difference between the law in NSW and Jordan is that the law in NSW requires an objective standard against which the response of the offender must be measured. The wording of Articles 98 and 340 suggest that it is a wholly subjective test. The absence of any additional objective test means that the offender is not being measured against a standard which may involve a limited regard to his or her individual autonomy. In this way, the *JPC* recognises a broader array of limitations on autonomy of the offender. In NSW, like Jordan, provocation will be taken into account at the sentencing stage for crimes other than murder. In this way, the impact of the provocation on the autonomy of the offender is reflected in the sentence imposed.

3.3.3.4. Self-defence

The rationale for self-defence resides in its focus on ‘a morally worthy motive i.e. self preservation’ (Mousourakis, 1998:183). A person who is forced to act under pressure to avoid harmful consequences which he or she believes will occur as a result of an unwelcomed attack cannot be regarded as an autonomous individual acting freely. It is
this lack of freedom of choice at the time of producing a harmful consequence which on the one hand provides the basis for criminal exculpation on the ground of self-defence. On the other hand, it is the aggressor’s wrongdoing and culpability which play a crucial role in turning the scale in favour of the defender (Mousourakis, 1998:183-84; Alseid, 1998:141-142). In both NSW and Jordan, the scope of self-defence extends to include situations where the individual attempts to ward off an attack against the self,\textsuperscript{141} protect his or her property\textsuperscript{142}, or to ward off an attack against another person\textsuperscript{143} or that person’s property\textsuperscript{144}.

In Zecevic v DPP (Vic) (1987) 162 CLR 645, Wilson, Dawson and Toohey JJ laid down the requirements for self-defence at common law as follows:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is of general application and is not limited to cases of homicide (p661).

In Conlon (1993) 69 A Crim R 92, Hunt J further clarified this test stating:

It is clear from the formulation of the issue in Zecevic v DPP that it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable. What is critical, where the reasonable grounds for belief test is concerned, is not what a reasonable person would have believed, but rather...what the accused himself might reasonably have believed in all the circumstances in which he found himself...the assessment of whether the accused’s belief was based on reasonable grounds means that account must be taken of those personal characteristics of this particular accused which might

\textsuperscript{141} See, for example, Zecevic v DPP (Vic) (1987) 162 CLR 645; Articles 60 and 341 of the JPC.

\textsuperscript{142} See, for example, Conlon (1993) 69 A Crim R 92; R v McKay [1957] VR 560; Articles 60 and 341 of the JPC.

\textsuperscript{143} See, for example, R v Duffy [1967] 1 QB 63 at 67; R v Williams (Gladstone) (1984) 78 Cr App R 276; Articles 60 and 341 of the JPC.

\textsuperscript{144} In NSW, self defence and the defence of property have been codified in the situation of so called ‘home invasions’ in Home Invasion (Occupants Protection) Act 1998 (NSW). The definition of self-defence largely codifies the common law. In contrast, it is arguable that the defence of property has been extended. See Brown et al, 2001 supra at 745.
affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his response to that danger (pp98-9). Therefore, the narrow recognition of the limits of autonomy recognised in the defence of provocation in NSW as imposed by the objective test do not apply in the case of self-defence.

In Jordan, the requirements of self-defence are found in Articles 60(1) and 341 of the JPC. Article 60(1) states that:

Every act done in responding to an imminent attack by warding off that attack against one’s self or property or against another person or his or her property is considered an act done in the exercise of right provided that the attack was unlawful and unprompted.

Article 341 of the JPC states:

The following acts are considered acts of self defence:

(1) Whoever kills another, or causes him or her wounds or any other injuries in defending himself/herself or his/her honor or defending another person or the honor of that person provided that
(a) The defence occurs at the time or during the attack;
(b) The attack needs to be unlawful; and
(c) Provided that the defender could not ward off the attack except by the killing or wounding or by the causing of any other injury.

(2) Whoever kills another or causes him or her wounds or any other injuries in defending his/her property or the property of another which is in his or her possession provided that
(a) The defence occurs at the time of or during the theft which is associated with the use of force; or
(b) The theft would cause serious damage to the victim even if it was not associated with force. In both cases there should be no other way to stop the robbers and reclaim the property except by the killing, wounding, or causing of injury.

In both NSW and Jordan in order to view an act carried out in response to an attack as being criminally blameless, it is necessary to establish that the defender did not create the

145 Similarly see Haines (1994) 35 NSWLR 294 at 305-306.
146 The reference to ‘defence of honor’ in this context refers to the defence against actions involving rape, sexual assault and so forth.
situation and provoke the attack upon himself or herself. When a person is under attack and he or she has reasonable grounds for believing that the threat or danger is about to occur or is imminent, then his or her will as an instrument for making free choices is considered effectively neutralised, and consequently criminal law absolves the accused from criminal culpability. Arguably in situations where a person responds to a threat of violence, such a threat interferes with the person’s autonomy as liberty of action. Further, it is also arguable that these external matters interfere with a person’s autonomy of effective deliberation. In this way, the law of self-defence in both NSW and Jordan relevantly acknowledges these limitations on an individual’s autonomy to act freely, so that it is right to exculpate them from criminal liability in such situations.

3.3.3.5. Duress

As far as duress is concerned, the proposition is that the individual acts under a threat of physical harm to the self or another person should he or she fail to comply with the threatener’s demands. In this way, a person who acts under duress is acting under compulsion, so that his or her autonomy as liberty of action is severely limited. At common law, a statement made by Smith J in *R v Hurley* [1967] VR 526 (which has been approved in NSW) sets out the elements of the defence:

Where the accused has been required to do the act charged against him (i) under a threat that death or grievous bodily harm will be inflicted unlawfully upon a human being if the accused fails to do the act and (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did and (iii) the threat was present and continuing, imminent and impeding...and (iv) the accused reasonably apprehended that the threat would be carried out and (v) he was induced thereby to commit the crime charged and (vi) that the crime was not murder, nor any other crime so heinous as to be

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147 This argument finds support in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 663; Article 60 of the *JPC*.
148 In *R v McKay* [1957] VR 560 at 562-3, it was held that self defence is not limited to the case where the person’s life is endangered or grave injury to him is threatened; it is also available where there is a reasonable apprehension that such possible danger or grave injury exists. In *Viro v R* (1978) 141 CLR 88 at 146 reference was made to an attack ‘being or about to be made’. In *Howe* (1958) 100 CLR 448 at 460, Dixon J referred to the attack as ‘an attack...made or threatened’.
149 *McCafferty* [1974] 1 NSWLR 89 at 90 by Glass J.
excepted from the doctrine and (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application and (viii) he had no means, with safety to himself, of preventing the execution of the threat, then the accused in such circumstances at least, has a defence of duress (p543).

In Jordan, Article 88 of the JPC deals with duress as follows:

There shall be no punishment for the person who commits a crime under a threat of duress and, at the time of the commission of that crime, he or she was reasonably under the apprehension of imminent death or a serious injury which would cause a permanent disability or mutilation of one of his or her organs if he or she did not submit to commit the crime (excluding murder) which he or she is coerced to commit. For a person to avoid criminal liability, he or she needs not to have created the situation of duress or subjected himself or herself to that duress, and there should be no other way to avoid such duress but to commit the crime.

A claim of duress does not negate the mens rea on the part of the compelled individual, nor does it deny the fulfillment of the commission of the physical act of a crime. That is, the individual under duress knows what he or she is doing and yet brings about the harmful consequence. However, the rationale for excusing a person from criminal culpability on the ground of duress is twofold. On the one hand, an individual who acts under pressure when confronted by an unavoidable threat of death or infliction of grievous bodily harm to either the self or another person his or her individual autonomy as liberty of action is severely limited. It may also be the case that in situations of duress, that fear involved in such a situation may infringe on the person’s autonomy as effective deliberation. Thus, if the person’s will was overborne at the time of acting through being subjected to a present, continuing and imminent threat or danger, he or she

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151 As to the requirement of causing death or grievous bodily harm as a sufficient grounds to establish duress see, for example, R v Lawrence [1980] 1 NSWLR 122; R v Brown (1986) 43 SASR 33. Threat to property is insufficient: DPP v Lynch [1975] AC 653 at 686.

could not be regarded as a free individual. Criminal law thus leaves his or her coerced action outside the scope of criminal culpability\textsuperscript{153}.

On the other hand, given the unwanted circumstances under which the individual was placed, without any fault on his or her part, his or her ensuing action can be seen as a reasonable response to an extremely dangerous situation. If the individual reasonably believes that the threat will be carried out if he or she does not comply, and commit the offence, then it can be said that resistance under these circumstances could not be reasonably expected. Consequently the compelled individual is absolved from culpability for the resultant offence. In \textit{Lawrence} (1980) 1 NSWLR 122 at p162, Nagel CJ and Yeldham J's joint judgment, acknowledged that the defence of duress incorporates an objective test, but they said whether the test to be applied was subjective or whether it was objective, given that most defendants are persons of ordinary firmness, with the result that the facts are such that a person of ordinary firmness would not have yielded, it is unlikely that the accused's will to resist would have genuinely been overridden\textsuperscript{154}.

3.3.3.6. Necessity

As with the defence of duress, that of necessity is based on the proposition that the individual’s will at the time of causing harm was constrained such that he or she could not make a meaningful choice\textsuperscript{155}. But unlike duress, the compulsion in the case of necessity arises from dangerous natural circumstances\textsuperscript{156}. In NSW, the defence of necessity has been recognised at common law\textsuperscript{157}, and in Jordan such defence is provided

\textsuperscript{153} The defence of duress cannot be raised in relation to murder in both NSW and Jordan: see R v McConnell [1977] 1 NSWLR 714; Article 88 of the JPC.

\textsuperscript{154} In \textit{Abusafiah} (1991) 24 NSWLR 531 at 545 it was said that the Crown must establish in relation to the threat that 'there is no reasonable possibility that such was its gravity that a person of ordinary firmness of mind and will, and of the same sex and maturity as the accused would have yielded to the threat in the same way in which the accused did'.

\textsuperscript{155} Murugason and McNamara, 1997 at 252; Tebbitt, 2000 supra at 131.

\textsuperscript{156} \textit{R v Howe} (1987) AC 417 at 429.

by the *JPC*. A useful definition of this defence is provided in the case of *R v Loughnan* [1981] VR 443 by Young CJ and King J:

[T]here are three elements involved in the defence of necessity. First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect...The [second] element...[is]...that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril...thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed. The [third] element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril? (p448).

Article 89 of the *JPC* provides that

The perpetrator of an offence is not subject to punishment if he or she carries out the conduct constituting the offence in response to an emergency which forced him or her to ward off immediately an immediate peril against himself or herself or his or her property or against another person or his or her property, provided that he or she did not intentionally cause that peril and provided that his or her conduct is proportionate with the danger.

In light of this formulation of the defence of necessity, it can be argued that as with duress, its rationale is that the existence of an imminent peril causing the individual to reasonably believe that it will inflict irreparable evil158 on the self or another unless action is taken to avoid that harm, and the absence of an alternative available to the individual apart from what he or she has done, serves to severely limit the person’s individual autonomy as freedom of choice. To this extent, when a person without prior fault on his or her part is being deprived of the freedom to make rational choice, he or she cannot be regarded as an autonomous person subject to criminal culpability.

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3.4. CONCLUSION

In this chapter, I set out to explore the extent to which individual autonomy forms a basis for criminal liability and how such liability can be explained by reference to this notion in both NSW and Jordan. It was noted that in both jurisdictions, one of the underpinning tenets of criminal culpability is the assumption that those who engage in crime, do so as free agents. Such an assumption necessarily raises issues of individual autonomy. In both NSW and Jordan, criminal liability requires proof of an actus reus and mens rea. Both of these elements contain at least some acknowledgment that the actor is engaging in autonomous action. For the actus reus, in both jurisdictions, there is a requirement that the performance of the elements of the actus reus are voluntary actions. Mens rea elements in both jurisdictions refer to notions such as intention, recklessness and knowledge, which further imply autonomous actions. All these states of mind, along with voluntariness are related to notions of individual autonomy. Therefore, in the first part of this chapter, I considered relevant philosophical accounts of consciousness, intention and autonomy, to help to understand the various nuances which are encompassed within the broader terminology of individual autonomy. To this end, I explored the work of Searle and Mappes and DeGrazia. The work of these authors provided fruitful theoretical insights into the notions of consciousness, intention, free-will and the limits of autonomy. These then provided the theoretical foundations for exploring the key concern of this chapter, namely, the extent to which individual autonomy (in its various forms) provides the basis for criminal liability in NSW and Jordan.

It is apparent from the analysis in this Chapter that individual autonomy indeed forms the basis for criminal liability in both NSW and Jordan. However, the form and degree of such autonomy with respect to voluntariness and different forms of mens rea, varies. At the most basic level, the requirement of voluntariness, only requires what Searle describes as a willed conscious bodily movement. Thus, in NSW, for crimes of absolute liability, only a bare minimum of individual autonomy is required to be exercised for a person to be found liable for such an offence. At the other end of the scale, offences for which the mens rea is intention, the notion of individual autonomy that is required is
much more complex. Again Searle’s analysis of prior intention, intention-in-action was useful in fleshing out the complexity of the notion of individual autonomy in the context of intentional human action.

When exploring notions of free will, Mappes and DeGrazia usefully provide a framework for exploring the limits on individual autonomy. They provide three definitions of autonomy (autonomy as liberty of action, autonomy as freedom of choice, and autonomy as effective deliberation) all of which can be restricted when a person acts under such restriction, so that it could not be said they were completely autonomous. The limits on autonomy recognised by Mappes and DeGrazia highlight that while at a general level individuals may be considered to be acting freely, there are various circumstances which may have an impact on the way in which an individual exercises their autonomy.

These limits on individual autonomy were also usefully employed in analysing the way in which the criminal law forgives transgressions which in some way result from an impingement on an individual’s autonomy. The defence of duress is underpinned by the recognition that certain actions of others may impose limits on a person’s liberty of action. Similarly, the defences of self-defence, provocation, diminished responsibility and insanity provide leeway in situations where an accused’s autonomy as effective deliberation is impaired. Finally, the defence of necessity recognises the limitations on autonomy as freedom of choice (in terms of the ability of a person to make decisions dependent on their access to material resources) although the circumstances in which this is recognised are restricted to extreme situations.

Thus, it can be seen from this chapter that individual autonomy indeed underpins the requirements of criminal culpability in Jordan and NSW, but that the notion of individual autonomy is complex and nuanced, and applies to particular forms of mens rea and defences in different and complex ways.

It is with these analytical tools that I now turn in the second part of this dissertation to critically analyse the law of complicity in Jordan and NSW. As such, in Chapters 4, 5 and
6 I explore how the notion of individual autonomy forms the ground for criminal liability in both NSW and Jordan when more than one person is involved in the commission of an offence (principles of complicity). Chapter 4 addresses this notion in relation to primary criminal liability, chapter 5 in relation to accessorical liability and in chapter 6 this notion is discussed in relation to the doctrine of common purpose.
4. **INDIVIDUAL AUTONOMY AND PRIMARY CRIMINAL LIABILITY**

**UNDER THE CRIMINAL LAWS OF NEW SOUTH WALES AND JORDAN**

4.1. **INTRODUCTION**

This chapter examines individual autonomy as the basis for the imposition of primary criminal liability under the criminal laws of NSW and Jordan. It addresses situations involving two or more persons entering into an agreement to commit an offence (known as the doctrine of straightforward joint criminal enterprise/acting in concert in NSW, and referred to as the liability of principal perpetrators and accomplices in Jordan). It also considers the case where, by the exercise of one’s own autonomy, a person (principal) exploits and utilises an innocent agent to commit an offence (known as the doctrine of innocent agent in NSW, and referred to as the moral perpetrator of crime in Jordan). In this chapter, the innocence of the agent (who is therefore devoid of criminal responsibility) refers to the absence or lack of his or her autonomy per se or in relation to the crime in question, whereas it is the exercise of the principal’s autonomy which forms the basis of the latter’s criminal liability. The chapter is divided into three parts. The first part explores the way in which the criminal law conceives the autonomy of an individual as a ground for primary culpability under the criminal law of NSW. The second part examines the position under the *JPC*. The chapter concludes by comparing and contrasting the respective positions of the two jurisdictions so as to cast light on how the two legal systems can inform each other on this contentious issue.
4.2. PRIMARY CRIMINAL LIABILITY IN NEW SOUTH WALES

Under the criminal law of NSW, a person may incur primary liability as a principal in the first degree in one of the following ways:159:

1. When he or she personally carries out the act or acts which constitute the whole or part of the physical element of an offence160.
2. Pursuant to straightforward joint criminal enterprise/ acting in concert even if he or she does not perform any physical act161.
3. When he or she exploits an innocent agent to commit an offence (doctrine of the innocent agent)162.

In this part, the aim is to show how the imposition of primary criminal liability is informed by the notion of individual autonomy through an analysis of the relevant legal principles applicable to this type of culpability under the law of NSW. To achieve this, this part is divided into two sections. The first deals with the principles applicable to the straightforward joint criminal enterprise (the second category), the second with the doctrine of innocent agent (the third category). The first category does not raise issues of complicity, and therefore does not warrant separate consideration.

4.2.1. Straightforward joint criminal enterprise (acting in concert)163

The doctrine of straightforward joint criminal enterprise operates to allow the attribution of criminal liability to an individual who agrees to participate in the

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159 On this point see for example Gillies, 1997 supra at 157-8,182; Scouler & Button, 2001 supra at 62-66; Gillies, 1980 supra at 39-41

160 See Osland v The Queen (1998) 197 CLR 316 at 341; Ferguson (1916) 17 S.R. (NSW) 69 at 76.


162 See White v Ridley (1978) 140 CLR 342; Cogan and Leak (1975) 2 ALL ER 1059; R v Hewitt [1997] 1 VR 295.

163 In Osland v The Queen (1998) 197 CLR 316, McHugh J at 343 states that according to the practice of New South Wales, the court refers to 'carrying out a criminal enterprise' rather than 'acting in concert'. The principles however are the same.
commission of an offence with another person or persons, and while present at the scene, one or more of the parties carries out the physical element of the offence agreed to be committed. The origin of this doctrine is to be found in the case of Macklin (1838) 2 Lew CC 22 where the court held it to be ‘a principle of law that if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law, done by all’\(^\text{165}\).

Throughout the following analysis, it will be shown that it is the exercise of one’s own autonomy, in combination with the exercise of another individual’s autonomy to commit an offence, which furnishes the ground for culpability under the doctrine of straightforward joint criminal enterprise. There are four identifiable essential elements of this doctrine.

First, the agreement or the understanding or arrangement amounting to an agreement between two persons or more to commit a crime, is the essence of the straightforward joint criminal enterprise. This understanding or arrangement can either be explicit or implied (unspoken understanding or arrangement). In Tangye\(^\text{166}\), the Court of Criminal Appeal of New South Wales held that:

> The Crown must establish both the existence of that joint criminal enterprise and the participation in it by the accused. A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed

\(^{164}\) The term 'straightforward joint criminal enterprise' is used to distinguish the issues discussed in this section from the extended concept of joint criminal enterprise which is based on the doctrine of common purpose. This is the terminology used by Hunt CJ in Tangye (1997) 92 A Crim R 545 at 556.

\(^{165}\) Although the origin of the doctrine of joint criminal enterprise can be traced to Macklin (1838), as the Law Commission in, Assisting and Encouraging Crime: A Consultation Paper No 131, Published in the United Kingdom for HMSO, 1993 at 14 observed, it has only been subject to close analysis in comparatively recent times.

\(^{166}\) (1997) 92 A Crim R 545 per Hunt CJ with whom McInerney and Sully JJ agreed.
This element of the doctrine encompasses recognition of the principle of individual autonomy as follows. The formation of an agreement between two or more individuals involves consciousness and capacity to make rational decisions based on deliberation by those individuals. On the one hand, this may entail prior intention (involving each individual knowing what the other is going to do because they already have the intention to commit a crime), and the transformation of such intention into action by committing the physical element of that crime. On the other hand, even in the absence of an agreement prior to the commission of the crime, the individuals will be seen as having acted intentionally, as their actions will involve their intention-in-action which caused their bodily movement (manifested in taking the steps toward the commission of the physical element of the crime in question).

Secondly, at common law the person who enters into an agreement or acts in concert with another to commit a crime needs to be present at the scene when the crime is committed pursuant to that agreement. In his article ‘Complicity, Concert and Conspiracy’ Lanham (1980) states that ‘the Australian cases which in effect treat those acting in concert as principals in the first degree stress the requirement of presence and show no disposition to extend the concept to those absent from the offence’ (p287). To this effect, in Tangye, Hunt CJ, with whom McInerney and Sully JJ agreed, held that:

A person participates in that joint criminal enterprise either by committing the agreed crime itself or simply by being present at the time when the crime is committed (with knowledge that the crime is to be or being committed) by intentionally assisting or encouraging another participant in the joint criminal...

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167 This principle has been reiterated in _Donnell v R_ (unreported, NSWCCA) 394, 5 October 2001; _R v Harrison and Georgiou_ (unreported, NSWCCA) 464, 21 November 2001; _R v Hickey_ (unreported NSWCCA) 474, 29 November 2002; _R v John Youkhana_ (unreported NSWCCA) 87, 6 April 2004; _R v Cotter and Others_ (unreported NSWCCA) 273, 1 October 2003.


enterprise to commit that crime. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime\(^{170}\) (p557). [Emphasis added]

Along these lines, in *Hui Chi-Ming v The Queen*,\(^{171}\) it was held by Lord Lowery that:

The law says that if two or more persons reach an understanding or arrangement that they will commit a crime...and whilst that arrangement is still in being, they are both present and one or other of them does, or they do between them, in accordance with their arrangement all the things necessary to constitute the crime, then they are all equally guilty of it provided the crime does not go beyond that understanding or arrangement ...The Crown may establish the offence charged against [the defendant] by proving that the [defendant] was present when the victim was attacked in accordance with an understanding or arrangement to which the [defendant] was a party and that the understanding or arrangement included the intent charged (p45). [Emphasis added]

A party’s participation in a straightforward joint criminal enterprise by being present at the scene by reason of pre-concert, is also seen as being underpinned by his or her free decision and action. This individual has freely entered into an agreement with another to commit a crime (as mentioned above, this will involve their deliberation and prior intention). Further, the intention-in-action for the party who is merely present by reason of pre-concert revolves around the idea that he or she has taken steps to come to the scene to ensure the commission of the agreed upon offence. Even where they thereafter remain ‘inactive’, not actually engaging in the relevant criminal activity, we can see such inaction to be a result of the prior decision to participate. And such prior decision encompasses the likely causal consequences of such ‘inactive presence’ in supporting or encouraging the active participant, as indicated by Hunt CJ.

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\(^{170}\) This principle has been reiterated in *Donnell v R* (unreported, NSWCCA) 394, 5 October 2001; *R v Hickey* (unreported NSWCCA) 474, 29 November 2002; *R v John Youkhana* (unreported NSWCCA) 87, 6 April 2004; *R v Harrison and Georgiou* (unreported, NSWCCA) 464, 21 November 2001.

\(^{171}\) [1992] 1 AC 34 at 45. *Hui Chi-Ming* was considered by The High Court of Australia in *Osland v The Queen* (1998) 197 CLR 316 at 344-345 without doubting the principles as laid down by it. In fact, the same principles are found in NSW: see *Tangye* (1997) 92 A Crim R 545.
In contrast, if the person participates in the commission of an offence and is present at the scene without any pre-arranged plan, then he or she might be liable as a principal in the second degree\(^ {172}\). Also, if a person participates in the commission of an offence but is absent from the scene when the crime is committed, he or she may be regarded as an accessory before the fact\(^ {173}\). In addition, presence at the scene is not necessary for application of the doctrine of common purpose (or what is sometimes called the extended concept of joint criminal enterprise\(^ {174}\), which operates to hold the participant liable for the commission of an additional crime which was not the same as that agreed under the *McAuliffe and McAuliffe* (1995) 183 CLR 108 principles (discussed in chapter 6). For example, suppose A and B agree to commit a crime, X. While the agreement is still afoot one (or both) of them perpetrate the physical element of that offence in each other’s presence. In this case, both are equally responsible for their act pursuant to the doctrine of straightforward joint enterprise. But if, in the course of the commission of crime X, B commits another crime, Z, then under the principles of the doctrine of common purpose, for A to be held responsible for crime Z, A should have contemplated its commission as a possible outcome in the course of the commission of the agreed upon crime X. In *Tangye*\(^ {175}\), Hunt CJ held that

The Crown needs to rely upon a straightforward joint criminal enterprise only where... it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed (p556).

\(^{172}\) *Donnell v R* (unreported, NSWCCA) 394, 5 October 2001; *Mohan v The Queen* [1967] 2 AC 187 at 189-190. The concept of the principal in the second degree is further developed when the issue of accessorial liability is dealt with in chapter 5.

\(^{173}\) *Osland* [1998] 197 CLR 316 at 342. The concept of the accessory before the fact is further developed when the issue of accessorial liability is dealt with in chapter 5.


\(^{175}\) (1997) 92 A Crim R 545.
Thirdly, the party to a straightforward joint criminal enterprise is liable for the commission of the agreed upon offence even if the actual perpetrator is not held liable for reasons such as insanity, not being arrested or having died.\footnote{See King v The Queen (1986) 161 CLR 423; R v Humphreys and Turner [1965] 3 All ER 689; R v Darby (1982) 148 CLR 668; R v Austin [1981] All ER 374.}

In \textit{Osland v The Queen}\footnote{(1998) 197 CLR 316.}, McHugh J held that

Once the parties have agreed to do the acts which constitute the actus reus of the offence and are present acting in concert when the acts are committed, the criminal liability of each should depend upon the existence or non-existence of mens rea or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator. So even if the actual perpetrator of the acts is acquitted, there is no reason in principle why others acting in concert cannot be convicted of the principal offence. They are responsible for the acts (because they have agreed to them being done) and they have the mens rea which is necessary to complete the commission of the crime (p350).

In order to hold an individual criminally liable on the grounds of straightforward joint criminal enterprise, that person needs to have the capacity to enter into the agreement with another. His or her later insanity does not necessarily affect the liability of his or her co-adventurer. In \textit{Matusевич v The Queen},\footnote{(1977) 137 CLR 633 per Gibbs at 637 and Aickin JJ at 661-664.} the High Court of Australia considered the question of whether or not it is possible to act in concert with an insane person. It was held that when two persons are said to be acting in concert (or in other words had formed a common intention and were acting together in a common enterprise to achieve an object which is in law criminal), the circumstance that the actual perpetrator is insane does not necessarily mean that the conviction of the other, who was present at the scene, should be quashed as long as the actual perpetrator had sufficient capacity to enter into the agreement or understanding.\footnote{See also \textit{Osland v The Queen} (1998) 197 CLR 316 at 345-346; R v Bikic (unreported NSWCCA) 227, 20 June 2002.}
Aikin J in *Matureyich* held that in a situation where the person who commits the actus reus of the offence is insane:

The jury should ... be told that they must consider whether the nature of the insanity, if they find insanity, is such as to make it impossible for there to be any concert between the two accused. They should be told that if they find that one accused did not understand the nature or quality of the act which he in fact did, then there could be no concert between the two accused. They should also be told that, if the basis for their finding of insanity was that the accused did not know that what he did was wrong, they may find that the two accused acted in concert, if they are satisfied that there was an actual agreement or common understanding (p664).

Thus, in NSW, the case law establishes that the agreement (which is required to make the act done as something done in concert) cannot be established unless the individuals involved possess the capacity to enter into the agreement. The law as it stands allows a person which the law considers to be insane to possess such capacity. However, as seen in Chapter 3, the law provides that if a person is found not to be able to know that what he or she was doing was wrong, may form the basis of the defence of insanity, and no criminal liability will follow. Yet, establishing an agreement for the basis of straightforward joint criminal enterprise arguably involves a higher level of rational decision making than does distinguishing between right and wrong. If the law allows an offender to escape liability on the basis of insanity in the sense of not knowing the wrongfulness of his or her actions, the law should not regard the insane person as capable of entering into an agreement with another so as to form the basis of that other person’s culpability.

Therefore, allowing an agreement with an insane person to form the basis of liability for a straightforward joint criminal enterprise attributes that insane person with an artificial degree of autonomy. Indeed, as Mappes and DeGrazia have pointed out, insanity creates severe limitations on a person’s autonomy as effective deliberation. Such an insane person is not capable of making rational and informed decisions, and to consider them capable of doing so to the extent of being able to form agreement is artificial. In any event, as discussed in the following section, the doctrine of innocent agent, which does
not require an agreement between the principal and the innocent agent, provides a foundation of criminal liability in such situations.

Fourthly, if the agreed crime is committed by one or more of the parties to a straightforward joint criminal enterprise, all are equally guilty for its commission regardless of the part played by each one of them in carrying out its physical element\(^{180}\). All parties to a straightforward joint criminal enterprise are liable as principals in the first degree, and their liability is primary. In *Osland v The Queen*\(^{181}\), McHugh J held that:

At common law, a person who commits the acts which form the whole or part\(^{182}\) of the actus reus of the crime is known as a "principal in the first degree". There can be more than one principal in the first degree\(^ {183}\)... a person may incur criminal liability not only for his or her own acts but also for the acts of others that do so... where a person was *not only present* at the scene with the person who commits the acts alleged to constitute the crime but was there by reason of a pre-concert or agreement with that person to commit the crime\(^ {184}\)... the liability of each person present as the result of concert is... primary. He or she is a principal in the first degree. Each of the persons acting in concert is *equally responsible for the acts of the other or others*. This general principle was clearly stated in *R v Lowery and King*\(^ {185}\) by Smith J who directed the jury in the following terms “the law says that if two or more persons reach an understanding or arrangement that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both present at the scene of the crime and one or other of them does, or they do between them in accordance with their understanding or arrangement, all the things that are necessary to constitute the


\(^{183}\) See *Errington and Others' Case* (1838) 2 Levin 217 [186 ER 1133]; *R v Clarke* [1959] VR 645 quoted in *Osland By McHugh J*. Sometimes the actus reus of an offence is being made up of two or more acts which are satisfied by two or more persons acting in concert; or the actus reus consists of one act which is committed jointly by two or more persons. An example for the former is a robbery where A holds a gun to B's head while C steals the money. An example for the latter is where, A and B attack C, who dies from the combined effect of their blow. On this point see The Law Commission, *Assisting and Encouraging Crime: A Consultation Paper No 131*, Published in the United Kingdom for HMSO, 1993 at 14.

\(^{184}\) See also *R v Lowery and King* (NO 2) [1972] VR 560; *Chai* [2000] NSWCCA 320. *R V Hurse* (1841) 2 M & Rob 360 at 361; [174 ER 316 at 317] quoted in *Osland*.

\(^{185}\) (NO 2) [1972] VR 560 at 560.
crime, they are all equally guilty of that crime\textsuperscript{186} regardless of what part each played in its commission. In such cases they are said to have been acting in concert in committing the crime” (pp341-342). [Emphasis added].

In sum, the doctrine of straightforward joint criminal enterprise, to a large extent requires a high degree of individual autonomy by those involved in the enterprise. The foundation of liability is the agreement between the parties, and the presence of both parties at the time the crime is committed. Even though a party may not perform any act or acts which constitute the physical element of the offence, he or she may still be liable, because of this focus on the agreement, and his or her prior intention for the crime to be committed, still being manifest by his or her presence at the scene of the crime. Further, it is arguable, that the prior intention of the parties that the crime be committed is more likely to be put into operation because of the encouragement that the person who performs the physical act may receive from the presence of the other party to the enterprise. In this way, it is arguable that the combination of the agreement and presence at the scene of the crime by one party, influences the autonomy of the other party to complete the commission of the crime. However, the doctrine of straightforward joint criminal enterprise allows an insane person to be attributed with the capacity to enter into an agreement. This is out of line with a true recognition of individual autonomy as the capacity to make rational and informed decisions. The underlying rationale of the legal category of insanity is to identify individuals incapable of making rational and informed decision. And such a capacity is surely a precondition for any meaningful agreement about a course of criminal action.

\textsuperscript{186} See also R v Jensen and Ward [1980] VR 194 at 195. McHugh J at 343 in Osland states that the correct statement, as subsequent cases show, is that they are all equally liable for the acts that constitute the actus reus of the crime.
4.2.2. The doctrine of the innocent agent\textsuperscript{187}

The doctrine of the innocent agent is concerned with the attribution of criminal liability to the person (referred to as principal in this section) who consciously and intentionally manipulates, uses and exploits a non-autonomous agent to commit a crime. The operation of this doctrine raises many questions. Some of these relate to the person who uses the innocent agent, while others concern the innocence of that agent. Among others, these questions involve addressing whether the person who commits the crime through an innocent agent is to be considered exactly equivalent to the normal perpetrator who commits a crime by himself or herself. What state of mind must he or she possess? Is it intention or is negligence sufficient? What type of conduct is required on his or her side? What is the solution if the offence requires personal performance by the actual perpetrator, or the law specifies a certain status to be satisfied in that perpetrator? What constitutes the innocence of the agent being used to commit the crime? (Smith, 1991: 96-97).

A consideration of these questions as they arise in the following analysis of the doctrine of innocent agent helps to tease out the way in which a person’s free choice and decision forms the foundation for culpability of the principal, and the exculpation of the agent. In what follows, I first consider the rationale of the doctrine. I then consider the extent to which individual autonomy forms the basis of criminal liability, and finally areas of uncertainty concerning the application of the doctrine.

4.2.2.1. The rationale of the doctrine

The rationale behind the evolution and development of this common law doctrine is to avoid the limitations resulting from the adoption of the narrow theory of accessorial liability. In particular, it aims to avoid the implications of the derivative nature of accessorial liability (elaborated below) which precludes holding as an ‘accessory’ the person who uses an agent who is free from liability to commit a crime. As a general rule, the principles of accessorial liability operate to determine the liability of an individual who assists and encourages (or in NSW legal terminology who aids, abets, counsels or procures) the commission of an offence where that offence has been committed by another person (Brown et al, 2001: 1349). According to the narrow theory, accessorial liability is derivative in nature,\textsuperscript{188} in that the secondary participant to the commission of an offence derives his or her liability from the criminal liability of the principal offender. This theory is reflected in the common law which holds that the liability of the accessory to an offence is derivative from and dependent on that of the person who commits the crime\textsuperscript{189}. In other words, unless there is a liable perpetrator of an offence, there can be no accessory to that offence\textsuperscript{190}.

The following example illustrates the situation. Suppose P uses an insane person A to steal the property of C. Under the narrow theory of accessorial liability, if A is exempted from criminal liability on the ground of insanity, P cannot be held as an accessory to theft because no criminal liability is attributed to A. In such situations, although it is appropriate not to attribute criminal liability to A, it is inappropriate to allow P -who intentionally encouraged the commission of the crime - to escape criminal liability. The device by which the common law sought to overcome this anomaly is through the invention of the doctrine of innocent agent, which operates to incriminate the ‘accessory’ as a ‘principal offender’ of the offence for which he or she has used an innocent agent to perpetrate its physical element (McAuley & McCutcheon, 2000:940-494; Crofts, 2001:

\textsuperscript{188} This point will be further discussed when the issue of accessorial liability is dealt with in chapter 5.
\textsuperscript{189} Osland [1998] 197 CLR 316 at 342.
\textsuperscript{190} R v Hewitt [1997] 1 VR 301 at 311.
As against this is the view which holds that the doctrine of innocent agent can be made redundant in favour of the adoption of a broad theory of accessorial liability. Under this theory, criminal liability is derived from the wrongful act of the perpetrator, rather than his or her liability. It is the wrongful act of the perpetrator and not his or her liability which is relevant to the question of an accessory’s liability. From this perspective, if the actual perpetrator’s act is excusable, an accessory can still be held liable if the culpability of the accessory arises from the wrongful act itself rather than from the liability of the perpetrator (Fletcher, 1978:642). Alldrige (1990) in his article ‘The Doctrine of Innocent Agent’ advocates this view, arguing that the doctrine of innocent agent would be made redundant if the narrow theory of accessorial liability were renounced in favour of the broad theory of accessorial liability, which draws on a distinction between the wrongfulness of the act and its attribution to a particular actor.

Alldrige states:

[The] broad theory of accessorial liability... draws a distinction between the wrongfulness of the act and its attribution to a particular perpetrator...while the wrongfulness is a feature of acts considered abstractly, culpability is always personal.... [I]n a prosecution against the accessory, it is the latter’s culpability that is relevant; the perpetrator’s culpability is incidental...thus the broad theory allows conviction of an accessory where the perpetrator cannot be convicted, so long as the latter did what is forbidden by law...accessorial liability is derivative not from a convictable crime but from a wrongful act (p46-47).

Arguably, renouncing doctrine of innocent agent in favour of adopting a broad theory of accessorial liability contradicts the structural formulation of the law of complicity, and overlooks the role of the principal’s autonomy as the ground of culpability under this doctrine. The criminal law recognises different degrees of mental and physical involvement in the commission of an offence. The mental state of the principal and accessory differs: the principal offender intends to commit the crime, while the accessory intentionally assists the principal in committing that crime. To say that the principal has
intended the commission of the crime involves him or her having formed a prior intention to bring it about, along with the translation of such intention into action through the perpetration of its physical element. By contrast, to say that an accessory assists the commission of the principal's crime indicates the secondary nature of the latter's role. Applying this formulation to the commission of an offence through the use of a non-autonomous agent shows the inappropriateness of describing the person who used an innocent agent as an 'accessory' to the commission of that offence, rather than as a principal. The case of Cogan and Leak\(^{191}\) provides a good example to illustrate this point.

In that case, Leak prevailed on his friend, Cogan, to rape his wife, Mrs Leak. Cogan was acquitted because he believed that Mrs Leak was consenting to the intercourse. In terms of the Mappes and DeGrazia's definitions of autonomy discussed in Chapter 3, Cogan's autonomy as effective deliberation was significantly restricted by virtue of the lies and deception perpetrated by Leak. His autonomy was restrained by virtue of lack of appropriate information on which to act.

The question raised in this case was whether Leak was to be held liable as an accessory to, or as a principal of that crime. Alldridge (1990:52) argues that in light of the broad theory of accessorial liability, the appropriate solution to this case is to say that the norm laid down by the law relating to rape is that it is wrongful for a man to have intercourse with a non-consenting woman. The wrongful act is rape and the excuse (mishandled belief in the existence of consent) is personal to Cogan and should not affect the liability of Leak as an 'accessory'. Obviously, this overlooks the fact that it was Leak who manipulated Cogan to achieve his goal of raping his wife. The suggestion that Leak should be considered an 'accessory' does not sit comfortably with his primary role in the crime, contradicting the fact that it was the exercise of his autonomy which led to the rape of his wife.

\(^{191}\) [1975] 2 All ER 1059.
4.2.2.2. Individual autonomy as the basis of criminal liability under the doctrine of innocent agent

Under the doctrine of the innocent agent or ‘perpetration by means’\textsuperscript{192}, criminal culpability rests on the exercise of the principal’s prior intention to commit a crime along with his or her intentional action to exploit the innocent agent on the one hand. On the other hand, it rests on the absence of the agent’s autonomy, the agent in effect being a mere instrument of the principal. The innocent agent is one who brings about the actus reus of an offence but is absolved from criminal liability by reasons including infancy, lack of mens rea or ignorance of the true facts, believing that the act is lawful or that he or she has a defence (Scanlan & Ryan, 1985:99; Smith, 1991:117; Card, 1995:550; Bronitt & McSherry, 2001:402; Murugason & McNamara, 1997: 315; Williams, 1961:350; Buxton, 1975:1133).

In order to illuminate the liability of the principal offender for the commission of an offence through an innocent agent, it is useful to distinguish between three situations. First, the agent’s innocent mind and the liability of the principal offender. Second, the agent’s guilty mind and the liability of the principal offender. And third, the agent’s exculpation because of his or her entitlement to a defence.

4.2.2.2.1. The agent’s innocent mind and the liability of the principal

In NSW, the legal principles concerning the liability of the principal offender who commits a crime through an innocent agent are found at common law. These principles have been considered in many cases such as White and Ridley\textsuperscript{193}, Hewitt\textsuperscript{194}, Demirian\textsuperscript{195} and Cogan and Leak\textsuperscript{196}. Throughout the analysis of these cases, it will be illustrated that

\textsuperscript{192} Fletcher, 1998 supra at 197.
\textsuperscript{193} (1978) 140 CLR 342.
\textsuperscript{194} [1997] 1 VR 301.
\textsuperscript{195} [1989] VR 97.
\textsuperscript{196} [1975] 2 All ER 1059.
it is the autonomy of the principal which forms the foundation for his or her liability pursuant to the doctrine of innocent agent.

The English case of Cogan and Leak\(^{197}\), touched upon above, is a key case on this matter, as it illustrates the policy consideration behind the creation of the doctrine of innocent agent (reflecting the central role of the principal’s autonomy as the ground of culpability). In that case, Leak, the husband, encouraged Cogan to have sexual intercourse with his wife. In his statement, Leak admitted that he had done so, and Cogan had intercourse with Leak’s wife in the belief that she was consenting whereas in fact she was not. Cogan was convicted of rape and Leak of aiding and abetting it, and both appealed against the conviction. The trial judge told the jury that they could find Leak guilty of aiding and abetting rape even if Cogan was found to have believed that Mrs Leak was consenting to the intercourse and that his belief was reasonable. Cogan’s conviction was quashed whereas Leak’s was upheld.

In his appeal, Leak contended that he could not be found guilty of aiding and abetting rape if Cogan as the actual perpetrator was acquitted of the offence. Given this, the court was faced with considering whether Leak should be allowed to go free since he was charged with aiding and abetting rape committed by Cogan who was found to be innocent. The trial judge directed the jury that they could convict Leak of aiding and abetting rape even if they found Cogan to have believed that the wife had consented. The court held that the fact that Cogan was innocent of rape because of his belief did not affect the proposition that Mrs Leak was raped and her ravishment had come about because Leak had ‘intended’ that and ‘used’ Cogan as an instrument to perform the physical element of rape. The court then had to consider whether it was possible to convict Leak as an accessory to rape, notwithstanding that the principal offender - Cogan - had been acquitted. Given the derivative nature of accessorrial liability, it was impossible

\(^{197}\) [1975] 2 ALL ER 1059. A similar application of the principles concerning the doctrine of the innocent agent as laid down in Cogan and Leak are found in the Australian cases: see White and Ridley (1978) 140 CLR 342. Compare Bourne (1952) 36 Cr App Rep 125. In that case, the court reached a different conclusion, holding a person who compelled his wife to commit buggery with a dog as a principal in the second degree rather than a principal in the first degree.
for the court to hold Leak as an accessory to rape, since Cogan was found not guilty. The method adopted by the court to overcome this problem was through the application of the doctrine of innocent agent. The court made it clear that Leak should not escape liability simply because he had been charged as an aider and abettor, and that he should be liable as a principal offender.

Lawton LJ who delivered the judgment of the Court held that:

Cogan had had sexual intercourse with [Mrs Leak] without her consent. The fact that Cogan was innocent of rape because he believed that she was consenting does not affect the position that she was raped. Her ravishment had come about because Leak had wanted it to happen and had taken action to see that it did by persuading Cogan to use his body as the instrument for the necessary physical act. In the language of law the act of sexual intercourse without the wife’s consent is the actus reus; it had been procured by Leak who had the appropriate mens rea, namely his intention that Cogan should have sexual intercourse with her without her consent... it is irrelevant that the man whom Leak had procured to do the physical act himself did not intend to have sexual intercourse with the wife without her consent. Leak was using him as a means to procure a criminal purpose... the modern law allowed Leak to be tried and punished as a principal offender. It would have been no defence for him to submit that if Cogan was an ‘innocent’ agent, he was necessarily in the old terminology of the law a principal in the first degree, which was a legal impossibility as a man cannot rape his wife during cohabitation... because the law presumes consent from the marriage ceremony... There is no such presumption when a man procures a drunken friend to do the physical element for him (p1062). [Emphasis added]

A similar application of the principles as laid down by the case of Cogan and Leak, is found in the Australian High Court case White v Ridley. In the course of his judgment,

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198 Marriage is no longer a bar to conviction for raping a wife in NSW: see section 61T of the Crimes Act 1900 (NSW). Moreover, the common law rape offence has been replaced by the sexual assault offences in sections 61-80 of the Crimes Act 1900 NSW. Accordingly, both sexes can commit sexual assault, and the victim could be either sex.

199 (1978) 140 CLR 342. This case involved the importation of cannabis on an airline into Australia. At the first instance, the Magistrate’s Court of Victoria convicted the accused of importing a prohibited substance into Australia, contrary to s 233B of the Customs Act 1901 (Cth). An appeal to the County Court was dismissed. At the appellant’s request, the case was sent to the Supreme Court. The Full Court upheld the conviction and the appeal was dismissed. The appellant applied for special leave to appeal to the High Court. Special leave was granted but the appeal was dismissed. For recent application of the doctrine of innocent agent, in circumstances similar to those of Cogan and Leak, see R v Hewitt [1997] 1 VR 301. In
Gibbs J considers the liability of the principal for the commission of an offence through an innocent agent. He acknowledges that when a person with the necessary 'intent' uses another but innocent person as an instrument to perform the physical act necessary to commit a particular crime, the former is the principal offender of that crime and he refers to this as a 'well established principle' (p347). Further, he states that the doctrine of innocent agent applies not only when the agent lacks criminal responsibility because of insanity or being too young to know what he was doing but also where the agent is of a sound mind and of full understanding but ignorant of the true facts and believes that what he or she is doing is lawful (p346). For the purpose of illustrating this doctrine, Gibbs J refers to cases from the 1800s in the UK and provides the following examples:

1. If A sends out B with a forged bank note for the purpose of passing it, and B does so, being ignorant that it was forged, A is guilty of uttering and publishing the note. That is, where 'an innocent person is employed for a criminal purpose, the employer must be answerable': *R v Palmer and Hudson* (1804) 1 Bos & Pul 96 at 97.

2. If A gives B false particulars to enter in a register, and B enters them believing that they are true, A is guilty of making the false entry in the register: *Reg v Butt* (1884) 15 Cox C.C 564.

3. If A, planning a forgery, procures B, an innocent engraver, to make a plate, A is guilty of making and engraving the plate: *Reg v Bull and Schmidt* (1845) 1 Cox C.C 281.

4. If the defendants fabricated false vouchers on the high seas and posted them to a third person who innocently delivered them in Middlesex, then the defendants will be triable for that delivery. That is, for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose. The crime of presenting these vouchers was exclusively their own, as the crime of

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administering poison through the medium who is ignorant of its quality would be the crime of the person who has procured it to be administered: *Reg v Brisac and Scott* (1803) 4 East 164, at 172.

Stephen J at p353 (with whom Aickin J agreed, at p363) also acknowledges the existence of the doctrine of innocent agent, holding that the accused had used 'an innocent instrument' to commit the offence (the accused's arrangement with the airline was the cause of the importation of cannabis into Australia). Stephen J prefers the use of 'instrument' rather than 'agent'. That is, the relationship between the accused and the person conducting the actus reus of the offence is not always one which the law would recognise as being of 'principal' and 'agent'. It appears that even although Stephen J acknowledges the existence of the doctrine of innocent agent, he was inclined to solve this case by reference to the principle of causation. Much of his judgment (pp352-359), was concerned with stating that the arrangement of the accused with the airline was the cause of the importation. He considers the argument that the chain of causation has to be broken to absolve the accused from liability, but on the facts stated he rejected this. Stephen J (p359) also states that this case may be analysed in terms of intent rather than in terms of causation, but with no difference in conclusion. That is, once the accused had made the arrangement with the airline to import the cannabis, no further action was required on his part so that his intent should take effect; all that was necessary to effect the importation using the airline as 'an innocent instrument' had been accomplished. The state of mind of the accused at a later stage is irrelevant. He considered the need for a coincidence of the actus reus and mens rea and held that in this case there was a coincidence because the accused had the relevant intent while in Singapore and all relevant acts, namely the arrangement for importing the cannabis into Australia were completed before he left Singapore.
In the same vein, in *Demirian*\(^{200}\), McGarvie and O'Bryan JJ stated that:

> Where an act which would be a crime if done by A, is caused by A to be done by B, and B does not commit a crime by doing so, the law may regard A as having acted by an innocent agent and as being guilty of the crime as a principal offender\(^{201}\) (p118).

In sum, it can be seen from the cases discussed in this section that the doctrine of innocent agent is founded on the principle of individual autonomy. The agent is not criminally liable because he or she is not considered to be autonomous as his or her autonomy as effective deliberation has been impinged upon by the lies and distortion of the truth conveyed to them by the principal. Therefore, any actions of the agent which may indeed have been deliberate, will not be considered to be autonomous for the purposes of the criminal law, and will be attributed to the principal. By the same token, the principal has exercised his or her individual autonomy when presenting incorrect

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\(^{200}\) [1989] VR 97 at 117-121. In that case, the accused Demirian and the deceased Levonian were members of the Armenian Revolution Federation concerned to redress what they called a genocide of the Armenian people by Turkey in 1915. They decided to bomb the Turkish Consulate in Melbourne. Levonian who had the bomb with him parked the car under the Turkish Consulate while Demirian waited for him some distance away in another car. The evidence showed that Levonian had interfered with the bomb, which caused it to explode prematurely, and was killed. Demirian was charged with conspiracy to bomb the Consulate and with the murder of Levonian. Demirian appealed and his conviction of murder was quashed. The Crown relied on the doctrine of innocent agent in combination with the doctrine of transferred malice, to convict Demirian of murder. The Crown argument was that Demirian intended that Levonian should do an act which would cause the bomb to explode and intended the explosion to kill or knew that it would probably kill Consular officials. Levonian did an act which caused the bomb to explode and as he could not commit a crime by killing himself, Demirian is to be regarded as having acted through an innocent agent. Demirian therefore is to be regarded as the principal offender and by the concept of transferred malice it follows in law that Demirian is to be treated as principal offender who did the act which killed Levonian with intent to kill him or with knowledge that it would probably do so.

\(^{201}\) Their honors considered the possibility of whether the doctrine of innocent agent can be combined with the doctrine of transferred malice and held that:

It is also settled law that if, for example, X shoots with intent to kill Y, but misses and hits and kills Z instead, X is guilty of the murder of Z. This is the doctrine of transferred malice...we assume that in an appropriate case, concepts of innocent agent and transferred malice may be combined. Thus, we assume, if M instigated N, a boy too young to be guilty of murder, to shoot O and N shot and missed but killed P, M could be convicted of the murder of P... no decision anywhere in the common law world has been cited to the court where the concept of innocent agent was combined with that of transferred malice to justify the conviction of an accomplice for the murder of a fellow accomplice who unintentionally killed himself or herself while engaged in carrying out the crime of murder or any other crime... there are no principles implicit in the existing decisions in Australia or England which would justify such a complex and artificial application of principles as would have to be followed if Demirian were to be liable to conviction.
information to the agent with the intention of using that agent to perpetrate the physical
element of the crime.

4.2.2.2. The agent’s guilty mind and the liability of the principal

As stated earlier, where the agent is completely free of criminal responsibility because of
the absence of autonomy, it is the principal who is liable for the commission of the crime
in question. But suppose the agent is to some extent not fully innocent (possessing a
mental state for a less serious offence than that intended by the principal) and
consequently can be found criminally responsible for his or her action. The situation
where the agent is not completely innocent (but rather he or she may be innocent in the
sense of lacking the necessary fault for a more serious offence sharing a common actus
reus) is referred to as the semi-innocent agent (Smith, 1991:130; Williams, 1983:373).
The question arises as to whether the principal should be liable to a higher degree than
the agent because of the principal’s greater mental culpability, or whether the agent’s
guilty mind operates to reduce the liability of the principal offender. As the following
discussion will illustrate, the guilty mind of the agent does not reduce the liability of the
principal. Rather, both the agent and the principal are considered to be liable according to
his or her own state of mind.

To illustrate the situation it is appropriate to consider the following example. Suppose P
intends to kill C and uses A to do so. A attacks C causing C minor wounds, thinking that
no more is intended. Assume that A is not guilty of attempting to kill C, the question is
whether or not P can be convicted for the acts of A, given that A was a semi-innocent
agent. Such a situation was considered in the Richards case, where Mrs Richards
procured two persons to assault her husband intending, that they should inflict grievous
bodily harm. The two persons attacked but did not seek to inflict grievous bodily harm,
and the assault fell short of that level of violence. Consequently, they were convicted of

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of murder under one of the common law definitions by combining the doctrines of innocent agent
and transferred malice (pp118-121).
the lesser crime of unlawful wounding whereas Mrs Richards was convicted of wounding with intent to cause grievous bodily harm. On appeal, Mrs Richards' conviction was reduced to unlawful wounding on the ground that she could not be convicted of a crime higher in degree than the persons who actually did it. Clearly, the perpetrators in Richards were not innocent in the usual sense but they were innocent in the sense that they lacked the necessary mens rea for the serious offence of wounding with intent to cause grievous bodily harm.

In light of the decision in Richards, a person who uses another to commit a crime cannot be held to a higher degree of liability than the agent. However, Richards was overruled in Howe\(^2\). In Howe, it was held that the offender who possesses the appropriate mens rea for a more serious offence than the one who actually brings it about may be convicted of that more serious offence. Lord Mackay held that 'where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant'. Williams (1983:374) prefers to use what he refers to as the 'semi-innocent agent' to characterise this situation. He argues that 'if a person can act through a completely innocent agent, there is no reason why he should not act through a semi-innocent agent. It is wholly unreasonable that the partial guilt of the agent should operate as a defence to the instigator'. In contrast, Smith (1991:131) points out that applying the objectively harmful wrongdoing analysis to the facts of Richards produces a different conclusion\(^3\). As he says 'taking the wounding as the common source of objective harm from which the accessory’s liability may be derived…it could be maintained that with the necessary mental culpability Mrs Richards actions constituted complicity in the more serious offence of wounding with intent'.

4.2.2.2.3. The agent's exculpation because of their entitlement to a defence

The agent's exculpation from liability might refer to his or her entitlement to a defence. In this case, the agent may or may not be aware of what he or she is doing. Nonetheless, because the agent's actions are not the product of free autonomy, criminal liability is attributable to the principal who used the agent to commit the crime. Suppose that P coerced A to kill C. If A is found entitled to the defence of duress, the question arises: what effect does the availability of such defence on the part of A have on the liability of P? Arguably, the classificatory nature of the defence available to A is crucial to the determination of the liability of P, depending on whether the defence is classified as a justificatory or excusatory one. If classified as a justification, then there would be no place for the application of the doctrine of innocent agent and P should escape liability as no crime has been committed by A in the first place (Clarkson & Keating, 1994: 533). The objective effect of a justificatory defence goes to negate the conduct's criminality, rendering permitted or lawful what would otherwise be deemed criminal. As Fletcher (1978) points out 'claims of justification concede that the definition of the offence is satisfied, but challenge whether the act is wrongful...a justification speaks to the rightness of the act' (p759). However, if the defence is being classified as an excuse, the principal who commits the crime through an innocent agent can be held liable for that offence (Clarkson & Keating, 1994: 533). This is because the availability of an excuse does not negate the criminality of the act: it simply excuses the actor. To this effect, Fletcher (1978) asserts that 'claims of excuse concede the act is wrongful, but seek to avoid the attribution of the act to the actor' (p759).

204 This follows from Alldridge's argument in 'The Doctrine of Innocent Agent' (1990:46-47), where he advocated the renunciation of the doctrine of innocent agent in favour of the adoption of a broad theory of accessory liability as discussed above.

As Brown et al (2001:611) point out, the distinction between justifications and excuses is not always clear, and defences such as provocation and duress have aspects of them which are both justificatory and excusatory. Whatever may be their classification, the analysis in Chapter 3 demonstrated that the legal defences are based on an acknowledgment of the possible restrictions on individual autonomy. Thus, it is right to exculpate the agent on the basis of an available defence because his or her autonomy will necessarily have been infringed. In contrast, the principal should be liable for the actions of the agent, because of his or her role in using that agent as an instrument to commit the crime, and should not benefit from a defence, whether a justification or excuse.

4.2.2.3. Areas of uncertainty regarding the application of the doctrine of innocent agent

Most criminal offences can be committed through a proxy, and the ‘proxyability’ of actions in these offences is not questionable. The range of this type of offences includes murder, theft, fraud, and forgery\footnote{For murder see for example: Osland (1998) 197 CLR 316; Dernriain [1989] VR 97; Matusевич v The Queen [1977] 137 CLR 633; Coombes (1975) 1 Leach 388; Tyler and Price (1838) 1 Mood CC 428; Michael (1840) 9 C & P 356. For importation of illegal drugs see White and Ridley (1978) 140 CLR 342. For poisoning see: Harley (1830) 4 C & P 369. For forgery see: Palmer (1804) 2 Leach 978; Giles (1827) 1 Mood CC 166; Mazeau (1840) 9 C & P 676; Clifford (1845) 2 Car & K 202; Bull (1845) 1 Cox 281; Vailler (1844) 1 Cox 84; Bannen (1844) 1 Car & K 295. For theft see: Pitman (1826) 2 C & P 423; Manley (1844) 1 Cox 104; Welham (1845) 1 Cox 192; Bleasdale (1848) 2 Car & K 765; Flatman (1880) 14 Cox 396; Adams (1812) R & R 225; Kay (1857) Dears & B 231; Paterson [1976] NZLR 394. For fraud see: DPP v Stonehouse [1978] 168 ER 773; Mutton (1793) 1 Esp 62; Brisac and Scott (1803) East, PC iv 164, 102 ER 792; Butcher (1858) Bell 6; Dowey (1868) 11 Cox 115; Butt (1884) 15 Cox 564; Oliphant (1905) 2 KB 73.}. However, the imputation of the innocent agent’s action or actions to the principal is subject to controversy in cases involving offences which are defined such as to require personal performance by the principal; those which require a certain quality or status to be available in the perpetrator, and those involving offences of negligence. The following discussion considers such cases.
4.2.2.3.1. Offences requiring personal performance

One of the limitations of the doctrine of innocent agent is that it does not apply where the crime committed by the agent requires personal performance by the principal (Smith, 1999:123-4; Simester & Sullivan, 2000:188; Lanham, 2000:709). Actions such as driving a vehicle and having sexual intercourse exemplify situations where the proxyability of actions is questionable. This is because the term ‘drive’ as well as the ‘act of having sexual intercourse’ carry a strong bodily connotation such that only the actual driver or the actual penetrator can be the principal offender. For example, suppose that after an intentional ‘all clear’ signal from the conductor, a bus driver reverses, injuring a pedestrian. Having reasonably relied on the conductor’s signal, the driver can escape criminal liability. The conductor will also avoid liability as principal offender, for injuring the pedestrian since only the driver can be found guilty of driving without due care. Sexual intercourse by a proxy in Cogan and Leak presents a similar problem. The decision in Cogan and Leak has been criticised on the ground that rape is too personal to be committed through an innocent agent and it is incongruous to hold a person liable for the commission of such a crime through the act of another (Smith & Hogan, 1992, 125, 153; William, 1983:371; Cremona, 1989:254; Reed & Seago, 1999:153).

Ashworth (1995:435-6) points out that some offences are phrased in terms which imply personal performance or which could only be committed by a certain class of persons. But as he contends, there is no reason why the law should be constrained by this linguistic barrier, and it is for the lawmakers to intervene by stretching the language of law or introducing a special provision to deal with this issue.

207 For a proposal to this effect see The Law Commission, Assisting and Encouraging Crime: A Consultation Paper No 131, 1993 at 31. See also subsection 4 of Section 7 of Queensland Criminal Code 1899. The full text of this section is:

7. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say (a) every person who actually does the act or makes the omission which constitutes the offence; (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; (c) every person who aids another person in committing the offence; (d) any person who counsels or procures any other person to commit the offence.
This issue of whether or not offences which may be classified as requiring personal performance by the principal can be resolved by considering the underlying principle of individual autonomy. For example, in the ‘conductor example’, the conductor intends the commission of the wrongful act, intentionally using the innocent driver to do so. While it might be appropriate not to hold the driver liable for injuring the pedestrian because of his or her honest belief, the conductor ought not escape liability on the ground that he or she was not driving. This would conflict with the fact that it was the exercise of his or her free autonomy through his or her intention-in-action (of saying ‘all clear’ to the driver) which caused the commission of the physical element of the offence in question.

Similarly, in the case of rape, as discussed above, the decision in Cogan and Leak, recognises the exercise of the autonomy of the principal, while at the same time, acknowledging the limitation on the autonomy of the agent, and therefore this decision should be considered to be good law. Indeed, in Hewitt\(^{208}\), Winneke P stated that the principle enunciated in the case of Cogan and Leak is good law. He further pointed out that in principle, there is no reason why a person should not be convicted of the crime of rape if that person intends and causes another to have intercourse with the innocent victim whom he or she knows is not consenting\(^{209}\).

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\(^{208}\) (1997) 1 VR 301 at 311.

\(^{209}\) For further discussion on Hewitt see Hubble G, ‘Rape by Innocent Agent’ (1997) 21 Criminal Law Journal 204-212.
4.2.2.3.2. Offences requiring special status or quality\textsuperscript{210}

Where the law specifies particular attributes or prescribes a status for the commission of an offence such as being a clerk or an officer, the fact that the agent satisfies such requirement precludes the use of the doctrine of innocent agent if the principal offender lacks these attributes (Smith, 1991:1060; Simester & Sullivan, 2000:188-9). In other words, the conviction of a person through the acts of an innocent agent is problematic if the crime can only be committed by a particular class of persons to which the principal does not belong (Alldridge, 1990:55; Kadish, 1985:372). For example, suppose that it is an offence for A, the holder of a liquor license, to sell liquor to a police officer knowing that he or she is on duty. Suppose also that P orders a drink for the officer, falsely telling A that the officer is not on duty. Can P be held guilty of breaking the liquor Act if by reason such as lack of mens rea A is free of criminal guilt? P could not be held principally liable for such offence through the action of the innocent agent A, since P lacks the required attribute for that offence. Also, A did not perpetrate the offence because A did not know that the officer was on duty, and therefore there is no offence to which P can be an accessory (Williams, 1983:369).

Again, in such a situation, a consideration of the underlying principle of individual autonomy can be employed to resolve this issue. P should be liable for the offence because of his or her free and conscious manipulation of the A. The principal should not escape liability simply because he or she is astute enough to choose carefully the agent who has an attribute which is a necessary element of the offence (although not criminally liable due to the lack of men rea) but the principal himself or herself does not have that attribute. As noted above, the principles laid down in Cogan and Leak, implicitly acknowledge individual autonomy of the principal and lack of autonomy of the agent, and could be extended to apply to this situation.

\textsuperscript{210} For discussion see Lanham D, ‘Accomplices, Principles and Causation’ (1979) 12 Melbourne University Law Review 490-515 at 500-506.
4.2.2.3.3. Offences of negligence

The question arises as to whether any state of mind on the part of the principal (P) less than intention would suffice for the purpose of holding P criminally liable for a crime committed by the agent (A). Or is the doctrine of innocent agent applicable to offences of negligence?

Several legal commentators have expressed the view that the doctrine of innocent agent should apply only when P intends A to commit the crime and not when P is merely negligent (Williams, 1983:369-370; Williams, 1992:296; Kadish, 1985:391). Remarks made by Fletcher (1998: 666) imply that the doctrine of innocent agent should be limited to situations where P has purposely used A to commit the physical element of a crime, arguing that the principal’s liability entails domination over and manipulation of the innocent agent’s action (and he refers to that as hegemony over the act). It seems this perspective finds support in cases such as White v Ridley\textsuperscript{211}, Hewitt\textsuperscript{212}; Cogan and Leak\textsuperscript{213} and Page\textsuperscript{214}.

In contrast, Smith (1991:98-103) argues that the question of whether the principal must have intended his or her action or the action of the agent, still remains unresolved in the case law. Smith states that if the agent is to be seen as no more than a conduit through which causal liability can flow, then, in principle, the doctrine of innocent agent should permit any form of liability if the person who has used that agent is culpable in the way required by the substantive offence. This is because accepting that P has caused A to commit an offence does not necessarily mean that P must have intended to cause A to do so. Consequently, a lesser state of mind on the part of P would suffice for the imputation of A’s actions to P. Namely, where recklessness or negligence are the relevant mens rea, a person who with that mens rea causes another to commit an offence, the former should

\textsuperscript{211} (1978) 140 CLR 342 at 346-347.
\textsuperscript{212} (1997) 1 VR 301 at 311.
\textsuperscript{213} [1975] 2 ALL ER 1059 at 1061.
\textsuperscript{214} (1983) 76 Cr App. Rep 279.
be liable for its commission. Smith (1991:98) illustrates this with the following example: if P negligently fits a tyre to A’s car causing it to run out of control and kill C, it could be said that P is liable for manslaughter through the innocent agent A. Smith (1991:98) cites the English cases of Tyler and Price and Quick as offering support for this argument.

An application of the principle of individual autonomy can again help to resolve this issue. While it was acknowledged in Chapter 3 that negligence as a mens rea element involves some degree of individual autonomy (for example, that the action must be voluntary), the preceding analysis on the doctrine of innocent agent has demonstrated that the notion of individual autonomy which underpins this doctrine is intentional exploitation and manipulation of the innocent agent to commit a consciously planned crime by the principal. It is the conscious planning and the intentional manipulation which are at the heart of this doctrine. It can hardly be accepted that a principal can do so by being merely negligent. Therefore, any state of mind less than intention contradicts the nature of the usage of an innocent agent by a principal to perpetrate the physical element of an offence (by conscious planning and intentional manipulation).

215 It appears that this perspective finds some support in the version of the doctrine of innocent agent adopted by the Criminal Code Act (Cth) 1995 section 11.3. According to this section, the mental state of the principal offender might be either intent or any other state of mind which is applicable to the physical element of the offence concerned. Section 11.3 reads as follows:

A person who:
(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;
is taken to have committed that offence and is punishable accordingly.

216 (1838) 8 C. & P. 616.
4.3. PRIMARY CRIMINAL LIABILITY IN JORDAN

Under the *JPC*, a person may incur primary criminal liability as a principal offender or as an accomplice/perpetrator with other/s (Articles 75 and 76), in situations similar to those in which the doctrine of straightforward joint criminal enterprise applies in NSW. Under the *JPC* a person might also incur primary criminal liability as a principal offender notwithstanding that he or she does not personally perpetrate the physical element of an offence. Rather, he or she may use a non-responsible person to do so. Although there is no explicit reference to this issue in the *JPC*, the doctrine which covers this area is referred to by legal commentators as the ‘moral perpetrator of crime’ (Alseid, 1998:375; Hussni, 1975:574; Alqahwaji, 1997:450). This doctrine corresponds to the doctrine of innocent agent in NSW.

In this part, I consider the relevant legal principles applicable to situations where an individual can be held liable as a principal or accomplice under the *JPC*. The following discussion is divided into two sections. The first addresses individual autonomy as the ground for the liability of an individual as principal perpetrator/s and accomplice/s; and the second explores how this autonomy forms the basis for criminal liability under the doctrine of the ‘moral perpetrator of crime’.

4.3.1. Principal offenders and accomplices

This section aims to illustrate how the autonomy of an individual, embodied in his or her intention or agreement with another individual or individuals, furnishes the ground for culpability as a principal offender and an accomplice. In Jordan, the legal principles governing the liability of principal offender/s and accomplice/s are found in Articles 75 and 76 of the *JPC*. 
Article 75 states that:

The perpetrator of an offence is the one who with the relevant mens rea commits the physical element constituting that offence or participates directly in its commission/execution.

Article 76 stipulates that:

If more than one person jointly\textsuperscript{218} commits a felony or a misdemeanor, or if that felony or misdemeanor consists of more than one act and each one of them commits one act or more of those constituting that offence with the intention of bringing about that felony or misdemeanor, then all offenders are to be considered as accomplices in the commission of that offence and punishable with the specific punishment of that offence as indicated in the Code as a primary perpetrator of that offence.

According to the explicit wording of Articles 75 and 76 the commission of an offence is possible by either a single perpetrator or by an accomplice/perpetrator with others, each of which I now consider.

4.3.1.1. Single perpetrator

The first part of Article 75 states that ‘the perpetrator of an offence is the one who with the relevant mens rea commits the physical element constituting that offence…’. It is clear from the language of this part of the Article, and it is agreed among legal commentators that according to this part, an offence can be committed by a single perpetrator who, with the relevant mens rea, personally commits the physical element of that offence (Alseid, 1998:369; Hussni, 1975:573; Najem, 1991:204-5; Alsadi, 1970:198; Garar, 1978:105; Alqahwaji, 1997:447; Abu Alroos, 1990:310). Alseid (1998:370) provides an example: in murder, the perpetrator is the one who intentionally kills the victim, and in theft the perpetrator is the one who intentionally takes away the property of another person without his or her consent. However, in situations where the offence

\textsuperscript{218} In Article 76, I use the word ‘jointly’ as the translation of the Arabic word ‘motahedeen’. In Arabic, ‘motahedeen’ implies that there has been a meeting of the minds, or an agreement between individuals who act jointly. Therefore, to be held liable for ‘jointly’ committing a felony or misdemeanor pursuant to Article 76 presupposes an agreement to do so.
requires a certain quality or status in the person who commits it, such as being an employee in the offence of bribery, for an individual to be held as the perpetrator of that offence, he or she must satisfy that quality or status (Abu Amer & Alqahwaji, 1984:272-3; Hussni, 1992:93). For example, in the offence of bribery the offender needs to satisfy the requirement of being an employee in a public service. Basically, the commission of an offence by a single perpetrator is a less complicated issue (as it is the principal’s free decision and action which operates to form the ground for his or her liability), compared to the situation where more than one person is involved in the commission of an offence, to which I now turn.

4.3.1.2. Acconplices/perpetrator with other/s

Under Articles 75 and 76 of the JPC, there might be more than one person involved in the commission of an offence. In essence, it is the exercise of the autonomy of each individual in combination with the exercise of the autonomy of another or others which provides the ground for their culpability upon the commission of an offence. It is their joint intention or agreement which renders all of them equally responsible for the commission of the offence which was subject to that joint intention or agreement. Under the JPC, it is possible to distinguish between two situations involving the commission of an offence by more than one offender.

1. Accomplices in the commission of an offence within the scope of Article 76 of the JPC.

Article 76 encompasses two cases which correspond to the doctrine of straightforward joint criminal enterprise under the laws of NSW.

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219 This situation might attract the application of the doctrine of the 'moral perpetrator of crime' which will be discussed below.
The first case involves the joint intentional participation of more than one person in the commission of an offence, with each participant committing part of the acts which constitute the physical element of that offence (Alseid, 1998:383; Hussni, 1975:578; Alqahwaji, 1997:448; Aldawoodi, 1968, 369). This case supposes that the physical element of the offence is composed of one or more acts and that each one of these acts is by itself enough to constitute an offence. But it is the agreement (or the joint intention) between the offenders which renders these acts as one offence, consequently rendering all of them equally liable for its commission (Alseid, 1998:383). For example, suppose that A and B agreed to break into C’s house to steal and take away some of C’s belongings. If B performs the acts which constitute the breaking, B can be held liable for an offence of breaking regardless of A’s acts. Similarly, if A enters the house and takes C’s belongings, A can be liable for theft regardless of B’s breaking. It is A’s and B’s joint intention or agreement which renders their acts as one offence of break, enter and steal, and consequently both of them are liable as the perpetrators of that offence.

The second case involves joint intentional participation by more than one person in the commission of an offence, with a partial commission of the physical element of that offence by each one of them. This situation supposes that the physical element consists of more than one act; each act in itself insufficient to constitute an offence. It also involves the commission of one or more of these acts by each participant pursuant to their joint intention or agreement (Alseid, 1998:383; Alqahwaji, 1997:448-9). For example, under the JPC, the offence of fraud (Article 417) requires false pretences supported by a further representation, either oral or documentary. Suppose A and B agree to commit fraud upon C. A lies to C. This in itself is not sufficient to constitute any offence. Suppose that B orally supports A’s lies to C. Again, this in itself is insufficient to constitute an offence. However, the combination of A and B’s acts make the fraud possible.

In both the examples of break, enter and steal, and fraud, it is the exercise of individual autonomy of both A and B in reaching the agreement to carry out the offence, and in their intentional acts which contribute to the offence, which is the foundation of their liability.
2. Direct participation in the commission of an offence under Article 75 of the JPC.

According to the second part of Article 75, a person participates in the commission of an offence when he or she commits an act which will render him/her as having directly participated in its commission. The second part of that Article reads as follows: ‘... or participates directly in [the] commission/execution [of the offence]’. It is important to state that the mode of participation as described in the second part of Article 75 is different from the mode of participation as described in Article 76, as Alseid (1998:384-5) points out. A person who participates directly in the commission of an offence under Article 75 is one who commits an act which falls outside the scope of the physical element of that offence, yet it contributes significantly to its commission (Alseid, 384-5; Husni, 1992: 115; Alqahwaji, 1997:449; Abu Amer & Alqahwaji, 1984:275-6). For example, suppose P and A intend to kill B. P approaches B’s house to shoot him. A locks the doors of B’s house to prevent B from escaping. Upon his arrival, P shoots and kills B. In this example, although the act of A (locking the doors) is not part of the physical element of murder (the shooting), it contributes significantly to the killing of B. A is thus regarded as a perpetrator of that crime, although he or she did not perform any of the acts which constitute the physical elements of murder.

It should be noted that even though A has not performed any act constituting the physical element of the offence, he or she is still liable as a principal. The principle of individual autonomy again appears to justify such liability. A has exercised his or her individual autonomy by intending that B be killed, and puts that prior intention into action by performing acts which significantly contribute to that killing.
4.3.2. The moral perpetrator of crime

The application of this doctrine raises questions similar to those raised in relation to the doctrine of innocent agent in NSW. Namely, how does the autonomy of the moral perpetrator operate to form a ground for his or her criminal liability for the commission of an offence through an innocent agent? What is the form of this autonomy? Is it intention, or is a lesser state of mind enough so as to allow the attribution of criminal liability to the principal? At the outset, it is worth noting that there is no explicit guidance to the answer of these questions in the JPC. However, as Mosa (1985:207) argues, the doctrine of the moral perpetrator is in essence based on the exploitation and utilisation of an innocent agent by the principal to commit the physical element of a crime which the principal intends should be committed. As Almasri (1998:79) points out, the intention on the part of the moral perpetrator rests on that perpetrator's knowledge and awareness of the fact that he or she is using an innocent agent to perpetrate the crime. By the same token, the moral perpetrator should have been intending to use that agent to carry out the physical element of the crime in question.

This section aims to explore the role of the autonomy of an individual in establishing a foundation for his or her liability pursuant to the doctrine of the moral perpetrator of the crime under the JPC. It also aims to highlight situations in which the imputation of the offence committed by the innocent agent to the principal falls outside the scope of Article 75 of the JPC. Throughout the discussion it will be illustrated how Article 75 of the JPC fails to adequately encompass the liability of the moral perpetrator. But before doing so, it is useful to highlight the rationale of the doctrine under the JPC. In order to achieve this, this section is divided into three subsections. The first addresses the rationale of the doctrine under the JPC. The second deals with the role of the autonomy of an individual in establishing the foundation for his or her criminal liability under this doctrine. The

220 Legal commentators in Jordan refer to the person who uses an innocent agent to bring about the physical element of a crime as the 'moral perpetrator of the crime' (Alseid, 1998:375; Hussni, 1992:574; Alqahwaji, 1997:450). They refer to the agent who performs or perpetrates the physical element of that crime as the 'physical executor' to whom no criminal liability is attributable (Alseid, 1998:377; Alqahwaji, 1997:450).
third provides insight into situations in which the application of this doctrine becomes uncertain, faltering and falling outside the scope of Article 75 of the JPC.

4.3.2.1. The rationale of the doctrine of the moral perpetrator under the JPC

As stated earlier, there is no explicit reference in the JPC to the doctrine of the moral perpetrator of the crime. However, Alseid (1998:376) argues that the definition of the perpetrator of crime under Article 75 of the JPC operates to cover situations in which a person commits the crime through an innocent agent. As noted above, Article 75 states:

The perpetrator of an offence is the one who with the relevant mens rea commits the physical element constituting that offence or participates directly in its commission/execution.

Alseid provides the following reasons in support of his argument. First, Article 75 of the JPC does not distinguish between whether the offender commits the crime personally or by using another. The JPC punishes whoever commits a crime regardless of the means or instrument used to achieve that purpose. This instrument could be a person acting in good faith, lacking legal competence, or an animal trained for that purpose.

Secondly, under the JPC the person who uses an innocent agent to commit the physical element of his or her crime cannot be regarded as an inciter. This is because incitement supposes the creation of the idea of the crime in the mind of the incitee. This requires legal competence on the side of the incitee so as to understand and appreciate what he or she has been incited to do. By contrast, in the case of the moral perpetrator, the agent who commits the physical element of the crime is supposed to lack the requisite intention for reasons such as insanity or good faith (bona fide). Added to this is the fact that under the JPC the person who uses an innocent agent to perpetrate the physical element of his or her crime cannot be regarded as an accessory to that crime. This is because the liability of the accessory is derivative from the liability of the principal. And under the JPC the ways
in which a person might become an accessory to an offence are mentioned restrictively and the use of an innocent agent is not one of them (Article 80(2))\textsuperscript{221}.

Although it might be true that Article 75 covers some situations relevant to the doctrine of the moral perpetrator of crime, it is also true that there is a need to criminalise the conduct of the moral perpetrator with an explicit provision in the JPC. This is because Article 75’s definition of the perpetrator of a crime limits situations in which the doctrine of the moral perpetrator may be invoked, and this will become clear as this issue is elaborated below. Also, as stated above, under the JPC the person who uses an innocent agent to commit a crime cannot be held criminally liable as an inciter\textsuperscript{222} or as an accessory. Furthermore, under the JPC the person who uses an innocent agent to commit a crime, cannot be regarded as an accomplice to that agent. This is because, as discussed above, under the JPC a person is liable as an accomplice to the commission of an offence when he or she intentionally participates in its commission. This intentional participation is absent when the moral perpetrator uses an innocent agent to perpetrate the physical element of the crime. Therefore, in cases where Article 75 does not capture the conduct of the moral perpetrator, and as this perpetrator cannot be held liable as an accessory, inciter or an accomplice, there is room for many crimes in which no one will be held accountable for their commission.

4.3.2.2. Individual autonomy as the ground for criminal liability under the doctrine of the moral perpetrator.

In order to provide insight into the liability of the principal offender for the commission of the offence through an innocent agent, it is useful to distinguish between three situations. First, the agent’s innocent mind and the liability of the principal offender. Secondly, the agent’s guilty mind and the liability of the principal offender. Thirdly, the agent’s exculpation because of his or her entitlement to a defence. It must be emphasised

\textsuperscript{221} Article 80(2) is further discussed when the issue of accessorical liability is considered in chapter 5.
that there is no explicit guidance in Article 75 of the JPC regarding these situations, demonstrating the need for legislative intervention to fill this gap. The following discussion elaborates on these situations.

4.3.2.2.1. The agent’s innocent mind and the liability of the principal

The application of the doctrine of the moral perpetrator requires the use of an agent who needs to be fully innocent in the sense that he or she lacks legal competence. As discussed in Chapter 3, under the JPC a person is deemed to be legally incompetent when that person does not act freely and consciously (being not aware of what he or she is doing), or when that person lacks mens rea. A person is also free of responsibility, if that person is mistaken in good faith as to a component of the physical element of the offence (Alseid, 1998:377; Almasri, 1998:113-14). The absence or severe limit on the autonomy of the agent for reasons including insanity (Articles 91 and 92) and non-consensual intoxication or poisoning by drugs (Article 93), places his or her actions outside the scope of legitimate punitive sanctions. It is the absence of such autonomy on the agent’s part which provides the justification for holding the principal criminally liable for the actions of that agent.

4.3.2.2.2. The agent’s guilty mind and the liability of the principal

In cases where the agent is not fully innocent, the question arises as to whether that agent’s guilty mind has any impact on the criminal liability of the principal. In the absence of any guidance in the JPC on this matter, it can be argued that where the agent has a guilty mind, both the principal and the agent should be liable according to their state of mind. To illustrate the situation, it is useful to consider the example provided by Alseid (1998:377). Suppose that P, with the intention of killing B, gives B’s daughter A poison, telling her it is medicine for her sick father. Suppose also that A, the daughter

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222 This is because under the JPC the term incitement is used to connote a mental interaction between the
administers the poison to her father thinking it is medicine, and consequently B dies. In this example, the daughter A is an innocent agent of P because A has administered the medicine in good faith to her father. But, in this example, suppose that A knows there is a hostile relationship between her father and P, and she suspected P might have given her poison instead of medicine, yet has given her father that medicine. Alseid argues that in this case A is not the agent of P, and A could be held liable for manslaughter, whereas P will be liable for murder. In other words, there is no room for the application of the doctrine of moral perpetrator in situations where the agent possesses a certain degree of guilt regarding the crime in question, and therefore is not an innocent agent.

4.3.2.2.3. The agent’s exculpation because of an entitlement to a defence

The innocence of the agent may be established because he or she is entitled to a defence. If so, should the principal benefit from that defence? There is no guidance on this issue in the JPC. However, under the JPC there are two types of defences. The first is those of an excusatory nature such as necessity (Article 89), duress (Article 88), being under the legal age (Article 94\textsuperscript{223}), and insanity (Articles 91 and 92). As discussed in Chapter 3, the autonomy of a person who may benefit from such defences is limited. Therefore, if the principal exploits such persons who were not acting in a legally autonomous way (for example because they are insane or are acting under coercion), that principal should bear responsibility for such autonomous exploitation. The second type of defence involves those mentioned restrictively in Articles (59-62)\textsuperscript{224}, including self-defence. These defences are of a justificatory nature the effect of which is the negation of the criminality of the conduct and rendering legal what otherwise would be criminal (Alseid, 1998:127-130). Almasri (1998:121) argues that if P uses A to commit a crime and the conduct of A is justified at law, the effect of that justification does not extend to justify the conduct of P. This is because the central focus of the doctrine of the moral perpetrator is the inciter and the incitee which is not available in the case of the innocent agent.

\textsuperscript{223} Article 94 of the JPC has been repealed by Article 372 of the Juveniles Act No 24 1968. Article 18 of the Juvenile Act now provides that a person under the age of 7 years cannot be held criminally liable.
intention and conduct of the moral perpetrator P rather than the agent A. Therefore, once the moral perpetrator has intentionally used the agent to commit the physical element of a crime, there is no need to consider whether or not the conduct of that agent was justified (Almasri, 1998:121-122).

However, this perspective fails to take into account that if the act of the agent A is justified, then the principal P who has used him or her would benefit from this justification because when an act is justified under the JPC, there is simply no crime to hold any person liable for, and the operation of the doctrine cannot turn non-crimes into crimes. On this interpretation of the JPC, the law in Jordan fails to render the moral perpetrator of a crime liable when the agent is free of liability due to a justification, and therefore fails to punish such moral perpetrator for the culpable exercise of his or her autonomy.

4.3.2.3. Areas of uncertainty regarding the application of the doctrine of the moral perpetrator.

Although the commission of certain crimes such as theft or murder through an agent raise no problems, it is problematic to apply this doctrine under the JPC with regard to crimes such as rape, bribery, crimes of omission, and non-intentional crimes. In the following section, I consider situations in which the imputation of the offence committed by the innocent or non-autonomous agent to the principal begin to falter and fall outside the scope of Article 75 of the JPC. This demonstrates the need for legislative reform to ensure all relevant situations which should be covered by the doctrine of moral perpetrator are in fact covered by the JPC.

224 Under the JPC causes of justifications are the exercise of right, self-defence, performance or execution of duty and the permission of the law (Articles 59-62).
4.3.2.3.1. Crimes that require a special feature, quality or personal performance

Under the JPC there are certain crimes which can only be committed by a certain class of persons, and crimes which require personal performance. For example, rape can only be committed by a male against a non-consenting woman who is not his wife, and requires personal performance in the sense of direct bodily contact (Article 292-295); and bribery can only be committed by a person who is a public servant (Article 170-171). To demonstrate how Article 75 of the JPC fails to address the liability of the moral perpetrator who uses an innocent agent to commit such crimes, I consider the offence of rape. Rape is chosen as it requires personal performance by the offender, and also requires the offender to have a certain attributes, namely, being a male. The question now becomes: who has to have that special feature or quality and who has to perform the crime: the agent or the principal?

There is no guidance in the JPC on this matter. However, there are two different points of view on this issue. First, Abed Alsatar (1987:355-357) argues that the special feature or attribute is something which is part of the physical element of the crime, and consequently it needs to be an attribute of the person perpetrating that physical element. From this perspective, there is no room for the commission of the crime (which requires a certain quality in the actual perpetrator) through an agent if that agent does not have the required quality or attribute (Alseid, 1998:379). In contrast, Mustafa (1970:75) argues that it is the principal who must possess the special attribute. On this view, the doctrine is operational even if the agent lacks the feature, provided it exists in the principal.

Regardless of which view is correct, the lack of clarity, and the complexity of situations which may arise under the JPC are illustrated by considering the example provided by Alseid (1998:381), with some modifications. Suppose that a woman P uses an innocent man A to rape another woman C. Can woman P be considered the perpetrator of rape through the act of the innocent agent A under the JPC? Or can she be held liable at all under the JPC? Currently, under the JPC woman P escapes criminal liability. This is because woman P cannot be considered an inciter as the agent A who raped C was an
innocent person. Incitement involves the instigation of someone to whom criminal liability can be attributed, and in this example A does not fulfil this requirement. In addition, woman P cannot be regarded as an accessory to A because under the JPC the ways through which a person can become an accessory to an offence are enacted restrictively; using an innocent agent is not one of them (Article 82). Added to this, woman P is not helping another person to commit rape. Rather, she is intentionally using an innocent man to perform the physical element of the offence. In this sense, P’s role is primary and not secondary. Moreover, woman P cannot be considered as an accomplice to A because there was no agreement between A and P to rape C.

But can P be held liable as the perpetrator of raping C through the action of agent A? The answer is no. This is because rape can only be committed by a male and involves personal performance of that crime by the perpetrator (Articles 292-295 of the JPC). Clearly, since P here is not a man, it is impossible for her to perform rape under the JPC. Accordingly, woman P escapes liability, in the absence of any legal provision to capture her conduct. A also escapes liability as he was an innocent agent. Obviously, in this example, P has exercised her autonomy to bring about a situation whereby the rights of C have been severely violated, and this should be sufficient to hold her criminally liable for such culpable autonomous behaviour. Therefore, the JPC requires legislative intervention to address this situation and incriminate P. In this regard, the principles laid down in the case of Cogan and Leak, as discussed above, could offer a useful solution to this situation if adopted and integrated into the JPC. More specific law reform to reflect this is included in the conclusion of this chapter.

4.3.2.3.2. Non-intentional crime

As noted in Chapter 3, Article 64 of the JPC stipulates that a non-intentional crime is one in which the mental element is fault, and that fault elements include negligence, recklessness or non-observance of laws and regulations. As stated earlier, the doctrine of moral perpetrator supposes the exploitation of an innocent agent by another person to
perpetrate the physical element of an offence. Therefore, the question in this context is whether a lesser state of mind than 'intention' is sufficient to hold a person criminally liable as a moral perpetrator for the commission of an offence.

There is no guidance in the JPC on this matter. However, Almasri (1998:141) argues that a non-intentional crime can be committed by a moral perpetrator through an agent. He provides an example of the pharmacist who mistakenly adds a poisonous substance to medicine, giving it to a father who administers it to his ill son who consequently dies. Here, the pharmacist would be considered a moral perpetrator of manslaughter through an innocent agent (the father who in good faith administered the medicine to his son). Contrary to this perspective, Almajdoob (1970:210-212) argues that a non-intentional crime is not committable by a moral perpetrator through an innocent agent, since the nature of this type of crime contradicts the requirements of the doctrine of moral perpetrator. Namely, the moral perpetrator is supposed to intend to use and exploit the innocent agent to commit the physical element of the crime; a type of mental state which is not satisfied in the case of non-intentional crimes. Almajdob's view is to be preferred because it more accurately reflects the principle of individual autonomy which underlines the criminalisation of the moral perpetrator. Namely, for a person to be considered a moral perpetrator, that person is supposed to intentionally manipulate the innocent agent to commit the crime. This indicates that a lesser state of mind than intention will not satisfy the requirement of that doctrine\textsuperscript{225}.

\textsuperscript{225} But this does not mean that the pharmacist in the example given above, will escape liability. Rather he will be guilty of manslaughter on the basis of criminal negligence. The point is, in this situation, there will be no place to invoke the application of the doctrine of the moral perpetrator.
4.3.2.3.3. Crimes of omission

It is worth noting at the outset that as a general rule there is no criminal liability for omissions under the JPC, unless the person is under a legal duty to act, and omits to do so (Alseid, 1998:205). In other words, criminal liability for omission is statutory based liability. For example, it is an offence to refuse to accept the Jordanian currency with its indicated value (Article 470 of the JPC). It is also an offence if a witness appearing before the court refuses to give testimony or to answer questions without any legal excuse (Article 165 of the Jordanian Procedural Criminal Code 1961 No.9). In the context of the doctrine of the moral perpetrator, the question is whether a crime of omission can be committed through an innocent agent or not. Although no guidance in the JPC exists to answer this question, legal commentators have different points of view on the matter.

Almajdoob (1970:212) and Alhussini (1970:282) argue that crimes of omission are not committable through an agent, whether the ‘omitter’ is the agent or the principal. This is because a crime of omission does not exist unless the person who omits to act is under a duty to do so. Accordingly, if the ‘omitter’ is the moral perpetrator who is under a duty to prevent the commission of the crime, he or she will be liable for its commission on the basis of his or her own omission, and it will therefore not be necessary to rely on an agent to establish liability (Almasri, 1998:136-7). Furthermore, if the ‘omitter’ is the innocent agent but the omission was caused by an act committed by the moral perpetrator, then the moral perpetrator has in fact committed an act and not an omission and may be held personally liable for that act. Almasri (p135) explains this by providing the following example. Suppose A is a father who tries to save his son B from drowning. Suppose also that C causes him to omit to do so by falsely telling him that his son has already been saved. In this example, there is no room to consider C as a moral perpetrator who has

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226 As a general rule in NSW there is no criminal liability for omission unless the person who omits to act is under a duty to act and fails to do so: Taktak (1988) 14 NSWLR 226 at 236-248. I have not discovered any literature which addresses the question of whether or not the principal can commit a crime of omission by using an innocent agent in NSW. However, as the doctrine of innocent agent in NSW rests on similar theoretical foundations to the doctrine of the moral perpetrator in Jordan, in NSW similar issues to those encountered in Jordan and discussed in this section may arise in NSW.
committed a crime of omission through an innocent agent. This is because C has in fact performed an act to stop A from saving his son by telling him falsely that his son has been saved, and consequently C should be considered as a moral perpetrator who has committed a positive crime through an innocent agent rather than a crime of omission.

In contrast, Abed Alsatar (1987:364-365) and Almasri (1998:137) argue that the crime of omission can be committed by a moral perpetrator through an agent only when that agent is under a duty and has omitted to act in good faith. From this perspective, if the omission of the agent who is under a duty has resulted from the intentional intervention of another person, and consequently a crime occurs, it is possible to conceive the commission of a crime of omission through an innocent agent. For example, suppose A is under a duty to act as a lifeguard on the beach. Suppose also that B was about to drown. A does not take any action to rescue B because C falsely told him or her that B was saved. Consequently B drowns. In this example, it can be said that C is a moral perpetrator of committing a crime of omission through A, who in good faith did not take any action to rescue B.

The view of Almajdoob and Alhussini is to be preferred because the nature of the crime of omission contradicts the requirements of the doctrine of the moral perpetrator. That is, the application of this doctrine requires the moral perpetrator to intentionally act so as to induce and exploit the innocent agent. It is difficult to conceive a situation in which a moral perpetrator could induce an innocent person to commit a crime by simply omitting to act. Rather, such a perpetrator needs to communicate his or her intention to that agent, and such communication must entail a positive action on his or her part. In addition, for a person to commit a crime of omission, he or she needs to breach a duty of some kind. It is accepted that the doctrine of moral perpetrator is applicable only when the agent, in the eyes of the law, is not responsible. As a general rule, the law does not impose duties on individuals who lack legal competence or are for some reasons not responsible. It is thus difficult to conceive the commission of a crime of omission when the ‘omitter’ is the agent, since a non-autonomous person is not required to observe any duties. Furthermore, if the agent is found not to be innocent but is criminally liable for his or her action, there is no room for the application of the doctrine of moral perpetrator in the first place.
4.4. CONCLUSION

This chapter sought to provide insights into how the principles of primary criminal liability in both Jordan and NSW are informed by the notion of individual autonomy. Central to this purpose was to determine how both jurisdictions can inform each other regarding any potential reform of these principles. This section ties together the key findings of this chapter. Based on the analysis undertaken, it was shown that the basis for the imposition of primary criminal liability (doctrine of straightforward joint criminal enterprise and doctrine of innocent agent in NSW, and liability of accomplices and principal offenders, and the doctrine of the moral perpetrator of crime in Jordan) rests on and is informed by individual autonomy. Drawing on the foregoing comparative analysis, it was established that on the basis of the exercise of one’s autonomy, a person incurs primary criminal liability in the following situations.

First, in NSW and Jordan, a person who, with the relevant state of mind, personally and alone brings about the physical element of a crime is regarded as a principal in the first degree for the commission of that crime. In this situation, an essential element is the offender’s free decision and action which forms the ground for criminal liability. As noted in Chapter 3, the degree of autonomy required on the part of the offender will differ depending on the nature of the mens rea element. Apart from the differences in the particular mens rea requirements, there are no significant differences in both jurisdictions regarding the way in which a person might incur criminal liability as a principal offender when he or she personally and alone commits an offence.

Secondly, in NSW, a person is liable as a principal in the first degree for the commission of an offence when he or she enters into an agreement with another person or persons to commit that offence pursuant to the doctrine of straightforward joint criminal enterprise. The joint criminal enterprise (the rules of which are found at the common law) exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and may be inferred from the surrounding
circumstances. For a person to be capable of reaching an agreement to commit a crime and to be consequently held liable, that person needs to be conscious and capable of making rational decisions based upon his or her deliberation with another person. This will inevitably involve the formation of prior intention to commit a crime by the participants and (while present at the scene as the law requires) they transform such intention into action by the bringing about of the physical elements of that offence (intention-in-action), regardless of the part played by each participant.

Comparatively, in Jordan, where an offence is committed following an agreement, all of the individuals are responsible for the commission of that offence. The JPC refers to the participants in the commission of an offence as accomplices and punishes them as principal offenders of that offence. Unlike NSW, in Jordan the principles governing the liability of the accomplices are found in the JPC, which provides no exposition regarding what amounts to an agreement between accomplices. However, as the basis for such liability clearly lies in the reaching of an agreement along with the commission of the crime (in both jurisdictions), it can be argued that the same definition of the agreement as found in NSW could be adopted by the JPC. In this regard, it is suggested that potential reform of the JPC could consider the definition of joint criminal enterprise under the laws of NSW. This is important because the JPC is the only authoritative body of law which governs the liability of accomplices who commit a crime pursuant to their joint intention/agreement. Therefore, it is important for the JPC to clearly lay down the principles governing the liability of accomplices. If these principles are not clearly enacted, this will either result in individuals committing crimes and escaping liability, or in holding them unjustly liable depending on the way in which the JPC is interpreted.

Under the JPC, unlike in NSW, for criminal liability to be imposed on the basis of joint intention/agreement between the offenders, it is required that each party to such an agreement needs to participate in the commission of the physical element of the offence, or at least commits an act which although it might fall outside the scope of that physical element, it contributes significantly to its commission. In this regard, the position under

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the JPC is different from that in NSW. The JPC requires a degree of positive contribution to the commission of the physical element of the offence, compared to the law in NSW, which for the purpose of criminal liability regards the presence at the scene by reason of pre-concert as sufficient. This includes the readiness to provide assistance to the co-adventurer, even if the party does not participate in the commission of the physical element of the offence in question.

Thirdly, in NSW, on the basis of the exercise of one’s autonomy, a person is liable as a principal in the first degree for the commission of the physical element of an offence even if he or she does not personally perpetrate that physical element. This is made possible under the law of NSW through the invention of the doctrine of innocent agent. The operation of this doctrine as a mode of criminal liability rests on the existence of the principal’s autonomy (prior intention to commit a crime, along with conscious bodily movement which itself involves intention-in-action to ensure the exploitation of the agent), and the absence of the agent’s autonomy (the agent either had no intention to commit the crime, or his or her autonomy was impaired or limited for reasons such as insanity or duress). It is the principal who intends to commit the offence, choosing to use a non-autonomous agent to perform the physical element of the crime. The chapter showed that at common law in NSW, it is settled that intention is stipulated as the basis for the autonomy of the principal who uses an innocent agent to commit a crime. And upon the commission of the physical element of that offence by the innocent agent, it is the principal who is liable for its commission. However, if the principal acts through an agent who was not fully innocent and possesses a certain degree of guilt regarding the offence in question, then both the principal and the agent may be liable according to their respective states of mind.

Moreover, in NSW several contentious issues concerning the application of the doctrine of innocent agent can be resolved by reference to the principle of individual autonomy underlying the doctrine, namely, the principal intends that a crime will be committed through the manipulation of an innocent agent. First it was demonstrated that when the offence in question is phrased in terms which imply that its commission requires personal
performance by the actual perpetrator, or indicates that it can only be committed by a certain class of persons to which the agent does not belong, reference back to the offender’s culpability based on the exercise of his or her autonomy provides that the principal should be liable for such offences. Second, a focus on the principle of individual autonomy helped to resolve the debate concerning whether or not the doctrine of innocent agent applies to situations where the principal negligently involves the innocent agent in the commission of a crime, rather than intentionally manipulating them in favour of requiring intentional manipulation by the principal.

Comparatively, in Jordan, it was established that there is no explicit guidance in the JPC regarding the doctrine of the moral perpetrator which corresponds to the doctrine of the innocent agent in NSW. Furthermore, it was demonstrated that Article 75 of the JPC (which defines the perpetrator of the crime) falls short of dealing with the culpability of the moral perpetrator. In particular, it was highlighted that there is no explicit guidance in Article 75 of the JPC as to what the position is if the autonomy of the agent is not fully absent. In other words, when the agent is guilty to some extent for the commission of the offence in question. It was also noted that Article 75 is silent regarding the liability of the principal who uses an agent to commit a crime when that agent is entitled to a defence. In addition, it has been shown that uncertainty and controversy exists as to whether the doctrine of the moral perpetrator applies to crimes of negligence, those requiring personal performance or certain attributes in the actual perpetrator, and to those of omission. The doctrine is not applicable where the crime of omission is concerned, since the existence of the doctrine requires some positive action to exploit the agent, and therefore, the principal could not do this by omission.

In the absence of such guidance in the JPC regarding the application of the moral perpetrator of crime, there is an obvious need for legislative intervention to explicitly address the liability of the moral perpetrator. In this regard, since the basis for the attribution of criminal liability through the application of this doctrine is the same in both NSW and Jordan (the principal’s autonomy and the absence of the agent’s autonomy), it would appear that any potential law reform of the JPC could be informed by the
principles established at common law in NSW. The following is a suggested proposal for law reform of the JPC:

1. A person who intentionally uses or utilises an innocent agent to perpetrate the physical element of a crime is liable for the commission of that crime, as if the person has personally perpetrated that crime, and this person is referred to as the moral perpetrator of the crime.

2. It is irrelevant to the criminal liability of the moral perpetrator that the offence is phrased in terms which imply that it requires personal performance by the actual perpetrator. It is also irrelevant that the offence is phrased in terms which imply that it can only be committed by a certain class of persons to which the actual perpetrator (the agent) may not belong.

3. Negligence or a lesser state of mind other than intention is not sufficient to satisfy the mental requirement on the part of the moral perpetrator.

4. If the moral perpetrator uses an agent who is proved not to be innocent or who had formed a certain state of mind toward the offence in question, then both the moral perpetrator and the agent should be liable according to the respective state of mind of each one of them. If the agent is exculpated from criminal liability because the agent is found entitled to a justificatory or excusatory defence, such a defence will not exculpate the moral perpetrator from liability.

5. A person cannot commit a crime of omission by utilising an innocent agent to perpetrate the physical element of that offence.
5. INDIVIDUAL AUTONOMY AND ACCESSORIAL LIABILITY UNDER
THE CRIMINAL LAWS OF NEW SOUTH WALES AND JORDAN

5.1. INTRODUCTION

This chapter explores how the autonomous contribution of individuals' free decisions and actions (or inactions) relating to the commission of an offence by another, forms the basis for accessorial liability under the laws of NSW and Jordan. Through a comparative analysis, the chapter seeks to comment on how the two legal systems can inform each other regarding any potential reform of the principles of accessorial liability. The chapter is divided into two parts. The first part addresses individual autonomy as the basis for the attribution of accessorial liability to individuals under the criminal law of NSW. The second part examines the same issue under the Jordanian criminal law. The concluding part of the chapter ties together the main findings of the analysis by comparing and contrasting the respective positions in both jurisdictions.
5.2. ACCESSORIAL CRIMINAL LIABILITY UNDER THE LAWS OF NSW

5.2.1. Introduction

Under the rules of accessorial liability in NSW\(^{228}\), a person attracts criminal liability as an accessory to the commission of an offence in two ways. The first as a principal in the second degree when the person is present at the scene when the offence is being committed aiding and abetting the commission of that offence\(^{229}\). The second as an accessory before the fact when the person is absent from the scene where the offence is being committed but has counselled or procured its commission\(^{230}\). However, it is submitted that the rules for determining the liability of secondary participants are the same in both cases, the difference between the two types of accessory is that one is present at the scene and the other is absent while the crime is committed (Brown et al, 2001:1334; Gillies, 1997:159-60). In addition, under the Crimes Act 1900 (NSW), both

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\(^{228}\) Despite the availability of some statutory provisions on accessorial liability in NSW, the substantive law on this area is found in the common law: See section 345,346, 351 of the Crimes Act 1900 (NSW). Section 345 states:

*Every principal in the second degree in any serious indictable offence shall be liable to the same punishment as the principal in the first degree.*

Section 346 provides:

*Every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced, either before or after the trial of the principal offender, or together with the principal offender, or indicted, convicted, and sentenced, as a principal in the offence, and shall be liable in either case to the same punishment as the principal offender, whether the principal offender has been tried or not, or is amenable to justice or not.*

Section 351 provides:

*Any person who aids, abets, counsels, or procures, the commission of a minor indictable offence, whether the same is an offence at Common Law or by any statute, may be proceeded against and convicted together with or before or after the conviction of the principal offender and may be indicted, convicted, and punished as a principal offender*.


The Criminal Code Act section 11.2(1) similarly provides: ‘A person who aids, abets, counsels or procures the commission of an offence by another is taken to have committed that offence and is punishable accordingly’.

\(^{229}\) *Stokes and Diffor* (1990) 51 A Crim R 25 at37; *Thambiah v R* [1966] AC 37; *Wilcox v Jeffery* [1951] 1 All ER 571; *Russell* [1932] VLR 59.

accessories (the principal in the second degree and the accessory before the fact to the commission of an offence) can be indicted, convicted and sentenced in the same way as the principal in the first degree\textsuperscript{231}.

5.2.2. The derivative nature of accessorial liability

Although the derivative nature of accessorial liability was briefly discussed in connection with the doctrine of innocent agent in the previous chapter, it is important to elaborate further on this issue here. The starting point in the analysis of this matter stems from the fact that accessoryship is not an offence by itself, rather it is a mode of participation by a person in the commission of an offence by another (Gillies, 1980:5; 1997:181). Thus, for a person to be held liable as an accessory to the commission of an offence, it must be established that the principal offender has committed that offence\textsuperscript{232} or at least attempted to do so. That is, if the accessory is responsible for the acts of the principal which constitute the complete offence, then that accessory should also be liable for the parts of the offence completed by the principal which are sufficient to render the principal liable for attempt\textsuperscript{233}. In this sense, the liability of the accessory is derivative in nature, in that, it is incurred by virtue of the commission of an offence by the primary offender which the accessory has aided, abetted, counselled or procured. As Kadish (1985) states, ‘the secondary party's liability is derivative...it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed’ (p337). Yet there has been some controversy surrounding the question as to how the liability of the accessory is derived, or what the liability of an accessory is derived from. Is it derived from the principal offender’s liability (the narrow view) or is it derived from the wrongfulness of the act of the principal offender (the broad view)?

\textsuperscript{231} However, given the significance and nature of the contribution of each participant to the commission of the offence, it has been pointed out that judges make sentencing distinctions between the principal in the first degree and the accessories (Brown et al, 2001:1334).

The narrow view is that the liability of the accessory is derivative from, and dependent on the liability of the principal offender. This view was espoused by McHugh J in *Osland v The Queen*\(^{234}\) as follows:

Those who aided the commission of a crime but were not present at the scene of the crime were regarded as accessories before the fact or principal in the third degree. Their liability was purely derivative and was dependent upon the guilt of the person who had been aided and abetted in committing the crime. Those who were merely present, encouraging but not participating physically...were regarded as principals in the second degree. They could only be convicted of the crime of which the principal offender was found guilty. If that person was not guilty, the principal in the second degree could not be guilty. Their liability was, accordingly, also derivative (pp341-342).

In contrast, the broad view holds that the accessory derives his or her criminal liability from the wrongfulness of the act of the principal offender, and not from his or her liability. To this effect Alldridge (1990) states that:

>[The] broad theory of accessorial liability... draws a distinction between the wrongfulness of the act and its attribution to a particular perpetrator...while the wrongfulness is a feature of acts considered abstractly, culpability is always personal.... [I]n a prosecution against the accessory, it is the latter’s culpability that is relevant; the perpetrator’s culpability is incidental...thus the broad theory allows conviction of an accessory where the perpetrator cannot be convicted, so long as the latter did what is forbidden by law...accessorial liability is derivative not from a convictable crime but from a wrongful act (pp46-47).

The remarks of the majority of the High Court of Australia in *Osland’s case*\(^{235}\) indicate that the current law on accessorial liability adopts this view. Gaudron and Gummow JJ held that

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\(^{235}\) (1998) 197 CLR 316. Remarks made by Callinan J (who delivered a separate judgment) conform with the view expressed by Gaudron and Gummow JJ. Callinan J says ‘participants in various degrees would be eligible for trial, although the doer may not have been convicted’ (401). Similarly, see *King v The Queen* (1986) 161 CLR 423 at 433-436.
The conviction of a person charged as accessory is not necessarily inconsistent with the acquittal or failure to convict the person charged as the principal offender. That is because the evidence admissible against them concerning the commission of the offence may be different. Even so, an accessory cannot be convicted unless the jury is satisfied that the principal offence was committed (pp323-324).

The derivative nature of accessorial liability does not, however, mean that a person cannot be held liable as an accessory where that person has aided, abetted, counselled or procured the commission of an offence which he or she cannot commit as principal offender. In Giorgianni, Mason J stated this principle as follows:

It is inherent in the concept of secondary participation, however, that a person may be convicted on the basis of aiding, abetting, counselling or procuring the commission of a statutory offence although the statute creating the offence deals only with the liability of the principal offender...this is also the case even where the offence is of such a nature that the person could not have committed it as a principal offender (pp491-492).

To illustrate this, it is useful to consider the example of the crime of bigamy provided by Williams (1961: 386). In this case, it is only the person who is already married who can be found guilty of bigamy as a principal offender, whereas the person who knowingly performs the marriage vows can only be found guilty as an accessory to that offence (which he or she cannot commit as a principal offender).

5.2.3. Individual autonomy as the basis for accessorial liability

In this section, the analysis aims to illustrate how the individual's actions or inaction resulting from a prior free decision to help in the commission of an offence forms the basis for his or her culpable secondary involvement in the commission of that offence. It is appropriate to conduct the analysis of this issue through the exploration of the physical and mental elements of accessorial liability.
5.2.3.1. The physical element of accessorial liability

The discussion of the physical element of accessorial liability revolves around the interpretation of the terms aiding, abetting, counselling or procuring\(^{237}\) (which, in effect, reflect the accessory’s intention-in-action in helping or encouraging the commission of an offence). Throughout the analysis, it will be highlighted how these terms have been interpreted so as to form the basis for the accessory’s active participation in the commission of an offence. It will also be considered how an individual’s voluntary inaction or omission would amount to culpable accessorial liability, and whether mere presence at the scene of the crime by a person is sufficient to hold that person liable for its commission as an accessory or not.

5.2.3.1.1. Accessorial liability by an act

At common law the terms which have been adopted to describe accessorial liability are ‘aiding’, ‘abetting’, ‘counselling’ or ‘procuring’ the commission of an offence by the principal\(^{238}\). However, the following analysis of accessorial liability by actions will show that such terms are only various ways of describing how the accessory transforms his or her prior conscious choices into actions by helping or assisting the commission of an offence by the principal.

In *Attorney-General’s Reference (No 1 of 1975)*\(^{239}\), Lord Widgery held that the terms aid, abet, counsel or procure are to be treated as four separate words, and are to be given their

\(^{236}\) (1985) 156 CLR 473.


\(^{238}\) See for example, *Giorgianni v The Queen* (1985) 156 CLR 473.

\(^{239}\) [1975] QB 773 at 779. In that case the defendant surreptitiously laced the drink of the motorist who drove his motor and was consequently charged with driving with an excessive quantity of alcohol in his blood, whereas the defendant was charged with aiding, abetting, counselling and procuring that offence. The prosecution submitted that if lacing of drinks is an offence then the appropriate offence is procuring, and there is no logical reason why procuring cannot stand on its own apart from aiding, abetting and counselling. That is, if a person knows that another had too much to drink and tells him to drive, then that
ordinary meaning. His Lordship then went to define procuring in the following terms ‘to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening’ (p779). This may involve a surreptitious action, and on the facts presented in Attorney-General’s Reference, it was held that surreptitiously lacing the drink of a driver who had no knowledge of this could amount to procuring the commission of the offence of driving with an excessive quantity of alcohol in the blood.

While Lord Widgery held that for aiding, abetting and counselling, there must be a meeting of the minds between the principal and the aider, abettor and counselor, but this is not an element of procuring. His Lordship held that even though a person may procure the commission of an offence by another without such meeting of minds between them, ‘you cannot procure an offence unless there is a causal link between what you do and the commission of the offence’ (p780).

However, it has often been argued that the ordinary meaning of the words aiding, abetting, counselling and procuring may not adequately describe the mode of participation recognised by the law (Smith, 1978:130-131; Ashworth, 1986:305-306). Smith240 (1978:130) provides a definition of the ordinary meaning of each word to illustrate his point. Accordingly, he points out that the ordinary meaning of aid is ‘to give help, support or assistance to’; abet means ‘to incite, instigate or encourage’; counsel means ‘to give or offer counsel or advice to... or to recommend’; and procure means ‘to bring about by care or pain... to bring about, cause, effect, produce...to prevail upon, induce, persuade (a person) to do something’. Smith argues that as the definition provided for each word reveals, their meanings clearly overlap, with little distinction

person is a procurer of the offence if the car is driven. If that person is present when the car is started, then he or she is an aider and abettor. The grounds put forward for rejecting the prosecution’s case were as follows. First, there was no common intent, community of purpose or shared intention between the motorist and the defendant. That is, joint knowledge held by both persons with regard to the facts necessary to constitute the offence is essential for the existence of the relationship between the procurer and the principal: National Coal Board v Gamble [1959] 1 Q.B. 11. Secondly, there was no sufficient encouragement to amount to aiding, abetting, counselling or procuring.

between 'abet' and 'counsel'. 'Procure' stands apart in that it requires a causal connection. Smith points out that a person may give help, support or assistance, or incite, encourage or advise without producing any result. Further, in the ordinary meaning of these words, the person advised to commit an offence has been counselled, although he or she may have rejected the advice. In contrast, to use 'procure' seems inapt unless the result is actually achieved.

Moreover, the reference to 'procuring' as involving a causal link between the accessory and the commission of the principal offence invokes some confusion in the law of accessorial liability. This is because the assumption in this area of the law is that the accessory does not cause the physical element of the offence and it is the principal offender who is the legal cause of that offence. As Williams (1990) argues, the legal theory at common law 'does not allow that an accessory causes the crime. What the procurer brings about or causes is a state of mind on the part of the perpetrator, leading him to perpetrate the crime' (p6). To this effect, Smith and Hogan (1992:129) point out that if the procurer is considered to have caused the commission of the offence 'for all purposes', he or she would be a principal offender to the commission of that offence and not an accessory. For example, as they argue, if D2, having procured D1 to kill C, were taken to have caused the death of C, D2 would satisfy the definition of murder as a principal offender.

Regardless of the terminology used to describe the accessory's involvement in the principal offence, the underlying idea is that of an individual whose actions were the product of their prior free intention to help another person in the commission of an offence. It should not really matter what terminology is used to describe the way that accessory has translated his or her prior intention into an intention-in-action. As Smith (1978:127) argues, the distinction between aiding and abetting on the one hand and counselling and procuring on the other hand depends on one consideration only, that is, whether the defendant was present or absent while the crime was committed. Notwithstanding the ordinary meaning of the words, the distinction does not turn in any way on the nature of the acts done by the accessory. Any act which could amount to
‘aiding and abetting’ if done while the accessory is present at the scene would amount to counselling and procuring if done while that accessory is absent from that scene, on the one hand. On the other hand, any act which amounts to ‘counselling and procuring’ when done in the absence of the principal would amount to ‘aiding and abetting’ if done while the accessory is present at the time241. Along these lines, Fisse (1990) asserts that this language,

with its distinction between accessories before the fact and principals in the second degree and its constant reference to particular types of conduct, characterised as counselling, procuring, aiding, abetting and in many other ways, tends to obscure the one certain requirement of this part of the law: that [the principal offender] be acting within the scope of a course of conduct assented to and promoted by [the accessory] (p326).

Although various terms can and have been used to describe the mode of accessory liability, it appears that the courts refer to these words as connoting one general or basic idea. In Russell242, Cussen ACJ noted that different words are commonly used to describe the participation of the principal in the second degree (such as aiding, abetting, comforting, concurring, approving, encouraging, consenting, assenting, countenancing), and that all these words are instances of one general idea, namely, the accessory is linked in purpose with the principal in the first degree in the sense that the words or conduct of that accessory made it more likely that the principal in the first degree would commit the offence. In the same vein, in Giorgianni v The Queen243, Mason J stated

While it may be that in the circumstances of a particular case one term will be more closely descriptive of the conduct of a secondary party than another, it is important that this not be allowed to obscure the substantial overlap of the terms at common law and the general concepts which they embody (p493).

As Bronitt and McSherry (2001:379) point out, the terminology used to describe accessory liability its outmoded, and it is preferable to adopt the proposal suggested by

241 McAuley and McCutcheon (2000:463) state a similar view.
Kadish, namely, that the physical element of accessorial liability should be articulated in
terms of a distinction between assisting or encouraging the commission of an offence\textsuperscript{244}.

5.2.3.1.2. Accessorial liability by omission

Various attempts have been made to explain how a deliberate omission to act by an
individual would amount to aiding or abetting the commission of an offence by another.
One of the most influential academic views on this issue is that expressed by Smith and
Hogan (1992)\textsuperscript{245}:

Where D has a right to control the actions of another and he deliberately refrains
from exercising it, his inactivity may be a positive encouragement to the other to
perform an illegal act, and, therefore, an aiding and abetting. A husband who
stands by and watches his wife drown their children is guilty of abetting
homicide. His deliberate abstention from action gives encouragement and
authority to his wife’s act. If a licensee of a public house stands by and watches
his customers drinking after hours, he is guilty of aiding and abetting them in
doing so. Again in \textit{Du Cros v Lambourne} [1907] 1 KB 40, it was proved that D’s
car had been driven at a dangerous speed but it was not proved whether D or E
was driving. It was held that, nonetheless, D could be convicted. If E was driving
she was doing so in D’s presence, with his consent and approval; for he was in
control and could and ought to have prevented her from driving in a dangerous
manner. D was equally liable whether he was a principal or an abettor (p132).

Along these lines, Fisse (1990) appears to favour the view that the secondary party’s
liability for inaction is best explained in terms of whether that accessory’s omission
manifests his or her assent to the actions of the principal offender in a way which
promotes their performance. As he says:

If PO intimates to D that he intends to steal something from D’s employer,
receives no reply, interprets this as meaning that D has no objection and duly

\textsuperscript{243} (1985) 156 CLR 473

\textsuperscript{244} In this dissertation, I advocate a similar view by suggesting in the concluding part of this chapter that
the law on this area in NSW can benefit from Article 80(2) of the JPC. The Article is stated below.

\textsuperscript{245} This remained unchanged in the subsequent edition: Smith J & Hogan B, \textit{Criminal Law}, 9th ed,

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steals without incident, D’s inaction is distinctly suggestive of complicity. Similarly, assent may be sufficiently manifested by silence on the part of a passenger in a car being driven in an illegal manner, at least where the passenger owns or possesses the vehicle, or is supervising or examining PO’s driving (p327).

Common instances of liability concerning the failure to exercise a degree of control over the actions of another person might arise in the context of situations involving ‘passenger-driver’ or ‘instructor-student’ relations, where the passenger or the instructor are deemed to be in a position to control the action of the driver. The attribution of accessorial liability in situations of this type might be seen as showing insufficient respect for individual autonomy246, as it does unduly restrict individuals’ liberty and autonomy by requiring them to act as the ‘keepers of others’. Further, inactivity in situations involving ‘power to control’ the action of another does not necessarily cause that action. As Finn (1994) points out

The reasons for P’s action are surely internal to P, as an autonomous individual, and the conduct arises from P’s own choice. The absence of activity may have an influence on P’s determination to persist with the conduct once begun but that is not the same as causing it (p100).

However, the case might be different when the ‘omitter’ is under a legal duty to act but deliberately refrains from doing so247. In this case, as Finn (1994) states, ‘we are not in the field of actual causation but what Beynon248 refers to as legal causation- a but for analysis, although within limits’ (p101). Where an individual (A) intentionally fails to intervene in another’s action (P), it is possible to say that P would not have achieved his

246 However, these concerns are substantially limited under the current formulation of the mental requirement of accessorial liability which requires intentional help or assistance to the commission of an offence by the principal before there can be any accessorial liability: Giorgianni v The Queen (1985) 156 CLR 473. This is discussed further below.

247 At common law, there are certain situations in which the failure to act may constitute a breach of legal duty, and consequently criminal liability could be incurred by virtue of omission. First, where a statute imposes a duty of care. Secondly, where a person stands in a certain status relationship to another. Thirdly, where a person has assumed a contractual duty to care for another. Fourthly, where a person has voluntarily assumed the care of another and so enclosed the helpless person as to prevent the others from rendering aid: Takeda (1988) 14 NSWLR 228 at 236-248.

or her goal had A acted as he or she was obliged to do. Here, we can see that A’s free and intentional inaction as having causally contributed to the outcomes produced by P’s action. As with the preceding analysis in Chapter 3, we can see that omission, in cases like these, ‘can be as much the cause of an event as acts. An omission can serve just as well as an act as a necessary and sufficient condition for any particular outcome’ (Norrie, 2001:105).

Although the aim here is not to engage in a detailed discussion of causation, it is nonetheless important to highlight how a person’s action or inaction can be taken to have contributed to the acts (and consequences) of another. The term ‘cause’ can apply to both necessary and sufficient conditions, and conditions that are both necessary and sufficient. Most often, each of a number of necessary and jointly sufficient conditions are called ‘causal’ factors. When all necessary conditions are present, a single necessary factor becomes sufficient to produce a particular result. Where such a ‘final’ necessary condition involves some sort of human action or inaction, it is more likely to be identified as the cause of that particular result. Absence can also be a necessary condition.

In the context of criminal law, lawyers are familiar with necessary conditions (and absences) treated as causes via the so-called ‘but for’ test. Typically, we identify a range of different conditions as individually necessary and jointly sufficient to bring about particular consequences. In this sense, every event is recognised as ‘the result of many conditions that are jointly sufficient to produce it’ (Fleming, 1992: 193). As Fleming further says

In legal inquiries it does not matter if we are unable to identify all, or even most, of the individual elements which constitute the complex set of conditions jointly sufficient to produce the given consequence. The reason is that we are usually interested only to investigate whether one, two or perhaps three specific conditions [for example identified acts or omissions by the defendant or other participants in the accident] were causally relevant... whether a particular condition qualifies as a causally relevant factor will depend on whether it was necessary to complete a set of conditions jointly sufficient to account for the given occurrence (pp193-194).

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A deeper understanding of causation typically centers upon identifying and explaining the characteristics, powers and tendencies possessed by particular sorts [or natural kind] of things by virtue of their particular structure. We must then consider the way in which particular powers are released or triggered to bring about particular sorts of results in particular sorts of situations. For example, by virtue of their cellular structure, seeds have the capacity to germinate and grow into plants- but such a power is released only in the presence of such necessary conditions such as water, appropriate substrate and nutrients and in the absence of growth restricting toxins or obstacles.

In law, the principle causal agents are humans. Here, the crucial issue is whether an individual's action or inaction has caused a particular result. Or whether the individual's guilty mind has caused a particular criminal action. In this context, it is not entirely clear what Finn has in mind by 'actual causation' as against 'a but for analysis'. But it seems that he is seeking to distinguish between causes as the exercise of such distinctive powers - by particular causal agents - and 'mere conditions or circumstances' functioning as necessary conditions.

As discussed below, the courts have come to confine the imposition of accessorial liability by omission to situations where the person concerned is under a duty (or has the power of control) to prevent the commission of the offence by the principal and intentionally refrains from doing so. As Finn (1994) points out, the use of the term 'power of control' by the courts may be seen as 'effectively equivalent to the creation of a duty by another name' (p97). Along these lines, Ashworth (1995) argues that 'the cases seem to transgress the principle that there should be no liability for an omission unless a clear duty exists. What the courts have done, in effect, is to assimilate these cases of power of control to cases of duty, thereby, creating a new class of public duty' (pp418-419). The essence of the matter is that the individual's decision for remaining inactive (in situations where he or she is obliged to act) has been interpreted by the courts as amounting to positive encouragement to the commission of the offence by the principal.
In *Russell*[^249] (which is perhaps the most commonly cited case on accessorial liability for omitting to perform a legal duty[^250]), a father was found guilty of the manslaughter of his children and wife on the basis that he had stood by passively while his wife drowned herself and their children. The jury sought direction on the father’s liability if he had ‘stood by conniving to the act of his wife’. Cussen ACJ was of the view that the use of the word ‘conniving’ by the jury indicates that the father was culpably acquiescent in a course of conduct which was likely to lead to the commission of an offence. He further said that the use of the word conniving ‘is at least as strong as, if not stronger than, would have been the case if the words “showing his assent” or “countenancing” had been used’ (p68). Cussen ACJ expressed his view on accessorial liability by omission in the following terms:

> If a person present at the commission of a crime in the opinion of the jury on sufficient evidence shows his assent to such commission, he is guilty as a principal [in the second degree], and that assent may in some cases be properly found by the jury to be shown by the absence of dissent, or in the absence of what may be called an effective dissent (p66). [Emphasis added].

Then, on the facts as presented in that case, Cussen ACJ held the view that the father’s free decision (involving his absence of dissent to the action of his wife) along with his actual abstention from stopping her action (which in the circumstances was taken to reveal assent to her actions) had promoted her actions and amounted to an act of encouragement, and therefore he should be liable as a principal in the second degree for their deaths.

[^249]: [1933] VLR 59. See also *R v Clarke and Wilton* [1959] VR 645. *Russell* was considered in NSW case of *Ex Parte Parker: Re Brotherston* (1957) 57 SR (NSW) 326 at 330 by Owen J who did not doubt the principles laid down by it.

[^250]: On authors who have cited this case see for example Bronitt S & McSherry B, *Principles of Criminal Law*, LBC Information Services, Sydney, 2001 at 382; Brown et al, 2001 supra at 1337; Murugason & McNamara, 1997 supra at 320; Croft P, *Essential Criminal Law*, 2nd, Cavendish Publishing (Australia), Sydney, 2001 at 162.
Mann J, in *Russell*, was inclined to uphold the conviction of the father on the basis of his inactivity to fulfill his moral duty (rather than any legal) duty to protect his children and control his wife's action. Mann J held that:

The moral duty of the accused to save his children, the control which by law he has over his wife, and his moral duty to exercise that control do not in this case cease to be an element of his crime. On the contrary, it is these elements which as a matter of law give to the acquiescence of the father in the acts of the mother committed in his presence the quality of participation...not only was the accused morally bound to take active steps to save his children from destruction, but by his deliberate abstention from so doing, and by giving the encouragement and authority of his presence and approval to his wife's act, he became an aider and abettor and liable as a principal in the second degree (pp75-76).

McArthur J (at pp77-83) in *Russell* concurred with Cussen ACJ and Mann J in their decision that the verdict for the conviction of manslaughter for the death of the children should stand, but took a different view, indicating that such liability is not sustainable on the basis of accessorial liability. Rather, the father (had he stood passively by doing nothing to save his children) should bear responsibility as principal in the first degree. In relation to the husband's failure to take action to save his wife, His Honor held the view that the husband does not owe the same duty of care toward his wife as he does toward his children, and therefore his conviction for the manslaughter of his wife could not stand, simply because he stood by and did nothing while she committed suicide.

It seems that criminal accessorial liability for inactivity is not confined to situations involving the individual's free decision not to act when he or she is under a duty arising from blood relationships. Rather, in some cases, the notion of duty has been stretched to include the employee-employer relationship. In the NSW case of *Ex Parte Parker: Re Brotheron*\(^2\), an employee was found guilty as an accessory to theft committed by another person from their common employer on the basis that a duty was owed by that employee to prevent the theft of the employer's goods. In that case, Owen J held that where a person

\(^2\) (1957) 57 SR (NSW) 326.
Stands in a special relationship to the owner of the goods stolen, as for example where he is an employee with a duty to preserve his employer’s property, an intimation by words or conduct to a person who has announced his intention to steal property belonging to that employer that he does not propose to perform that duty may be treated by the tribunal of fact as an act of encouragement or acquiescence sufficient to make him an aider and abettor (p330).

Clearly, the paradigm case of accessorial liability for omission is that of an individual’s free inaction to prevent the commission of an offence by another when that individual is under a duty to do so, or has control over the action of that person and deliberately refrains from exercising that duty in controlling the conduct of that person. In terms of the analysis of individual autonomy as the basis for criminal liability, it can be seen that inaction in certain situations can be a result of a particular prior decision, producing a prior intention. The individual decides to remain inactive with a view of producing particular outcomes (encouraging the principal offender to exercise his or her autonomy to commit the crime) as a consequence of his or her inactivity. In this way, culpability of the accessory lies in the deliberate exercise of his or her autonomy to remain inactive in such a way that will nevertheless encourage the principal offender to exercise his or her autonomy to commit a crime. Because the individual has freely chosen not to act, so he or she has chosen to expose himself or herself to liability as the cause of not upholding his or her duties.

5.2.3.1.3. Accessorial liability by mere presence

The emphasis on an individual’s freedom and autonomy stands as a barrier against the inclusion of a ‘blank rule’ in the criminal law which would impose accessorial liability on the passive bystander beyond situations involving free inactivity arising from a breach of a pre-existing duty or special relationship of some kind. As it has been pointed out ‘without a special relationship each person is responsible for his own welfare, and thus a person’s decision to mind his own business cannot affect the welfare of others (Norrie,
2001:123). From this perspective, criminal law does not impose a general duty on individuals requiring them to be the ‘brother’s keeper’ of each other. As Ashworth (1995) points out

If mere presence at the scene during the principal’s offence were sufficient for accomplice liability, this would amount to recognising a citizen’s duty to take reasonable steps to prevent or frustrate any offence which is witnessed. The citizen’s choice would lie between taking some preventive action or being deemed to be an accomplice (p416).

At common law, a passive by-stander (without a duty) does not incur criminal liability as an accessory to the commission of an offence by another simply because he or she does nothing to prevent it. It is difficult to conceive of situations where mere presence at the scene of a crime without prior intention to assist in the commission of that crime would have been determined as conduct which has aided or abetted the principal in performing that crime. Even in situations of spontaneous presence at the scene, criminal law does not impose accessorial liability unless the individual’s presence is found to be intentional aiming to promote the commission of that offence. The body of the case law reveals that mere accidental presence when a crime is committed does not implicate the person present as an accessory in the commission of that crime. Rather, for a person to incur accessorial criminal liability on the basis of his or her presence at the scene, such presence needs to reflect some prior purposive free decisions and choices to intentionally assist or encourage the commission of the offence by the principal offender. The individual’s later free inactivity (which was the result of his or her prior intention to attend the scene to promote the commission of the crime) does not preclude criminal liability.

The decision in Annakin\(^{532}\) emphasises how the lines of responsibility are drawn between purposive and incidental presence at the scene. Annakin involved six members of a rival motor cycle club who were found guilty of murder and affray resulting from a gunfight in which seven people were killed, and others were convicted of manslaughter. In the course
of its judgment, the New South Wales Court of Criminal Appeal (Lee CJ, Yeldham and Allen JJ) held that:

Each accused who participated in the fight... whether his participation involved direct participation in the fighting or merely being present for the purpose of assisting or encouraging his side or members of his side, was thereby participating in the conduct which caused the death. The presence of each accused in those circumstances both made the fight possible and ensured its continuance...the unlawful presence of each was an aiding and abetting of whatever unlawful fighting took place (p149).

To similar effect, in *R v Ryan*\(^{253}\), Wood CJ (with whom McClellan J and Smart AJ agreed) held that

Mere acquiescence or assent to a crime does not make a person liable as a principal in the second degree. What was needed in such a case is proof that the principal in the second degree was linked in purpose with the person actually committing the crime, and was by his or her words or conduct doing something to bring about or render more likely, through encouragement or assistance, its commission (p69).

In *R v Doorey and Gage*\(^{234}\), the Court of Criminal Appeal of NSW took the view that no criminal liability should be imposed on the basis of being present at the scene of a crime unless such presence was the product of some prior individual choices to aid the commission of the crime. It was held by Herron CJ, Mason JA and Taylor J that

Mere presence of a person when an offence is committed is not of itself sufficient to convict him as an aider or abettor. Principals in the second degree are those who are present at the commission of the offence and aid and abet its commission...Even if A is present whilst a felony is committed but takes no part in it and does not act in concert with B who does commit it, A is not a principal in the second degree merely because he did not endeavor to prevent the felony or failed to apprehend the felon. A person who stands by and does not actually aid in

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\(^{234}\) [1970] 3 NSWR 35.
the commission of the offence can be convicted only if, for example, he watches for his companions in order to prevent surprise or to assist escape (p353).

The principles, as outlined above, were emphasised in *McCarthy and Ryan*\(^{255}\). In that case, the accused M was charged as an accessory to R’s crimes, having been present aiding and abetting their commission. Hunt CJ at p409 (with whom Wood and Smart JJ agreed) held that for a person to be held as an aider and abettor to the commission of an offence by the principal, that person needs to be present at the time when that crime is committed and intentionally aid or give encouragement to the principal offender\(^{256}\). His Honor further considered the concept ‘presence’ and stated that it was somewhat elastic. That is, the encouragement provided by the aider or abettor is sufficiently established if the person was both present and ready to give aid to the principal offender if required. In that regard, Hunt CJ distinguished between two types of presence. He referred to the first type as ‘actual presence’, where he stated that an accessory may be actually present at the scene within sight and sound of the crime; and to the second type as ‘constructive presence’ stating that a person may be constructively present at the scene if sufficiently near as to be able to readily render assistance to the principal offender should the need have arisen\(^{257}\).

The inference that the presence of an individual was not incidental, rather it was the product of prior choice to promote the commission of the offence by the principal, might be drawn if A has gone to the place where the action has taken place, and has paid to attend the event knowing that an offence will be committed. A situation of this type was encountered in the case of *Wilcox v Jeffery*\(^{258}\). In this case, the defendant A, the owner and managing editor of a magazine entitled ‘Jazz Illustrated’ was charged with aiding and abetting a breach of the immigration legislation by a musician P, who had been granted

\(^{255}\) (1993) 71 A Crim R 395 at 409

\(^{256}\) See also *Stokes and Difford* (1990) 51 A Crim R 25 at 35-38.


\(^{258}\) [1951] 1 All ER 464 at 465-467.

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permission to land in the United Kingdom to attend a concert. The condition of P’s permission was that he would be spotlighted and introduced to the audience but would not perform or take any paid or unpaid employment. Nevertheless, P played the saxophone at the concert. The defendant A was present at the concert after having paid for his ticket and was aware of the above conditions. On the second day after the concert, a description of the performance by P with several photos was published in the defendant’s magazine.

Lord Goddard CJ, in *Wilcox and Jeffery*, held that where presence is entirely accidental, a person cannot be held as aiding and abetting the commission of an offence. However, where presence is prima facie not accidental a person might incur criminal liability as an accessory. Lord Goddard was of the opinion that a person can be held as an aider or abettor to the commission of an illegal act by the principal offender, if that person knows that it is illegal for the principal to do that act and yet encourages its commission. On the facts of the case, Lord Goddard held that the defendant’s presence at the concert was not accidental (the defendant paid to go to the concert and went there because he wanted to report it). Therefore, he must be held to have been present, taking part, concurring or encouraging the illegal act of P who played the saxophone at the concert.

A range of possibilities can emerge in the context of accessorial liability by omission and mere presence. First, an individual might have the power to control the actions of another but does not give assent to their action because his or her presence is not known by the perpetrator. The question here is whether that individual should be held liable by virtue of his or her failure to control the actions of the other or not. A second scenario involves presence at the scene where a commission of an offence is taking place with no prior intention to help the commission of that offence and no pre-existing duty to prevent its commission. The individual concerned offers no overt support for the criminal act, but their lack of active intervention could be seen by the perpetrator as assent to, and support for, their criminal action. And it could be clear to the observer that this is the case.
Perhaps the observer can easily intervene to stop that crime but fails to do so. Here, mere presence could indeed promote the commission of the offence. Should the present person who does nothing to stop the crime when they could do so be held liable? From an individualistic point of view, the answer might be no, as this would impose a duty of rescue on individuals thereby showing insufficient respect for their autonomy. But then questions arise of possible serious assault upon the autonomy of possible victims. Here, indeed, we see a possible conflict of rights of those involved. These scenarios raise issues as to the appropriate mental element of accessorial liability to which I now turn.

5.2.3.2. The mental element of accessorial liability

As noted in Chapter 3, Searle argues that conscious individuals relate to the world through a cognitive mode where the individual represents ‘how things are’, and through a volitional mode where they decide how they would like them to be, and intentionally proceed to achieve such an aim. Within this framework, the following analysis considers the two aspects of the mental requirement of accessorial liability. First, I consider the cognitive aspect of the accessory’s mental state (the accessory’s knowledge of the essential matters of the offence in question). Secondly, I deal with the accessory’s attitudinal or volitional mental state (the accessory’s intentional assistance or encouragement (based on his or her knowledge of the essential matters of the crime) to the commission of that crime by the principal offender).

5.2.3.2.1. The cognitive element of accessorial liability

As the case law reveals, it appears that the courts have not achieved a coherent or consistent view on what constitutes the cognitive aspect of the accessory’s mental state. Terms including intention, wilful blindness and sometimes expressions embracing a notion of recklessness have been used by the courts to describe the degree of awareness

[1951] 1 All ER 464 at 465-467.
on the part of the accessory regarding the factual ingredients of the offence being assisted or encouraged. As Professor Glanville Williams (1990) notes:

The authorities do not state a consistent fault principle for accessories. Sometimes they require a purpose to bring about the crime; sometimes knowledge; sometimes an intention in a wide sense; sometimes they are satisfied with an intention to play some part in bringing it about; sometimes they use a formula which embraces recklessness. As so often happens, the courts are chiefly concerned to achieve a result that seems right in the particular case, leaving commentators to make what they can of what comes out (p4).

The majority of the New South Wales Court of Criminal Appeal in *Reg v Glennan*[^260], adopted a broad approach in relation to the cognitive state which would satisfy the accessory’s awareness of the factual ingredients of the principle offence. In that case, the majority considered the question whether a person can be convicted as an aider and abettor of the commission of an offence of strict liability involving driving a vehicle with an excessive quantity of alcohol present in the blood of another, if that person did not know the concentration of alcohol in the driver’s blood. It was held (at p614) that in the case of statutory offences in which intention is not a necessary element, the law does not require actual knowledge on the part of the aider and abettor of all the essential facts of the offence. The aider and abettor’s knowledge or intention can be established if that aider and abettor knew or suspected the existence of the facts which would constitute the commission of the offence (he acted recklessly, not caring whether the facts existed or not). The majority also indicated that wilful blindness (deliberate abstention from making an inquiry to obtain knowledge in relation to a certain fact because the accused suspects its existence) is sufficient to satisfy knowledge on the part of the accessory. But according to the majority, mere failure to make inquiry which, if made, would yield

[^260]: [1970] 91 W.N (N.S.W) 609, Judgment of Herron CJ, Mason JA and Taylor J at 613-614. In *Glennan*, G and O consumed alcohol in a hotel. Then O drove G’s car erratically while G was sitting beside her. The police stopped O and required a breath test which showed that she was driving with a prescribed quantity of alcohol in her blood contrary to section 4E of the *Motor Traffic Act* 1909. O was charged with driving a vehicle under the influence of alcohol, a strict liability offence. G was convicted of aiding and abetting the commission of that offence.
knowledge of an essential fact, is not enough to constitute knowledge of the fact (as a person cannot be made an aider and abettor by acting negligently).

A higher degree of awareness concerning the essential matters of the principal offence on the part of the accessory was adopted by the High Court of Australia in Giorgianni\(^{261}\). In that case, and after having reviewed some authorities\(^{262}\), the majority rejected the principle laid down by Glennan in relation to the sufficiency of recklessness and wilful blindness to satisfy the accessory’s degree of cognition stating that it ‘does not correctly state the law’ (p507). According to Wilson, Deane and Dawson JJ at p500, for a person to be held as an aider, abettor, counsellor or procurer to the commission of an offence, that person needs to intend the participation in the principal’s offence, and he or she must have knowledge of the essential matters which constitute the offence in question whether he knew that those matters amount to a crime or not. They further stated that it is not sufficient if the accessory’s ‘knowledge or belief extends only to the possibility or even

\(^{261}\) (1985) 156 CLR 473 at 497-509 per Wilson, Deane and Dawson JJ. In Giorgianni, a truck was leased by the accused, Giorgianni, and driven by his employee Renshaw. The vehicle collided with other vehicles because of a defect in its brakes. As a result of the collision, five persons died and one was injured. The accused used to do the maintenance on the truck. The evidence showed that the accused and Renshaw had done work on the truck two weeks before the accident. Renshaw testified that there had been no problem with the operation of the brakes. However, the evidence showed that the brake components on one of the wheels were held together by a piece of wire. Renshaw also testified that on the day of the accident he had called the accused to inform him that there was oil leakage from one of the wheels. The accused Giorgianni was not present at the time of collision but the prosecution contended that he was liable in that he procured Renshaw to drive the truck with the defective brakes, contrary to section 52 of the Crimes Act 1900 (NSW). Accordingly, Giorgianni was charged as a principal offender pursuant to section 351 of the Act. Section 351 (as it then was) stated that ‘any person who aids, abets, counsels, or procures, the commission of any misdemeanor, whether the same is a misdemeanor at common law or by any statute, may be indicted, convicted, and punished as a principal offender’. Giorgianni appealed against the conviction to the Court of Criminal Appeal, but his appeal was dismissed. He then sought leave to appeal to the High Court of Australia.

probability that the acts which he is assisting or encouraging as such, whether he realises it or not, as to constitute the factual ingredients of a crime\textsuperscript{263} (pp506-507).

The New South Wales Court of Criminal Appeal in \textit{Stokes and Diffford}\textsuperscript{264} expressed the same degree of awareness that is required for accessorrial liability as established in \textit{Giorgianni}. Hunt J (with whom Wood and McInerney JJ agreed at p45) held that to establish the accessory’s liability for the commission of the principal offence, the Crown must establish that ‘the accused knew all the essential facts or circumstances which must be established by the Crown in order to show that the crime was committed by the principal offender whether or not the accused knew that they amounted to a crime’ (p37).

5.2.3.2.1.1. The accessory’s scope of knowledge

The test formulated in \textit{Giorgianni} raises a series of questions about the scope of knowledge of the accessory: What constitutes the knowledge of the essential facts or matters of the assisted offence? Is it knowledge of ‘all the factual ingredients’ of that offence? What constitutes the essential matters or facts of the principal offence? Must the accessory have knowledge of the principal offender’s state of mind besides the essential facts? Will knowledge of the type of crime to be committed by the principal offender suffice to hold a person as an accessory to the commission of that offence?

In \textit{Giorgianni}\textsuperscript{265} (a case which involved accessorrial liability in offences of culpable driving occasioning death and grievous bodily harm), the accessory’s scope of knowledge was confined to the actual knowledge of the factual ingredients of that offence, that is, the actus reus of the principal offence. As noted above, the majority held that the

\textsuperscript{263} In \textit{Giorgianni} (1985) 156 CLR 473, Gibbs CJ at 482, 487-488 with whom Mason J at 488-497 agreed concurred with the majority that both knowledge of the essential facts constituting the offence in question, and intention to aid, abet, counsel or procure are necessary to render a person liable as an accessory to the commission of that offence, and neither negligence nor recklessness is sufficient. However, they held that wilful blindness (the deliberate shutting of one’s eyes to what is going on) is equivalent to knowledge. However, in subsequent cases, wilful blindness was rejected as equivalent to actual knowledge: see \textit{Kural v The Queen} (1987) 162 CLR 502; \textit{Pereira v DPP} (1988) 82 ALR 217.


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accessory needs to have knowledge of the ‘essential matters’ which constitute the offence in question. The accessory was taken to know the essential matters constituting the offence of culpable driving occasioning death or grievous bodily harm if he knew the facts which made the principal offender’s driving culpable. However, although an essential matter constituting that offence is the occasioning of death or grievous bodily harm, knowledge was not required in relation to this component of the offence. The reason given by the majority for laying the consequence of this offence outside the scope of the accessory’s cognition was put in the following terms:

As with involuntary manslaughter, culpable driving does not require that the death, if it is a case involving death, should be intended. It is merely a consequence which serves to convert what would otherwise amount to one offence - driving in a manner dangerous to the public, for instance - into another and more serious offence. The same may be said of grievous bodily harm if it is a case of grievous bodily harm (p502).

The Giorgianni approach in defining what amounts to the essential matters (in relation to the offence of culpable driving occasioning death or grievous bodily harm) has been criticised as a restrictive approach. Fisse (1990:333) criticises the concept of ‘essential matters’, referring to it as an elusive concept. He further (p334) argues, convincingly, that it is hard to accept the reason given by the Court in Giorgianni for the exclusion of the consequence as an ingredient of the essential matters of the offence of culpable driving. According to Fisse, the implausibility of such an approach is evident if tested in the context of complicity in involuntary manslaughter. As he argues, death is not merely a consequence which converts an assault into manslaughter but it is the very essence of the latter offence. If so, as Fisse points out, following the Giorgianni approach ‘a major element of the principal offence does not amount to an essential matter’ (p335). Moreover, Fisse (1990) argues that such an approach also implies that knowledge of the essential matters constituting an offence ‘does not necessarily mean knowledge that [the principal offender] is to commit the external elements of the offence with the mental element required’ (p333). According to this view, an accessory must have knowledge of the factual ingredients of the principal offence (and mere knowledge of the perpetrator’s intent to commit that offence will not suffice). As Bronitt (1993) points out, the difficulty

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which Professor Fisse encountered in analysing the principles arising from Giorgianni is that ‘it constructs the essential matters around the perpetrator’s conduct, as opposed to the perpetrator’s mental state’ (p255).

Although not applicable to strict liability issues, the New South Wales Court of Criminal Appeal’s broader approach (focusing on the accessory’s awareness of the principal offender’s mens rea instead of his or her actus reus) might remedy the concerns associated with Giorgianni’s definition of the essential matters in relation to other sorts of cases. In Stokes and Difford266, Hunt J indicated that in relation to both types of accessory:

It is usually more appropriate to speak of the accessory’s knowledge (or awareness) of the principal offender’s intention to do an act with a particular state of mind at the time when the accessory aids, abets, counsels or procures the principal offender to commit the crime in question than it is to speak of the accessory’s knowledge of the act done by the principal offender with that state of mind. That knowledge will usually crystallize in the accessory’s mind before he involves himself as an accessory to that crime (p38).

5.2.3.2.1.2. The precision of the accessory’s knowledge

The question which arises here is whether the accessory must have precise knowledge of the offence alleged to have been assisted or encouraged by him or her or whether knowledge of the type of the offence which is going to be committed is enough. The answer to this question was considered in Bainbridge267, by Lord Parker who delivered a

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267 [1960] 1 QB 59. In Bainbridge, the accused was charged as an accessory before the fact to office breaking by using oxygen cutting equipment. The case against him was that he bought that equipment on behalf of the offenders with full knowledge that it was going to be used for that purpose. The accused admitted that he suspected that the equipment was wanted for an illegal purpose but denied any knowledge that it was to be used for such purpose as it was used. He appealed against the conviction. The first ground of appeal was that there was no evidence to show that the accused knew that this particular breaking and entering was going to be committed. The second ground was that there was misdirection to the jury as to the degree of knowledge required by the accused before he could be convicted as an accessory before the fact. The accused contended that it was too wide to direct the jury that if they were satisfied without doubt
judgment stating that ‘the knowledge that is required to be proved in the mind of [the accessory] is not the knowledge of the precise crime...but he must know the type of crime that was in fact committed’ (p132). The same principles as laid down in Bainbridge were endorsed in *Johns* by Lusher J, who held that where

There is a compliance in substance with the terms of the procurement, a variation or divergence as to the method, mode, time or place, will not relieve the accessory before the fact...the prosecution must at least show that an offence of the kind or type actually committed was in fact intended (p301).

In *Giorgianni*, the High Court of Australia referred to Bainbridge and did not doubt the correctness of the principle laid down by it. Wilson, Deane and Dawson JJ held that

There are, of course, those cases which hold that the requisite knowledge need not extend to the precise crime which is in fact committed, although some crime must be in contemplation at the time secondary participation is alleged to occur, a general criminal purpose being insufficient: see *R v Lomas*, *Reg v Bullock*, *Reg v Bainbridge*; *Reg v Maxwell*. The questions which these cases raise do not arise in this case and it is not necessary to do more than refer to them (pp505-506).

In another place in their judgment, as noted above, the majority held that the accessory needs to know ‘that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence’ (p506). On one possible interpretation of Giorgianni, as Bronitt (1993:256) points out, the accessory must have knowledge of the actual offence which is, in due course, committed by the principal offender. If so, the problem lies in how to reconcile Giorgianni with

\[\text{that the accused bought the equipment and that he knew at some time that a felony of that kind was going to be committed, then they could convict him as an accessory before the fact. The accused contends that the proper direction should have been that at the time the accused bought the equipment he must have had full knowledge in the sense that he knew that a particular crime, in this case the breaking and entering of the premises on a particular date, was going to be committed.}\]

\[268\ (1978) 1 NSWLR 282. It was also followed in Ancuta (1990) 49 A Crim R 307 (CCA QLD).\]

\[269\ (1985) 156 CLR 473 at 505-506.\]

\[270\ (1913) 9 Cr App R 220.\]

\[271\ [1955] 1 WLR 1; [1955] 1 All ER 15.\]

\[272\ [1960] 1 KB 129.\]
Arguably, seeing accessorial liability as formulated in terms of the accessory’s free decision and action to help and encourage the commission of the principal offence by the principal entails holding that accessory liable to the extent that the offence actually committed is not substantially different from the one he or she has aided, abetted, counselled or procured. If the accessory freely chooses to assist the commission of an offence by the principal, that accessory can still be held liable according to the principles established in Bainbridge provided that the offence actually committed is not materially different from the offence intended to be committed. This is because criminal liability in situations like these (as will be elaborated below) lies in the accessory’s knowledge of the type of crime to be committed by the principal, along with that accessory’s free choice to put himself or herself in such a situation to help the principal commit that crime. If A assists and encourages P to break into a house but P breaks into an office instead, A’s liability should not be affected, since the offence is not materially different. But, if P enters the house intending to rape instead of stealing, and this was not within the scope of A’s awareness, A cannot be held as an accessory to rape because rape is a totally different type of offence. Another possibility is that A might assist and encourage P to kill C. B shoots at C, missing him or her and kills D instead. In this case, A will be liable as an accessory to P for the murder of D.\(^{274}\)

\(^{273}\) [1978] WLR 1350; [1978] 3 All ER 1140.

\(^{274}\) This is because the doctrine of transferred malice applies to accessories in the same way as it applies to the principals (Smith & Hogan, 1992:142; Parson, 1998:354). The doctrine of transferred malice is that if X shoots with intent to kill Y, but misses and hits Z instead, X is guilty of the murder of Z: Demirtan [1989] VR 97 at 118. The doctrine of transferred malice is concerned with situations where A encourages P to commit an offence, and P commits an offence of the same description but against a different victim or subject matter or in a different manner. For further discussion on the concept of the doctrine of transferred malice in relation to accessorial liability see Lanham D, ‘Accomplices and Transferred Malice’ (1980) 96 The Quarterly Review 110-125
5.2.3.2.1.3. The mental state required for accessories in *Giorgianni* and the accessory's mental state which is required under the doctrine of common purpose.\(^{275}\)

Another issue relating to the precision of the accessory’s knowledge is the inconsistency between the fault required for aiding, abetting, counselling and procuring the commission of an offence and the fault required for accessories under the doctrine of common purpose. Basically, as Gillies (1997:173) points out, the doctrine of common purpose finds its classic application in resolving issues of criminal liability of the participants in the commission of an offence (the foundational offence) where one or more party commits an additional or different crime from the one which was the subject of their original venture. The High Court of Australia considered the mental state required for the application of the doctrine of common purpose in cases such as *Johns*\(^{276}\) and *McAuliffe and McAuliffe*\(^{277}\). In those cases, the view was that the accessory can be held criminally liable for the commission of the additional or incidental offence committed by the principal offender if that accessory has contemplated or foreseen its commission as a possible outcome of the carrying out of the primary offence. This fault standard is much broader than the mental requirement for accessorial liability as laid down in *Giorgianni*\(^{278}\) as discussed above.

Different views have been expressed by legal commentators on how such an inconsistency could be resolved. On one view, Bronitt (1993:261-262) points out that this lack of symmetry can be resolved in either one of two ways. First, it is possible to regard the doctrine of common purpose as a ‘species of secondary participation separate from aiding, abetting, counselling or procuring’ to which a separate mental requirement could be adopted. Secondly, Bronitt argues that the High Court could reconsider the mental

\(^{275}\) The doctrine of common purpose is further considered in chapter 6. However, at this stage it is necessary to briefly highlight the mental state which is required on the part of the accessory so as to establish his or her liability for the additional crime committed by the principal offender pursuant to this doctrine (to highlight its inconsistency concerning the accessory’s mental state as established in *Giorgianni*).


\(^{278}\) (1985) 156 CLR 473.
requirement for common purpose and could restrict the liability of participation in a common purpose to crimes which are in the joint contemplation of the parties as evidenced by an agreement or authorisation.

Another view is expressed by Fisse (1990:336,343) who argues that this inconsistency should be removed by revising the decision in Giorgianni, and by redefining the mental element of accessorial liability to require intentional or reckless assistance or encouragement of the commission of an offence by another.

It is useful to consider the principle of individual autonomy in seeking to explain and resolve the lack of symmetry between the Giorgianni mental requirement for accessorial liability and that which is required under the doctrine of the common purpose. As suggested by Bronitt, the doctrine of common purpose should be treated as a species of accessorial liability separate from aiding, abetting, counselling or procuring, and therefore it is not necessarily an inconsistency to have differing mental requirements for accessorial liability and common purpose. The requirement of intentional assistance and encouragement based on knowledge of the essential matters for accessorial liability as established in Giorgianni is justified on the grounds that a high degree of personal autonomy, in the form of intentionality should be required to incriminate a person in the commission of a crime by others. On the other hand, the doctrine of common purpose only arises once a person is already intentionally involved in some from of criminal enterprise. Thus, to hold a lesser degree of individual autonomy as the mental element (foresight of possible outcomes) for further offences within that situation does not unduly restrict the autonomy of a person who has intentionally involved themselves in the commission of another crime.

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279 Bronitt (1993:262) prefers his second proposed solution for reasons including the avoidance of risks of over-criminalisation posed by the present law, allowing the attribution of criminal liability for the commission of the incidental offence on the ground that it was foreseen by the participant as a possible outcome to the commission of the primary offence.

280 However, as will be seen in chapter 6, the application of the doctrine of common purpose is not only concerned with an accessory's liability for the commission of the incidental crime by the principal, but also
As far as the mental requirement of the doctrine of common purpose is concerned, in some cases 'moral' and 'criminal' liability appears to be as much concerned with the person's prediction of the likelihood of possible responses as with decisions stemming from prior intention alone. As noted in Chapter 3, as Searle points out, individuals may choose to avoid situations when they know there will be a chance of some undesirable consequences occurring. Individuals in situations like these consider themselves as an object rather than a subject, and they use their past behaviours as materials for reasoning and causal explanations. Yet they are still freely choosing their actions in light of such understanding and awareness. This is not so different from actions directed by some prior intention. Arguably, the rationale underlying the doctrine of common purpose is dependent upon ideas of this kind (this point is elaborated in the next chapter). The offender freely chooses to engage in the criminal enterprise, so have they therefore, in a sense, chosen to expose themselves to responsibility for the possible outcomes of such an enterprise.

5.2.3.2.2. The attitudinal element of accessorial liability

It has been pointed out that in the context of complicity, the notion of intentional assistance or encouragement on the part of the accessory can embrace two reflective attitudes (Bronitt, 1993: 248; Bronitt & McSherry, 2001:392). In a narrow sense, such assistance or encouragement means specific intent (that the accessory entertaining a conscious purpose and free choice to promote the commission of the principal offence by another). In a broader sense, it may embrace the notion of oblique intention (the accessory being aware of the likelihood that his or her conduct will encourage or assist the principal to commit the offence). The question that arises in this context is how the attitudinal aspect of the accessory's mental state has been applied by the Courts. The short answer is that the bulk of case law has employed intention in its narrow sense.\footnote{See McCarthy and Ryan (1993) 71 A Crim R 395 at 409; Davis v The Queen (1991) 66 ALJR 22 at 22-24; Stoke and Diffor (1990) 51 A Crim R 25 at 37; Yorke v Lucas (1985) 158 CLR 661 at 667; R v Dooney}
For the purpose of many offences it may be true to say that if an act is done with foresight of its probable consequence, there is sufficient intent in law even if such intent may more properly be described as a form of recklessness. There are, however, offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. Those offences require intentional participation in a crime by lending assistance or encouragement (p506).

Confining the mental basis for accessorial liability to intention in the narrow sense reflects the purposive nature of the accessory’s involvement in the commission of an offence by another. Intention in this sense refers to the accessory’s reason for action which, in effect has caused his or her participation in the commission of that offence. The accessory intends to help and assist the commission of the offence because he or she has knowledge of what the principal is going to do. This knowledge or awareness produces what is called prior intention on the part of that accessory which in effect goes to cause the accessory’s actions of helping and encouraging the commission of the offence by the principal. In this sense, it is clear that the accessory’s intention is seen as both the reason for and the cause of his or her participation. Thus, the paradigm case will involve the accessory’s prior intention to assist and encourage the commission of the principal offence along with his or her intentional help or encouragement which will in itself

\[282 \text{Giorgianni} (1985) 156 CLR 473.\]
involve his or her intention-in-action. Similarly, in the case of spontaneous participation the accessory's involvement will still be intentional, as this will involve his or her intention-in-action.

The formulation of accessorial liability in terms of intentional help and assistance in the commission of an offence by the principal shows respect for individuals' freedom and autonomy. This is important because a lowering of the fault standard of accessorial liability to include notions such as foresight of the likelihood that a person's actions or omissions are likely to promote the commission of an offence by another, would impose a duty on individuals to be the 'brother's keeper' of others. This would pose the risk of unmeritorious convictions where individuals have no intention, whatsoever, to help the commission of crimes, and in the process it would restrict the freedom and autonomy of those individuals. In this regard, it has frequently been argued that the Giorgianni formulation of the mental requirement of accessorial liability in terms of intentional help and assistance (based on knowledge of the essential matters of the offence) of the commission of that offence offers a solution to many of the practical problems which might incur in the context of complicity\(^{283}\).

As pointed out, one of these problems concerns the supplying of goods or tools in the normal course of business (Bronitt, 1993:306; Fisse, 1990:344). Prior to Giorgianni (where the fault element of accessorial liability was satisfied by mere knowledge or recklessness), the merchant who in the course of their lawful occupation supplied goods or tools which subsequently facilitated the commission of an offence could have been found guilty as an accessory if he or she knew or foresaw the possibility that the person who received them intended to use them to commit a crime\(^{284}\). As has been convincingly argued, a fault standard which embraces recklessness would place a duty on suppliers requiring them to act as the keepers of their customers (Bronitt, 1993:306; Williams, 1990:344).


\(^{284}\) This is so even if the action in question is required by the professional codes of conduct and has social value, as Bronitt (1993:307) points out. See for example the case of Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.
1961:373). However, following the Giorgianni principle, this problem does not arise, since no individual is open to accessorial liability unless he or she intends to assist or encourage the commission of the crime by another.

Another problem arises in relation to complicity by omission particularly when the person has the power to control the acts of another and refrains from doing so. Problems of this type have been encountered by the English Courts. For example, a landlord who stands by watching customers drinking after hours would be guilty as an aider or abettor to them to do so.\(^{285}\) Also, a passenger who does not object when the driver drives at a high speed would be guilty of aiding and abetting dangerous driving.\(^{286}\) However, following Giorgianni, problems of this type do not arise, since intentional assistance or encouragement is required before accessorial liability can be attributed to anyone including those in a position to control the action of others.

A third problem as Bronitt (1993:311) points out, which might arise in the context of complicity, relates to the performance of a legal duty (for example a situation involving individuals returning property to owners knowing or suspecting that the owner intends to use them to commit a crime).\(^{287}\) Prior to Giorgianni, where knowledge or mere recklessness was a sufficient mental requirement for complicity, it was possible to hold the person who has returned the property as an accessory to the offence committed by the owner. However, following Giorgianni, as Bronitt (1993) says 'individuals who facilitate the commission of a crime by performing a legal duty will only be liable where they act with the intention of assisting or encouraging the perpetrator' (pp.313-314).

\(^{286}\) Du Cros v Lamborne [1970] 1 KB 40.
\(^{287}\) Harris [1964] Crim LR 54.
5.2.3.2.2.1. Participation in an offence of strict liability

The issue here is whether the accessory needs to have the same mental state required in the definition of the offence alleged to have been assisted or encouraged as that of the principal offender or not. Prior to Giorgianni, the view was that both the accessory and the principal needed to possess the same mental state as identified by the definition of the offence in question. Bronitt (1993:251) points out that this concept of equivalent states of culpability has been described by legal commentators as the 'principle of parallelism'. In this respect, Gillies (1980:56, 57-58, 69) argues that except in offences of strict liability, the accessory needs to have the same mens rea as the principal offender. As he says 'it is proposed that the authorities are, with this solitary exception, consistent with a principle of parallelism, whereby the accessory must act with precisely the same degree of awareness as to the relevant circumstances in which the actus reus is committed, as must the principal' (p70). As it has been asserted by Bronitt (1993:252) it is hard to accept that the accessory must have the same identical degree of mental state as the principal. For example, P is guilty of murder when P causes the death of another with the intent to kill. A who assists P does not act with intent to kill, rather, as an accessory, A will assist with the intention that P will commit murder. As Bronitt argues, these are different though equivalent mental states. It appears that Gillies has recanted in his recent work, stating that the accessory need not 'have the precise mens rea for the subject offence, where it is one of mens rea...this is because [the accessory] is not required to share any such element of criminal intention as might be required to be proven in the case of the principal' (1997:164).

The principle laid down by the High Court of Australia in Giorgianni makes it clear that an accessory can intentionally aid, abet, counsel and procure the commission of an

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288 Giorgianni did not consider the question of whether a person can become an accessory to the commission of an offence of negligence. However, in principle, there is nothing to suggest otherwise: R v Creamer [1965] 3 All ER 257. But for a person to be held liable as an accessory to an offence of negligence, that person needs to intentionally assist or encourage its commission in light of the principle as laid down in Giorgianni.
offence of strict liability, notwithstanding that no mental state needs to be proved on the part of the principal. The majority held that:

There is no basis upon which it can be said that where a statutory offence requires no proof of intent, it is unnecessary in order to establish secondary participation in the commission of that offence to prove actual knowledge of all the essential facts of the offence. Intent is an ingredient of the offence of aiding and abetting or counselling and procuring and knowledge of the essential facts of the principal offence is necessary before there can be intent (pp504-505).

In conclusion, as with the preceding analysis of individual accessorial liability, it was established that such liability is imposed where an individual has freely chosen to aid, abet, counsel or procure the commission of an offence by the principal. Here, the paradigm case will involve the accessory’s prior intention to either perform the forbidden act or to refrain from performing an act he or she is obliged to perform, either of which may constitute the necessary encouragement or assistance in the commission of the principal offence. This prior intention to encourage or assist, based on the accessory’s awareness of the principal’s intention to commit a crime, is seen as the cause of the accessory’s criminal intention-in-action (involving the actual active help or encouragement or the passive intentional inaction). However, noticeably, the illumination of the principles concerning this area of the law is surrounded by difficulties owing to the large number of (and sometimes inconsistent) cases involved. Therefore, I agree with the suggestion made by Scouler and Button (2001), who call for codification of the principles

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289 This statement by the majority, as Bronitt (1993:257-259) points out, raises the question concerning the precise nature of the relationship between knowledge and intention. As he points out, the interaction between knowledge and intention has two aspects. The first relates to their relative significance (is knowledge of the essential matters required in addition to intentional assistance or encouragement?). The second concerns the role of knowledge as knowledge a distinct mental element of accessorial liability? Or is it just evidence from which a jury can infer intention. Bronitt interprets the majority’s judgment in Giorgianni as supporting the view that knowledge can be used as evidence from which intent can be inferred. Whereas, the statement made by Gibbs CJ could be taken to indicate that knowledge is required in addition to intentional participation before an individual can be held as an accessory, Gibbs CJ held that ‘no one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender’ (pp487-488). Similar remarks to those made by Gibbs CJ are found in R v Fowler (2003) 321.
governing accessorial liability. In their work ‘Guide to accessorial liability in New South Wales’ they state:

It can hardly be said to be satisfactory that basic principles of criminal liability can only be discerned by a careful review of the judgments in a large number of cases. We dare say that these principles are not easy for experienced criminal counsel to apply, let alone for interested citizens who wish to know the law. The principles should be expressed clearly and concisely in legislation (p66).

An insight into the way in which the law in NSW might be clarified may be gleaned from considering the codification of accessorial liability in the JPC to which I now turn.

5.3. ACCESSORIAL LIABILITY IN JORDAN

5.3.1. Introduction

In this part, I consider the position under the JPC in relation to the principles concerning secondary involvement of an individual in the commission of an offence by the principal. The aim is to highlight how the JPC has come to recognise individual free decision and action as forming the foundation for his or her accessorial liability. This objective is achievable through addressing the elements of accessorial liability. However as with the preceding analysis, it is useful to touch upon the derivative nature of such liability under the JPC. Therefore, the following discussion is divided into two sections: the first addresses the derivative nature of accessorial liability; and the second explores individual autonomy as the basis for such liability. Before doing so, I set out the relevant provisions covering accessorial liability in the JPC.

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290 As noted in Chapter 1, in the JPC the offence of helping the commission of an offence is referred to as the offence of Al tadakal in the commission of an offence. The English translation of the term Al tadakal is Interfere. Under the JPC the legal meaning of the term Al tadakal is providing help to do something or helping the commission of an offence. However, the English translation Interfere of the term Al tadakal means standing in the way of, hinder, inhibit, disturb or confuse (Oxford Compact Thesaurus, 2001). In order to avoid any confusion which might result from the usage of the English translation of the term Al tadakal into Interfere, I will use the term accessory instead of Interfere while considering the accessorial liability under the JPC.
Under the JPC, a person may incur criminal liability as an accessory to the commission of an offence by the principal pursuant to Articles 80(2), 81 and 82.

Article 80(2) provides that:

A person is an accessory to the commission of a felony or misdemeanor where such person:

a. Helps the commission of such an offence by providing instructions;

b. Helps the commission of such an offence by giving the principal perpetrator a weapon or tools or anything else which helps the commission of such an offence;

c. Presents at the scene where the offence is committed for the purpose of frightening the victim or supporting/encouraging the determination of the principal perpetrator or to ensure the commission of the intended offence;

d. Helps the principal perpetrator to set up acts which prepare or facilitate or complete the commission of the offence;

e. Agreed with the principal perpetrator or accessories prior to the commission of the offence and participates in covering up the commission of that offence or hiding or marketing the whole or part of the things obtained by its commission or harboring one or more of the offenders who participated in its commission;

f. Although having knowledge of the criminal history of offenders who have committed banditry/robbery/brigandage, violent acts against the security of the state or the public safety or against persons or property, proceeds with providing such offenders with food or a place to hide or assemble.

Article 81 deals with the punishment of the accessory and inciter and stipulates that:

The inciter or the accessory shall be punished with:

1. (a) Temporal penal servitude for a period from 15 to 20 years if the punishment of the principal perpetrator is the death penalty.

(b) Temporal penal servitude from 7 to 15 years if the punishment of the principal perpetrator is either permanent penal servitude or permanent imprisonment.

\[\text{291} \text{ Article 80(1) deals with incitement which is not considered in this dissertation.}\]

\[\text{292} \text{ The JPC classifies crimes into three types: felonies, misdemeanors or contraventions. The punishment of the offence committed is the criterion for such classification. A felony is the most serious type of offence, and a contravention the least (Articles 14-27).}\]

\[\text{293} \text{ The distinction between imprisonment and penal servitude is that the latter involves the performance of labour.}\]
2. In all other cases, the inciter and the accessory shall be punished by the same punishment as that of the principal perpetrator after having this punishment reduced from 1/6 to 1/3.
3. If the incitement to commit a felony or a misdemeanor fails, then the punishment indicated in the above two subsections of this Article should be reduced to its 1/3.

Article 82 states: 'There is no punishment for inciting or helping the commission of a contravention'.

5.3.2. The derivative nature of accessorial liability under the JPC

Although there is no explicit reference in the above-cited Articles to the derivative nature of accessorial liability, such an idea is implied in and can be understood from the wording of these Articles. This is because the notion which underpins the law of accessorial liability is that of an accessory who, by his or her words or conduct, has helped another to commit the offence in question. Along these lines, the common view held by legal commentators is that the issue of accessorial liability arises only in subordination to primary criminal liability (Alseid, 1998:365; Hussni, 1992:248-412; Najem, 1991:211; Alhalabi, 1997:301; Awad & Abed Almonem, 1999:295). Thus, accessorial liability is not an offence in itself, rather it is a mode of culpability through which a person can be found guilty where the principal offender has committed or at least attempted to commit the offence alleged to have been assisted or helped by that person. However, under the JPC, Articles 80(2) and 82 confines accessorial liability to situations where the principal offence is a felony or a misdemeanor with no accessorial liability attached to helping the commission of a contravention²⁹⁴.

It is commonly accepted that no accessorial liability arises in the following situations under the JPC (Alseid, 1998:413-16; Alhalabi, 1997:301-2; Hussni, 1992:255-62; Awad & Abed Almonem, 1999:296-298). First, if the conduct of the principal offender

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²⁹⁴ It is often pointed out that the reason behind the exclusion of accessoryship in the commission of a contravention refers to its triviality (Garar, 1978:113; Alseid, 1998:419).
constitutes only an act of preparation which is not criminalised under the JPC. Second, if the principal action amounted to no more than an uncompleted attempt which is followed by voluntary withdrawal by that principal, except where the acts themselves have amounted to an offence\(^{295}\). Third, there is no accessorrial liability to an isolated act from among those constituting a ‘habitual offence’ under the JPC. The definition of the physical element of the ‘habitual offence’ or the ‘offence of habit’ under the JPC requires the performance of more than one act to satisfy the commission of such offence by the principal (with no liability attached to the commission of only one single act of those from which the offence is composed). Accordingly, a person cannot be held as an accessory to the commission of one single act of those which constitute the offence of habit unless that act was the one which has completed the physical component of such an offence. For example, Article 120 of the JPC criminalises the recruitment of soldiers on the land of Jordan to fight for another state without the consent of the Jordanian government. As it has been pointed out, the recruitment of one soldier is insufficient to satisfy the offence enacted by Article 120, and to hold the person principally liable for it (Alseid, 1998:232). Accordingly, a person who has helped such recruitment cannot be held as an accessory to the commission of the act of recruiting one soldier under this category of offence.

Fourthly, under the JPC, a person cannot be held as an accessory to the principal whose actions are justified because of the availability of a justificatory defence such as self-defence\(^{296}\). This type of defence negates the criminality of the act and renders lawful

\(^{295}\) Article 69 of the JPC deals with uncompleted attempt, and this Article needs to be read in line with Article 68 of the JPC which defines ‘attempt’. Article 68 stipulates that

Attempt is the commencement of the commission of one act of the apparent acts which leads to the commission of a felony or a misdemeanour. If the principal fails to complete the acts necessary for the commission of that felony or misdemeanour for reasons outside his or her will, then he shall be punished.\...

Article 69 enact that:

Mere determination to commit an offence and the acts of preparation are not ‘attempt’. And whoever attempts/commences to commit an act and has voluntarily withdrawn from completing the acts which if completed would constitute an offence shall not be punished for that act or acts unless these acts amount to an offence by themselves.

\(^{296}\) Under the JPC, the justificatory defences are mentioned restrictively, and they are the exercise of right, self-defence, performance or execution of duty and the permission of the law (Articles 59-62). Similarly, if the offence committed by the principal has become the subject of a law of general indemnity, the person
what would be otherwise criminal. Thus, the principal who commits the justified act cannot be held criminally liable for its commission, as no offence has been committed, and consequently, the person who has helped the commission of that act cannot be held as an accessory, given the absence of a criminal act from which to derive his or her liability. However, if the principal offender is exculpated from criminal liability for reasons special to himself or herself such as insanity, then the person who has helped him or her to commit the offence can still be liable as an accessory to the commission of that offence. The derivative nature of accessorial liability is also reflected in the punishment of the accessory pursuant to Article 81 (stated above) which is more lenient than and based on, and calculated in light of, the punishment of the principal offender.

5.3.3. Individual autonomy as the basis for accessorial liability under the JPC

In this section, the aim is to establish how a person's intentional involvement in providing help to the principal offender to commit a crime forms the ground for accessorial liability under the JPC. It also highlights whether accessorial liability is confined to situations of active participation or whether it extends to cover situations of passive inactivity. The following analysis addresses these issues by considering the physical and mental elements of accessorial liability.

who helped the commission of that offence cannot be held as an accessory to its commission. This is because the effect of the law of general indemnity is to negate the criminality of the principal's conduct, rendering it lawful, and consequently there can be no accessorialship in lawful conduct. Under the Jordanian Constitution, the legislative authority has the right to enact what is called the 'law of general indemnity' (Article 38). By exercising this right, the legislature has included an Article in the JPC which deals with the law of general indemnity and authorises the legislative authority to enact such law at any time (Article 50). According to this Article, the effect of the law of general indemnity is to render lawful what otherwise would have been a criminal conduct. Alseid (1998:765-767) explains Article 50 and points out that the effect of the law of general indemnity is to remove the criminality of the conduct with a retroactive effect. Namely, it renders the conduct committed by the principal lawful from the date it was committed, and not from the date in which the law of indemnity was issued.
5.3.3.1. The physical element of accessorrial liability

For a person to be held as an accessory to the commission of an offence by the principal, that accessory needs to contribute to the commission of that offence by providing the principal with help in ways which fall within the categories articulated in Article 80 (2) of the JPC. A judge cannot attribute accessorrial liability to anyone irrespective of his or her contribution to the commission of an offence if that person assisted its commission in ways which fall outside the scope of Article 80 (2) as discussed below. The restrictive ways in which accessorrial liability has been defined in the JPC reflects broad respect for notions of individual autonomy.

5.3.3.1.1. Accessorial liability by an act

Pursuant to Article 80 (2), a person can become an accessory to the commission of an offence by the principal when that person has helped its commission by performing one of the acts articulated in the various subsections. It is apparent from the situations covered by that Article, and it is commonly accepted by legal commentators that the accessory’s help in the commission of an offence may be provided prior to, simultaneously, or subsequent to the commission of the offence in question (Alseid, 1998:421-30, Garar, 1978:115-117; Alhalabi, 1997:308-13; Najem, 1991:212-215). Regardless of the various ways in which the conduct element of accessorrial liability has been defined, the common feature between these ways is that they all describe situations in which the accessory has transferred his or her prior decision to help the commission of the crime into actions. It is by his or her free and intentional words or acts that the commission of the crime in question is made more likely, and this is what justifies the accessory’s liability. One way in which a person may actively provide prior help to the commission of an offence by the principal includes helping that principal by providing him or her with instructions which render possible the commission of that offence (Article 80(2)(a)). While this is not further defined in the JPC, legal commentators have often pointed out that this includes the giving of information or guidance to the principal.
perpetrator, such as by advising him or her about the entrances to the house which it is intended to be broken into, teaching the principal methods of opening the drawers and cupboards, and identifying the location of the house on a map (Alseid (1998:421; Alhalabi, 1997:309; Najem, 1991:213; Alsadi, 1970:205). Actions resulting from the individual’s prior free choice to help the commission of an offence may also include giving the principal offender weapons, tools or anything else to help in the commission of the offence (Article80(2(b)). For example, the accessory may provide the perpetrator with a gun or axe to use in the commission of the offence in question or a drug so as to render a woman unconscious before raping her.

Helping the principal in setting up the acts and making preparations for the commission of the offence is another way of providing prior help to the commission of the offence according to Article 80(2)(d). According to this subsection, the accessory may also be present at the scene and perform actions which provide the principal simultaneously with help to commit the crime in question. In this regard, the accessory’s prior intention to help the commission of an offence is reflected by that accessory's intention-in-action through helping the principal to set up the acts which facilitate the commission of the offence or those acts which help its completion. Actions of this type may include, for example, the servant’s action of leaving the door of their employer’s house open upon the arrival of the principal, or keeping guards at a distance from the location where the offence is taking place, or the accessory might provide the principal with a ladder to get out of the house through the window or providing that principal with a car to escape (Alseid, 1998: 423).

With regard to subsequent intentional assistance to the commission of the offence, the person who provides such help is liable as an accessory in two situations. Firstly, when that person agrees with the principal perpetrator or other accessories prior to the commission of the offence to render subsequent help, and pursuant to that agreement the accessory helps the principal offender and/or other accessories to cover the commission of the offence by concealing the evidence or hiding the whole or part of the things obtained by its commission or harboring one or more of the offenders Article 80(2)(e).
Secondly, when that person intentionally provides help to the principal or principals by giving food or providing them with place in which to hide or assemble, knowing they have committed banditry/robbery/brigandage or violent acts against the security of the state, public safety, persons or property Article (80/2/f), and if such this may assist them in the commission of subsequent crimes.

5.3.3.1.2. Accessorial liability by mere presence

The question of whether or not a person may be liable as an accessory due to mere presence at the scene of the crime can be answered by undertaking a close analysis of Articles 80(2)(c) and (d). It is clear from the words of Article 80 (2)(d) that passive presence at the scene by an individual is not enough to implicate that individual as an accessory. Rather, accessorial liability is articulated in terms of intentional and active contribution to the commission of the offence by providing contemporaneous help to the principal. In terms of the analysis of accessorial criminal liability as underpinned by the notion of individual autonomy, respect for such autonomy operates to limit the reach of such liability to situations involving the individual’s prior decisions and actions to help in the commission of a wrongful act by the principal. If the person’s presence at the scene is seen as reflecting such purpose, then it is legitimate to hold those present at the scene criminally liable. Article 80(2)(c) recognises this limit by stating that no accessorial liability should be attributed to individuals found to be present while the offence is committed unless such presence is purposive. According to this Article, one of the purposes which a person may seek to achieve by being present at the scene is to frighten the victim or support and encourage the determination of the principal. As has been pointed out, the presence of the accessory at the scene with such aim will limit the victim’s autonomy by creating a state of fear in his or her mind which may hinder self-defence. Alternatively, such a presence may encourage the principal to commit the offence, knowing that his or her actions are being supported (Alseid (1998:427-428; Hussni, 1992:325; Alhalabi, 1997:310-311)). According to Article 80(2)(c), a person can be held liable as an accessory on the basis of his or her intentional and purposive
presence at the scene when that person is present to ensure the commission of the intended offence. As Alseid (1998:428) points out this purpose means that the presence of the accessory need not be directed to discourage the victim or encourage the principal. Rather, it needs to be directed to the elimination of any factors which may prevent the commission of the offence including, for example, giving the police a false direction as to where the offence is taking place.

5.3.3.1.3. Accessorial liability by omission

As noted in Chapter 3, conscious and intentional inactivity can be described as a form of action. Inactivity does not mean emptiness, rather it is a description of what has happened as a consequence of an individual’s deliberate abstention to do a particular thing. As Hussni (1992: 313) points out, an omission is a form of human action which involves a willed abstention for the purpose of achieving a particular aim, and in this sense it is hardly convincing to describe it as ‘nothing or emptiness’. As an individual’s action can be seen as the product of his or her prior intentions, so too can his or her omission be regarded as the outcome of some prior free and deliberate decisions not to act. A person might decide to refrain from acting in a given situation with the view or aim of achieving a certain result. As discussed above, respect for individual autonomy does not allow the enactment of a ‘blank rule’ by which individuals are held criminally liable on the basis of their omissions. Rather, the emphasis on individual freedom has resulted in confining the scope of culpable inactivity to situations where an individual is under a duty of some kind, or stands in a special relationship to another person, and deliberately fails or refrains to upholding such a duty.

Along these lines, it is generally accepted by legal commentators on the JPC that a person can only become an accessory to the commission of an offence on the basis of omission where that person is under a duty to prevent the commission of the offence and deliberately refrains from doing so (Alseid, 1998:431; Hussni, 1975:600; Hussni, 1992: 313; Salamah, 1979:434; Behnam, 1976:470). But the question arises of whether a person
can become an accessory to the commission of an offence by omission under the *JPC* or not. Alseid (1998:431) argues that the formulation of Article 80 of the *JPC* does not preclude accessorial liability by omission as it does not state that accessorial liability is limited to the participation by positive acts. And as long as the omission of an individual (who is under duty to prevent the crime) has helped and contributed to its commission, then that person should be held liable as an accessory. To illustrate his point, Alseid (1998:431) argues if a police officer intentionally refrains from preventing P from breaking and entering into a bank to steal, that officer should be liable as an accessory to P.

Contrary to this view, I contend that given the current formulation of Article 80(2) of the *JPC*, it is hard to conceive the conviction of anyone as an accessory to the principal on the basis of omission. This is because Article 80(2) is phrased in terms which indicate that accessorial liability requires positive help and assistance to the commission of the offence. Expressions of this nature found in the Article include helping by providing instructions, giving weapons, helping the principal setting up the acts or providing the principal with food and so on. However, it must be emphasised that notwithstanding that the current formulation of Article 80(2) makes it difficult to speak of accessorial liability by omission, in principle, there is nothing which precludes such liability where the omitter is under a duty and fails to act. Thus, the equation will involve respect for individual autonomy by not imposing accessorial liability without the existence of a certain duty on the one hand. On the other hand, responsibility is the flip side of autonomy, and where the autonomous individual has freely and deliberately refrained from upholding his or her duty with a view of helping the commission of an offence by another, then it is appropriate to hold him or her liable. But in order to allow accessorial liability by omission under the *JPC*, it is necessary to amend Article 80(2) to allow such a possibility.
5.3.3.2. The mental element of accessorial liability

The main question which arises here concerns the form in which the autonomy of an individual is manifested so as to establish his or her accessorial liability. Is it intention, or is it a lesser state of mind such as recklessness or negligence which would satisfy the mental requirement of such liability under the \textit{JPC}? The direct answer to this question (which can be understood from the wording of Article 80(2) of the \textit{JPC}) is that intention is the mental requirement to establish accessorial liability. As stated above, the wording of Article 80(2) includes terms such as ‘purpose’ and ‘knowledge’ to describe the accessory’s involvement and participation in the commission of the offence by the principal offender. However, there is no further exposition in the body of this Article as to what constitutes the cognitive aspect of the accessory’s mental state (except mentioning that the accessory needs to have knowledge of the criminal history of the offenders in Article 80(2)(f)). However, as noted above, conscious and autonomous individuals act intentionally when they have knowledge about how things are, and with that knowledge or awareness they intentionally proceed to change these things the way they prefer them to be. In line of this analysis, legal commentators who have explained the mental requirement of accessorial liability distinguish between the scope of awareness which is required for intentional help in the commission of an intentional offence, and that which is required to establish secondary involvement in the commission of an unintended offence.

With regard to secondary participation in the intentional offence, the view expressed by legal commentators is that the accessory needs to have knowledge of the essential matters which constitute the physical element of the offence to which help has been provided and with that knowledge the accessory intentionally helps its commission (Alseid, 1998:435-437; Amer, 1985:265; Hussni, 1992:353-362; Alhalabi, 1997:314-315; Najem, 1991:215; Abou Amer and Alqahwaji, 1984:287). As has frequently been pointed out, this will involve the accessory’s knowledge of all elements of the offence which the principal is about to carry out, besides awareness of the nature of his or her actions (that is, he or she is helping the principal to commit the offence in question) (Alhalabi, 1997:314-5; Abu
Amer and Alqahwaji, 1984:287; Hussni, 1992:355; Alseid (1998:435). For example, for A to be held liable as an accessory to murder committed by P, A needs to know that P is about to commit murder, and with that knowledge A provides P with a gun to shoot C. It is not enough to establish A’s liability as an accessory that A has given the gun as a gift to P (assuming that A’s action does not amount to an offence by itself), and subsequently uses it to commit an offence. Rather, A needs to perform such an action intending to help P to commit murder.

In relation to accessorial liability in the commission of unintended offences, there are two different points of view on this matter. The first view holds that a person can be held liable as an accessory to the commission of an unintended offence (Alseid, 1998:439; Hussni, 1992:366; Mustafa, 1974: 348-349; Behnam, 1968:719; Alqahwaji, 1997:487). In support of this view Alseid (1998:439) points out that Article 80(2) does not distinguish between helping intended and unintended offences, and consequently the person can intentionally help the commission of both type of offences. But the accessory to an unintended offence needs only to help the wrongful act without intending its consequence as such a result is not part of the definition of such an offence. To illustrate the point, Alseid (1998:440) provides the following example: suppose A knows that if P drives a car he or she might run over a person due to P’s poor eyesight. A intentionally gives P a car who drives it and runs over and kills C. In this example, both A and P are liable for the death of C: P as principal offender, and A as an accessory. This is because A knew that if P drove that car, P would kill C, and with that knowledge intentionally provided P with the car.

In contrast, Alfadel (1976: 237) and Alhalabi (1997:316) argue that a person cannot be held as an accessory to the commission of an unintended offence. From this perspective, this is because the essence of accessorial liability is to intentionally help the principal to commit an offence, and this intention needs to include all the factual ingredients of the offence, including the result. And as results are not intended in unintended offences, it is not possible for a person to be held as an accessory to the commission of that offence.
Arguably, the view which contends that a person can be held as an accessory to the commission of unintended offence seems to be more acceptable. This is because there appears to be nothing in Article 80(2) to suggest that accessorial liability is limited to helping the commission of intentional offences. Article 80(2) identifies intention as the mental requirement for accessorial liability, and in principle, a person can intentionally help the commission of both intended and unintended crimes. This interpretation better acknowledges the individual autonomy of both the victim and the accessory. The accessory's autonomy is taken into account by still requiring intentional assistance to the principal in the commission of the offence; the victim's\textsuperscript{397} autonomy which has been impinged upon as the result of a commission of the crime is also recognised by holding those who have contributed to it liable.

5.4. CONCLUSION

This chapter examined individual autonomy as the basis for accessorial liability in both NSW and Jordan. The comparative analysis demonstrated that it is the autonomous contribution (free decision and action/inaction) of an individual to the commission of an offence which forms the basis of accessorial liability in both jurisdictions. As the analysis showed, this mode of criminal liability can be understood in the light of the notion of prior intention and intentional action or inaction. The accessories to the commission of a crime act from their prior intention to assist or encourage that crime. This prior intention involves their conscious knowledge of the ingredients of the offence in question, and with that knowledge they proceed to counsel, procure, aid and abet its commission, which will entail their intention-in-action. It is the accessory's prior intention to assist the commission of an offence which causes his or her bodily movement to aid, counsel, procure or abet (which in itself involves intention-in-action). Along these lines, it was shown that the accessory's liability for passive inactivity could also refer to his or her prior free choice not to act so as to help to commission of the offence in question.

\textsuperscript{397} It is acknowledged that some unintentional offences may be victimless, in which case this argument will not arise.
As the discussion revealed, unlike in Jordan, in NSW accessories to the commission of an
offence are divided into two types namely, principals in the second degree and
accessories before the fact. It was highlighted that the basis for such a division is the
presence of the accessory at the scene when the offence is committed. If the accessory is
present at the scene, he or she is considered as a principal in the second degree, but if
absent from the scene, he or she is considered as an accessory before the fact. Putting
aside the issue of presence, case law reveals that the range and quality of the acts which
describe the alleged assistance or encouragement (manifesting the accessory's intention-
in-action) are the same for both types of accessories. This indicates that beyond the
requirement of presence, there is no substantive significance behind the division of
accessories into principal in the second degree and accessory before the fact. Therefore, it
is suggested that any future reform of the law of accessorrial liability in NSW could merge
the two categories of accessories into one category of accessorrial participation. In this
connection, any reform of the law of accessorrial liability in NSW might benefit from
Article 80(2) of the JPC, which makes no distinction between the accessories.

In NSW, unlike Jordan, accessories to the commission of an offence (both the principal in
the second degree and the accessory before the fact) are liable to the same penalty as the
principal in the first degree. But the law recognises different degrees of involvement
(both mental and physical) in the commission of a crime. It is evident that the principal in
the first degree is the one who perpetrates the actus reus of the offence in question, and
the accessory becomes involved in its commission by virtue of a lesser direct act of
assistance or encouragement. And in that regard, the liability of the accessory is
derivative and not primary. Moreover, as far as the question of mens rea is concerned, the
law of criminal liability differentiates and has been developed around the distinction
between the mental requirement which is necessary for the liability of the principal
(intention to commit the crime) and the mental requirement which is required for
accessorrial liability (intention to help or assist the commission of a crime). In other
words, different principles of mens rea and actus reus are required for establishing the
liability of the principals compared to those which are required for establishing
accessorial liability. But this does not negate the fact that it is the accessory’s free
decision and action which forms the basis of his or her accessorial liability. The essence
of the matter is that the accessory’s autonomous involvement is sufficient to render him
or her liable to that degree of involvement (usually secondary in nature) in the criminal
project. Therefore, it is important to make a distinction between the accessories and the
principals with regard to punishment applicable to them. This is because if the
fundamental differences between the principal and accessory’s contribution to the
commission of an offence are not recognised for such a substantive purpose, this would
undermine the significance of the current law in classifying the parties to an offence into
principals and accessories. In this connection, it is suggested that any potential reform of
the law of accessorial liability in NSW could benefit from a consideration of Article 81 of
the JPC. Article 81 deals with the punishment of the accessory and holds the accessory to
a lesser penalty than the principal. It stipulates that the liability of the accessory should be
based on that of the principal and subject to certain deductions depending on the
punishment of the primary offence to which the principal offender is held liable.

In NSW, addressing the physical element of accessorial liability involves a distinction
between ‘aiding’ and ‘abetting’ on one hand, and between ‘counselling’ and ‘procuring’
on the other. And the terms ‘aid’ and ‘abet’ are taken to describe the secondary
participation of the principal in the second degree, whereas the terms ‘counsel’ and
‘procure’ to describe the secondary participation of the accessory before the fact. As
established above, this distinction does not depend in any way on the nature of the acts
done by the accessory, and any act which could amount to ‘aiding and abetting’ if carried
out while the accessory is present at the scene would amount to counselling and
procuring if done while the accessory is absent and vice versa. Therefore, it is suggested
that it is appropriate while dealing with the physical element of accessorial liability to
redefine it in terms of providing help or encouragement to the commission of an offence,
thereby avoiding any confusion which might result from the usage of overlapping
terminology. In this regard, a redefinition of the physical element of accessorial liability
under the laws of NSW might benefit from considering Article 80(2) of the JPC. Article

398 See ss 345, 346, 351 of the Crime Act 1900 (NSW); s 11.2(1) of the Criminal Code Act 1995 (Cth).
80(2) defines the accessory’s physical contribution to the commission of an offence in terms of providing help and encouragement to the principal offender.

In NSW as in Jordan, accessorial liability can be incurred on the basis of one’s free action which has assisted or encouraged the principal offender to commit the principal offence. Moreover, in both jurisdictions, it was established that passive inactivity and mere incidental presence of a person at the scene while a crime is committed does not render that person as an accessory to its commission. Rather for the presence at the scene to form the basis of accessorial liability, it needs to be purposive, aiming to assist and encourage the commission of the principal offence. Unlike in Jordan, in NSW, it is explicitly established that for a person to incur accessorial liability by virtue of omission, then that person needs to intentionally remain inactive where that person is under a duty to act and prevent the commission of the offence in question. Under the JPC, accessorial liability by omission is subject to controversy due to the lack of guidance in Article 80(2) on this matter. Accordingly, any potential reform of the JPC in this connection can benefit from the principles established in NSW on accessorial liability by omission. A suggested reform of Article 80(2) might consider adding a paragraph in that Article stating that a person can become an accessory to the commission of an offence by virtue of his or her omission provided that that person is under a duty to prevent the commission of the offence and deliberately refrains from doing so.

As established above, in NSW, following the Giorgianni principles, the mental requirement of accessorial liability is defined in terms of intentional assistance or encouragement of the principal offence which is based on knowledge of the essential matters of that offence. This formulation excludes any lesser state of mind such as foresight of the probability or possibility as a sufficient mental state for accessorial liability. It was pointed out that this formulation of the mental requirement of accessorial liability provides solutions to many of the problems which could arise in the context of accessorial liability. However, it was shown that this formulation has attracted some controversy in relation to the scope of the accessory’s knowledge of the essential matters which constitute the offence in question, and whether the accessory should have
knowledge of the precise offence to which he or she has provided assistance or encouragement. Another area of uncertainty regarding the mental requirement of accessorial liability related to lack of symmetry between the mental state required on the part of the accessory in Giorgianni and the accessory's mental state which is required under the doctrine of common purpose. It was demonstrated that a consideration of the principles of individual autonomy help to demonstrate this discrepancy.

Comparatively, it was shown that while the wording of some of the subsections of Article 80(2) of the JPC include terms such as 'purpose' and 'knowledge' to describe the mental requirement for accessorial liability, there is no further exposition in the body of that Article as to the scope of the accessory's knowledge or what that knowledge should include. Therefore, in light of such lack of clarity on this matter, it can be suggested that the JPC can benefit from the principles established at the common law in NSW. In this connection, the following is a suggested proposal for reform of the JPC regarding the mental requirement of accessorial liability:

1. For a person to be liable as an accessory to the commission of an offence, that person must have knowledge of the essential matters which constitute that offence, and with that knowledge intentionally assists or encourages its commission.
2. A person may be held liable as an accessory to the commission of an unintended offence provided that person has intentionally assisted or encouraged the commission of that offence.
3. Any state of mind less than intention will be an insufficient state of mind for accessorial liability.

In this Chapter, the issue of the doctrine of common purpose was raised while considering the mental element required for accessorial liability. In light of the controversy surrounding this doctrine, I turn to consider it in the following chapter.
6. **INDIVIDUAL AUTONOMY AND THE DOCTRINE OF COMMON PURPOSE UNDER THE CRIMINAL LAWS OF NEW SOUTH WALES AND JORDAN**

6.1. **INTRODUCTION**

This chapter explores how the attribution of criminal liability for the commission of an additional or alternative offence, in the course of carrying out a primary criminal venture by a group of individuals, can be explained in terms of the notion of individual autonomy under the laws of NSW and Jordan. The set of rules usually used to deal with this issue is known as the doctrine of common purpose. Following the pattern of earlier chapters, this chapter is divided into two parts. The first part examines individual autonomy as the ground for the extension of criminal liability (for the commission of an additional offence) pursuant to the doctrine of common purpose under the criminal law of NSW. The second part explores the same issue under the criminal law of Jordan. The chapter concludes by comparing and contrasting the respective position in both jurisdictions to provide insight into how the two systems can inform each other on this important and complex area of the law of complicity.

6.2. **THE DOCTRINE OF COMMON PURPOSE UNDER THE CRIMINAL LAW OF NEW SOUTH WALES**

At the outset, it is useful to provide a definition of the doctrine of common purpose, and then highlight some of the problematic aspects associated with this area of law. It is commonly accepted by legal commentators that the doctrine of common purpose operates to render individuals who engage in a primary criminal venture to commit an offence (the foundational offence) liable for the commission of any incidental or additional offence committed by other participants in the course of carrying out their primary criminal
venture (Gillies, 1980:90 & 1997:173; Bronitt & McSherry, 2001:412; Brown et al, 2001:1357; Rush & Yeo, 2000:683-684). However, legal commentators differ on whether the doctrine is to be regarded as an extension of the rules relating to joint criminal enterprise (acting in concert) (as discussed in chapter 4), or as an extension of the law of accessorial liability (as discussed in chapter 5). On one view, Gray (1999) refers to the doctrine of common purpose as an extension of the law of accessorial liability when he states

The High Court [in McAuliffe]...draws the apparently fine distinction between consequences which are within the scope of the common purpose, and those which are outside the scope of the common purpose and are similarly foreseen...Within this apparently unexceptionable extension to the law of accessorial liability is concealed an important conceptual leap (p205).

Another view is expressed by Brown et al (2001) who argue that ‘it is more accurate to conceive of the [doctrine of common purpose] as an extension of the special rules relating to joint criminal enterprise’ (p1364). To similar effect, Bronitt and McSherry (2001) assert that the doctrine of common purpose is ‘a mode of secondary participation that renders individuals who embark on a joint criminal enterprise or plan to commit an offence (the foundational crime) liable for any further crime (the incidental crime) committed by other group members in the course of that joint criminal enterprise or plan’ (pp411-412).

As between these two perspectives, the second is the one which conforms with the way this doctrine has been formulated by the Courts. For example, it was held by Hunt CJ in Tangye (1997) 92 A Crim R 545 that the prosecution ‘needs to rely upon the extended concept of the joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed’299 (p556). But, as Gillies (1997) points out, ‘although the doctrine [of common purpose] has been applied in the context just described (the commission of crime Y by one of the parties, during the commission by them of the expressly agreed upon crime X), the doctrine has never been formulated in

299 See also R v Youkhana (unreported, NSWCCA) 87, 6 April 2004.
terms of confining its application, in directing juries, to this situation’ (p174). For example, in *Johns*\(^{300}\), the majority (Mason, Murphy and Wilson JJ) held that ‘the object of the doctrine [of common purpose] is to fix with complicity for the crime committed by the perpetrator those persons who encouraged, aided or assisted him, whether they be accessories or principals’ (p125).

The application of the doctrine of common purpose (as elaborated below) is not confined to situations involving the commission of foreseen (but not agreed) offences by one or more of the parties acting pursuant to an agreement (straightforward joint criminal enterprise/acting in concert). Rather, it also allows the extension of criminal liability for the commission of such foreseen offences to the accessories who have helped and encouraged the commission of the primary offence. The parties to a primary criminal venture can be both individuals acting pursuant to an agreement and accessories who have rendered help or encouragement to the carrying out of that venture. To illustrate the point, it is useful to consider the following example: suppose that P1 and P2 agreed to commit theft (straightforward joint criminal enterprise/acting in concert). A assisted and encouraged them to commit that offence. Suppose also that, in the course of committing theft, P1 assaulted V. In this example, is it possible to hold P2 and A liable for the commission of the additional offence (assaulting V)? And if the answer is yes, what is the ground for extending criminal liability to both P2 and A for the commission of such offence?

As there was no agreement between P1 and P2 to commit crime V, the principles which govern the liability of the parties to a straightforward joint criminal enterprise (as discussed in Chapter 4) do not provide the basis for extending criminal liability to P2 for assaulting V by P1. Moreover, the principles which govern accessorrial liability (as discussed in chapter 5) do not support the conviction of A as an accessory to commission of that additional offence. This is because A did not provide any intentional assistance or encouragement to the commission of the crime of assaulting V. Therefore, the question

\(^{300}\) (1980) 143 CLR 108.
arises as to how the attribution of criminal liability, if any, to P2 and A for assaulting V can be made possible, explained and justified.

The set of rules which might operate so as to allow the extension of criminal liability to P2 and A for assaulting V by P1 are known as the doctrine of common purpose (Brown et al, 2001:1357). It has been pointed out ‘although conceptually distinct, common purpose is regarded as simply another way of participating in crime as an accessory’ (Bronitt & McSherry, 2001:411). It needs to be emphasised that, pursuant to the doctrine of common purpose, complicity of the participants in the subsequent incidental crimes is based on the participant’s earlier criminal association with the principal offender. As Bronitt (1993) points out:

Common purpose regulates criminal liability for individuals who jointly set out to commit one crime, in the course of which another crime is committed. Participants in the original unlawful enterprise do not become accessories to the subsequent crime by any direct act of assistance or encouragement on their part. Rather, it is their act of involvement in the original foundational offence which is the basis for incrimination in the subsequent incidental crime (p262).

In determining the liability for the additional or incidental offence pursuant to the doctrine of common purpose, the critical question is whether the mental requirement of criminal liability for the commission of the additional or incidental offence differs from the mental requirement of criminal liability for the commission of the primary offence (this point is elaborated below). As argued below, any resolution of what the law should be is assisted by considering the underlying issue of individual autonomy.

6.2.1. Individual autonomy as the basis for criminal liability pursuant to the doctrine of common purpose

In terms of the analysis of individual autonomy as the basis for criminal liability, such liability can be understood in terms of an individual’s free decision and action to break
the law through the commission of a wrongful and prohibited act. The emphasis upon individuals’ free choices as the basis for their liability requires confining the reach of criminal liability to the situation where the conscious individual intentionally involves himself or herself in a criminal venture either alone or with others to commit a crime. In group-based criminality, an individual might either agree with others to commit a particular offence (straightforward joint criminal enterprise) or that individual might intentionally render help and assistance to the commission of a particular offence (accessorial liability). Beyond these situations, it is also arguable that individuals act autonomously when they freely choose to engage in a particular course of conduct in circumstances where they foresee that further criminal consequences may occur. This form of free choice can be further understood by applying the analysis of individual autonomy developed in Chapter 3.

As discussed in Chapter 3, an individual does not always form a prior intention to perform an act. Rather, his or her actions might be seen as a response to external or internal stimuli of some kind, without deciding beforehand that he or she would respond in this way or knowing that he or she was going to do so. For example, an external threat to our life may produce an internal surge of anger leading to someone lashing out at the source of the threat; and a traffic light changing to red produces a response of someone pushing down on the brake. Clearly, these examples suggest that an individual’s spontaneous responses are partly a result of particular external factors which might not allow for deliberation, and partly a result of internal factors involving his or her tendency or propensity for particular responses in a given situation. Individuals’ responses are determined by their perceptions of situations, and these perceptions are shaped by the individuals’ patterns of belief (including, in the above example, their belief about the operation of traffic lights). It is certainly possible that their earlier free choices can be relevant in causing certain spontaneous responses. If someone knows that it is possible that they are going to respond in a particular way in particular sorts of situations, then they might choose either to retain such propensities or work to try to change them. Individuals might even choose to avoid the sort of situations likely to trigger undesirable responses by keeping away from situations likely to ‘make them angry’. Once an
individual recognises the role of such earlier choices in shaping later spontaneous intentional actions, so he or she can see how such earlier choices can also place them in situations which render unintentional responses of one sort or another possible. Here again, individuals might choose to avoid situations possible to produce undesirable or criminal unintended consequences.

As discussed in chapter 3, in cases like these, culpability is as much concerned with, and can be explained by, our prediction of the likelihood of the possible outcomes as with our decisions alone. Individuals can choose to avoid situations where there is a risk of producing a particular result. They also use their past memories and experiences as materials for inductive generalisation and causal explanation of their behaviours. Here, individuals treat themselves as an object in the world rather than a subject. Yet, they still choose an action in light of such understanding. This does not differ fundamentally from actions directed and caused by some prior intention.

Along these lines, it is possible to explain and understand the extension of criminal liability pursuant to the doctrine of common purpose for foreseen offences. In keeping with the emphasis upon individual autonomy as the basis for culpability, the common law determines the liability for incidental offences committed in the course of the execution of a primary criminal venture on a subjective basis (according to what the accused has foreseen). In the case of *McAuliffe and McAuliffe*[^10], it was held by Brennan CJ and Deane, Dawson, Toohey and Gummow JJ that:

Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose (p114).

[^10]: (1995) 183 CLR 108 per Brennan CJ and Deane, Dawson, Toohey and Gummow JJ.
As the following discussion will indicate, the body of the case law reveals that the extension of criminal liability on the basis of the doctrine of common purpose is contingent on whether the incidental offence was within the scope of the original common purpose and was contemplated by the party other than the principal perpetrator as a possible outcome of the carrying out of the primary criminal venture. Just as an individual can foresee his or her possible responses, so too can he or she foresee those of others together with whom they collaborate in criminal ventures. However, as the following discussion reveals, the approach adopted by the courts in setting the ambit of the doctrine of common purpose is not always devoid of obscurity and inconsistency. There are several questions raised in the analysis of the case law. Must the incidental offence be in the joint contemplation of the parties or will individual contemplation suffice? Must the incidental offence be within, or can it be outside, the scope of common purpose? Is it possible for the doctrine of common purpose to apply to participation in a venture not involving the commission of an offence? What is the mental requirement of the doctrine of common purpose, and how can this be reconciled with the mens rea for murder? I consider each of these questions in the following discussion.

6.2.1.1. Joint contemplation of the incidental offence

In *Johns* the majority (Mason, Murphy and Wilson JJ) appear to endorse the view that the incidental offence was in the joint contemplation of the parties. In that case, J and W agreed that J would drive W to Kings Cross, where W in the company of X was to rob M, whom W had told J was in possession of a large amount of money and jewellery. J knew

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that W always carried a pistol. After the robbery W was to return to J’s car, deposit the money with him, and makes his getaway. J knew that W was a quick-tempered person and capable of becoming quite violent. On the way to Kings Cross, W told J that he would not stand for any nonsense, and that M was ‘always armed and would not stand for any mucking around if it came to a showdown’. J delivered W to Kings Cross where W transferred cars. W with X accosted M but found that he was not carrying any money or jewellery. There was a struggle and W shot M dead. The next day J learned that M was killed.

The trial judge directed the jury that they could find J guilty of the murder of M as an accessory before the fact if ‘the parties must have had in mind the contingency that for the purposes of carrying out their joint enterprise or attempting to carry it out the firearm might be discharged and kill somebody’. And he further said that the jury are entitled to hold that all parties must be taken to have in mind the possibility of the lethal use of the firearm when they assented to and encouraged the joint enterprise or robbery with arms. J was convicted and appealed to the Court of Criminal Appeal where his appeal was dismissed. J then sought special leave to appeal to the High Court against the dismissal of his appeal. On appeal, J contended that the direction of the trial judge to the jury was erroneous, and he submitted two grounds against his conviction for the death of M on the basis of the doctrine of common purpose. First, J argued that the doctrine of common purpose does not apply to the accessory before the fact as it does to the principal in the second degree. Secondly, J contended that pursuant to the doctrine of common purpose, the participants in the commission of an offence are liable for the probable, as distinct from the possible, consequences of the carrying out of their venture. The majority (Mason, Murphy and Wilson JJ) of the High Court rejected J’s submissions.
In relation to the J’s first submission, the majority held that the doctrine applies to both types (accessory before the fact and principal in the second degree) by stating that

There is nothing in this to suggest that the criterion of complicity and liability should differ as between accessory and principal in the second degree. If they are both parties to the same purpose or design and that purpose or design is the only basis of complicity relied upon against each of them, there is no evident reason why one should be held liable and the other not. In each case liability must depend on the scope of the common purpose. Did it extend to the commission of the act constituting the offence charged? This is the critical question. It would make nonsense to say that the common purpose included the commission of the act in the case of the principal in the second degree but that the same common purpose did not include the commission of the same act in the case of the accessory before the fact... there would...be no logical or legal justification for distinguishing between the complicity and liability of the driver whether he be a principal in the second degree or an accessory before the fact (pp125-126).

The majority also rejected the second submission of J, expressing the principles of the doctrine of common purpose in the following terms

An accessory before that fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture. Such an act is one which falls within the parties’ own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise †[pp130-131]. [Emphasis added].

This statement made in Johns, suggests that the fault element of the doctrine of common purpose requires ‘consensus’ between the parties regarding the commission of the additional or alternative offence. As Bronitt (1993:260) points out, it requires the parties to ‘jointly contemplate’ the commission of the additional or incidental offence. Another statement which appears to require joint contemplation is found in McAuliffe and McAuliffe (elaborated below) where the Court stated:
The scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose...criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight and that is so whether the foresight is that of an individual party or is shared by all parties (pp114, 118).

If the fault element is joint contemplation, the doctrine of common purpose overlaps with the fault element of the doctrine of straightforward joint criminal enterprise/acting in concert (as discussed in chapter 4). In chapter 4, it was established that ‘an agreement, understanding or arrangement which amounts to an agreement’ between the parties is the mental requirement for criminal liability pursuant to the doctrine of straightforward joint criminal enterprise. The requirement of ‘consensus or joint contemplation by all parties to a criminal venture’ as the mental requirement of the doctrine of common purpose, is, in effect, equivalent to requiring an agreement between those parties. If so, the liability of the parties to that venture should depend upon that ‘agreement’ rather than ‘contemplation’ of the commission of the additional offence. Gray (1999:204) argues that the statement by the majority in McAuliffe and McAuliffe, that the accused can be held liable for ‘the possible consequences which...were within the contemplation of the parties to the understanding or arrangement’, in effect extends the concept of agreement to include the notion of contemplation. As Gray (1999) points out

It is not quite clear what the notion of contemplation adds to the term agreement in this context. The term agreement includes an express or implied understanding or arrangement, provided it is within the scope of the common purpose. It is difficult to see how something could be contemplated by both parties, and within the scope of the common purpose, and yet not be part of an express or implied understanding or arrangement (p204).

Arguably, the formulation of the fault element of the doctrine of common purpose in terms of ‘joint contemplation’, along with the interchangeable use of the terms ‘common purpose’ ‘common design’ to describe the doctrine of straightforward joint criminal

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304 Johns, was applied in Hitchens [1983] 3 NSWLR 318 at 330. See also Miller v The Queen [1981] 55 ALJR 23.
enterprise (acting in concert) and vice versa, have resulted in confusion as to the doctrinal limits of each doctrine. For example in *McAuliffe and McAuliffe*\textsuperscript{305}, the High Court held that:

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms- common purpose, common design, concert, joint criminal enterprise- are used more or less interchangeably to invoke the doctrine which provide a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime... Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances (pp113-114). [Emphasis added]

In *Osland*\textsuperscript{306}, Gummow and Gaudon JJ (in the minority) held that

It will shortly be necessary to turn to the principles that hold a person guilty for a crime committed pursuant to an understanding or arrangement with another that, together, they will commit the crime in question, or, as it is sometimes said, they act in concert or pursuant to a common purpose... principle dictates the conclusion that those who form a common purpose to commit a crime together are liable as principals if they are present when the crime, or any other crime within the scope of the common purpose, is committed by one or more of them (pp327, 329). [Emphasis added]

The interchangeable usage of the language in this way is a source of confusion which makes it difficult to strike a firm distinction between the two doctrines. As it has been pointed out, acting in concert (straightforward doctrine of joint enterprise) must be distinguished from the doctrine of common purpose (Bronitt & McSherry, 2001:413). The former doctrine relates to the imposition of criminal liability where the parties embark on the commission of an offence pursuant to an agreement, whereas, the latter

\textsuperscript{305} (1995) 183 CLR 108.
\textsuperscript{306} [1998] 197 CLR 316.
imposes criminal liability for foreseen (but not agreed) offences committed by one or more of the parties to a primary criminal venture. It can be argued that a clear distinction between the two doctrines can be achieved by confining the application of the doctrine of common purpose to situations involving ‘individual’ rather than ‘joint’ contemplation of the commission of the additional offence. This is because as pointed out by Gray earlier, if the commission of an offence is jointly contemplated by all parties to a criminal venture, then their joint contemplation would in effect amount to an implicit agreement between them. If so, the doctrine of straightforward joint criminal enterprise/acting in concert (as discussed in chapter 4) would form the basis for their culpability and not the doctrine of common purpose. For example, suppose that P1 and P2 agree to murder V. Both P1 and P2 find V in the company of X, and in the presence of each other (P1 and P2), P1 shoots V. Suppose also that, in the course of carrying out the murder, P1 uses a knife to inflict grievous bodily harm upon X. In this example, P1 and P2 are liable as principals in the first degree for murdering V on the basis of their agreement pursuant to the doctrine of straightforward joint criminal enterprise. The question arises whether P2 is to be held liable for the infliction of grievous bodily harm upon X by P1. The extension of criminal liability to P2 for the commission of crime X, is made possible at common law through the application of the doctrine of common purpose according to which the liability of P2 is contingent upon P2’s contemplation of the commission of crime X as a possible outcome of the carrying out of crime V.

In *Tangye*\(^{307}\), Hunt CJ criticises the failure to distinguish between circumstances in which it is appropriate to rely on the doctrine of common purpose, and those in which it is appropriate to apply the doctrine of straightforward joint criminal enterprise. Hunt CJ states:

> The Crown needs to rely upon a straightforward joint enterprise only where… it cannot establish beyond reasonable doubt that the accused was the person who physically committed the offence charged. It needs to rely upon the extended concept of the joint criminal enterprise, based upon common purpose, only where the offence charged is not the same as the enterprise agreed. This Court has been

making that point for years. And it is a pity that in many trials no heed is taken of what has been said... common purpose becomes necessary only where there has been an agreement to carry out a particular crime (some text books call it the foundational crime) but some other crime has been committed which had been within the contemplation of the accused as a possible incidence in the execution of their agreed joint criminal enterprise (some texts call it the incidental crime) which said to be within the scope of the common purpose (pp556, 558).

6.2.1.2. Individual contemplation of the commission of the incidental offence

Subsequent restatement of the fault requirement of the doctrine of common purpose has not been restricted to joint contemplation between the parties. In Chan Wing-Siu v The Queen (which was applied by the New South Wales Court of Criminal Appeal in Sharah), three persons were charged with murdering V and wounding his wife with intent to cause her grievous bodily harm. The prosecution case against them was that the three persons went to V’s flat armed with knives intending to rob him. When V’s wife answered the door, they rushed in and drew their knives and ordered her to kneel. While one of them guarded her, the other two forced her husband into the kitchen where he was stabbed. As the three persons left the house, V’s wife was slashed across the head. V died from his wounds. The three persons admitted that they went to V’s house with the purpose of collecting a debt owed by V to one of them. Two of the three persons admitted taking a knife, and knowing that the other had a knife. Whereas, the third person denied having any knives or knowing that his co-adventurers were armed with knives. They alleged that V had attacked them and one of them stated that he stabbed V in self-

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310 [1985] AC 168. In Sharah (1992) 30 NSWLR 292 at 301-303, per Carruthers J (Gleeson CJ and Smart J agreeing), the principles laid down in Chan Win-Siu were applied. See also Hui Chi-Ming v The Queen [1992] 1 A.C 34 at 52-53 per Lord Lowery. In that case, Lord Lowery accepted that in many cases the contemplation of the primary and secondary party is likely to be the same. But he stated that it does not follow that joint contemplation is required in every case before the secondary party can be proved guilty. Applying the principle laid down in Chan Wing-Siu, Lord Lowery asserted that foresight of the possible consequence of the carrying out of a joint venture by the secondary party alone is enough to establish his or her liability pursuant to the doctrine of common purpose.
311 (1992) 30 NSWLR 292 at 301-303 per Carruthers J (Gleeson CJ and Smart J agreeing).
defence. In relation to the three persons on both charges, the prosecution submitted that a crime of the type charged must have been contemplated as a possible occurrence in the course of their joint venture. The jury was directed that each one of the three people was guilty on both counts if proved to have contemplated that a knife might be used by his co-offender in the course of carrying out their venture. The three persons were convicted on both charges and appealed. On appeal, the appellants submitted that it was not enough for them to be held liable for foresight of death or grievous bodily harm as a possible consequence of their joint enterprise. Rather, they argued it was necessary to be proven that one of those consequences must have been foreseen as a probable consequence. In delivering the judgment, Sir Robin Cook rejected their submission and held that

A person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. In view of the terms of the direction to the jury here, the Crown does not seek to support the present conviction on that ground. The case must depend rather on a wider principle whereby a secondary party is criminally liable for the acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation,

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312 The use of the terms ‘authorisation’ as synonymous terms with ‘contemplation’ has been criticised on the ground that there is a difference between contemplation of a particular possibility and the authorisation of that possibility (Giles, 1990:385; Simester & Sullivan, 2000:214). This is because contemplation incorporates a wider principle of foresight, whereas authorisation implies more strongly a narrower principle of foresight, in that it suggests some communication on the matter between the parties. However, the conflation between these two terms as used in Chan Wing-Siu was subsequently clarified in Hui Chi-Ming [1992] 1 AC 34 at 53. In Hui Chi-Ming, Lord Lowery commented on the usage of the term ‘authorisation’ in the context of setting the ambit of what is required to be contemplated by the secondary party so as to establish his or her liability pursuant to the doctrine of common purpose. Lord Lowery stated that the term ‘authorisation’ explains what is meant by contemplation, but it does not add a new ingredient. His Lordship pointed out that, this is so manifested from Sir Robin’s pithy conclusion when he stated that ‘the criminal liability lies in participating in the venture with that foresight’. See also, R v Britten and Eger (1988) A Crim R 48 at 50 per King CJ who explained the concept of authorisation in the following terms: ‘the fundamental notion is that by participating in the enterprise, each participant impliedly authorises all criminal acts which are in his contemplation as being part of the common design or as being a substantial risk associated with its implementation’.
The criminal liability lies in participating in the venture with that foresight\textsuperscript{13} (p175). [Emphasis added]

In Duong v R\textsuperscript{14}, D and three other persons (Lu, Do and Tran) were convicted of manslaughter of B. B was stabbed during the course of an altercation at his house involving Lu, Do, Tran and another two persons. D was not present at the time of the stabbing, but it was at his invitation that the other persons went to D’s house to discuss “talking to” B, whom D believed had stolen his property. One of the persons had a knife and there was no evidence that D or any of the others knew about it. The persons went to B’s house and during an altercation B was stabbed. Lu, Do and Tran were convicted as principals in the second degree while D was convicted as an accessory before the fact to B’s death. D appealed against his conviction, submitting that he believed the other participants were going to confront the victim non-violently to recover the property. On appeal, the New South Wales Court of Criminal Appeal held that D may have foreseen that violence might be used against B, that such violence would not exceed some minor punches, and quashed D’s conviction. The Court held:

It is important here to recognise the distinction between unexpected incidental acts of a principal and unexpected consequences of the principal’s action. The law has long provided for accessorial liability in relation to unforeseen and unusual consequences, so long as they are caused during the carrying out of the common design. But it has never created liability in respect of acts (and therefore the consequences of those acts) which fall entirely outside the ambit of the common design...[a person] can only be guilty of manslaughter if there is evidence from which the jury can infer that the use of a weapon such as a knife should have been perceived as a possible incident in the carrying out of the common design (pp149-150). [Emphasis added]

\textsuperscript{13}See also Hui Chi-Ming v The Queen [1992] 1 AC 34 at 52-53 per Lord Lowery. In that case, Lord Lowery accepted that in many cases the contemplation of the primary and secondary party is likely to be the same. But he stated that it does not follow that joint contemplation is required in every case before the secondary party can be proved guilty. Applying the principle laid down in Chan Wing-Siu, Lord Lowery asserts that foresight of the possible consequence of the carrying out of a joint venture by the secondary party alone is enough to establish his or her liability pursuant to the doctrine of common purpose.

\textsuperscript{14} (1992) 61 A Crim R 140.
In *McAuliffe*, the High Court in its exposition of a broad definition of the doctrine of common purpose (as discussed in the following section), extended the fault element of common purpose to cover those situations where there was not necessarily joint contemplation of the incidental offence.

### 6.2.1.3. Incidental offence within and outside the scope of common purpose

In *McAuliffe and McAuliffe*\(^{315}\), three youths decided to go to and bash someone at a nearby park. One went with a hammer and another with a stick. Two of them were experienced in kick-boxing. At the park, two of them attacked a man who was standing near the top of a high cliff. They kicked and beat him with the stick. The other youth then side-kicked the man in the chest, causing him to fall from the edge of the cliff. The youths then left, and the next day the body of the man was found in the bottom of the cliff. The prosecution case against the youths was that the common purpose of all of them was to rob or roll someone. And part of that common purpose is that the victim or victims would be attacked by one or more of the group with the intention to inflict grievous bodily harm. Each of the youths contemplated the intentional infliction of grievous bodily harm as a possible incident in carrying out a common purpose to assault someone. The common purpose was carried out and none of the three youths withdrew until the injuries were inflicted upon the victim.

At the trial of two of the youths for murder, the trial judge directed the jury in relation to the common purpose in the following terms the prosecution has to establish that:

> A common intention on the part of the three youths to bash someone, that an act on the part of one of them which caused the death was done with the intention of inflicting grievous bodily harm on the deceased, and that the accused either shared the common intention of inflicting grievous bodily harm or contemplated the infliction of grievous bodily harm by one or other of them was a possible incident in the common criminal enterprise (p108).

The accused were convicted. Their appeal against the conviction to the Court of Criminal Appeal of NSW was rejected, and they then appealed to the High Court. The accused contended that the trial judge was erroneous in his direction to the jury, submitting that the realisation, by one of the parties to a common design that the infliction of grievous bodily harm by another is a possible incident of the joint enterprise is not sufficient to render that party liable for a murder committed by another. Rather, it has to be proved that the possibility was within the contemplation of all parties so as to form part of the common purpose. The High Court rejected the submission, affirming that there are two types of common purpose (narrow and wide). The Court (Brennan CJ and Deane, Dawson, Toohey and Gummow JJ) endorsed the narrow formulation of the common purpose (as laid down in Johns), holding that

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design... If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission316. Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose... the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose317 (pp113-114). [Emphasis added]

After that, their Honors in McAuliffe and McAuliffe affirmed that there is a wider principle of liability pursuant to the doctrine of common purpose. They held that:

The Court [in Johns] did not consider the situation in which the commission of an offence which lay outside the scope of the common purpose was nevertheless contemplated as a possibility in the carrying out of the enterprise by a party who continued to participate in the venture with that knowledge. That situation would occur where, for example, a party knows that another party to a joint criminal enterprise is carrying a weapon which that other party might use to kill or inflict

316 R v Lowery and King (No 2) [1972] VR 560 at 560 per Smith J.
grievous bodily harm in carrying out the enterprise and expressly reject any agreement that the weapon might be used but nevertheless continues with the venture. The question arises whether both parties are liable if the weapon is used to inflict harm in the course of executing the common purpose, that action being one which lay outside the scope of the common purpose or agreement, but within the contemplation of the secondary party...[After reviewing some authorities\textsuperscript{318} the court held that] There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose (pp115, 117). [Emphasis added]

The High Court’s approach in broadening the scope of common purpose has been criticised by Odgers (1996), who appeared in the court for one of the offenders. Odgers (1996) argues that ‘the judgment of the High Court on the scope of the doctrine of common purpose is a major development in the principles relating to secondary liability for crimes committed by others. Unfortunately, it is also a development which is much to be regretted. Indeed... it is one of the most regressive of the High Court’s judgments in the field of substantive criminal law’ (p44). In a similar vein, Gray (1999) criticises the High Court approach in \textit{McAuliffe and McAuliffe} in extending the doctrine of common purpose to include crimes which fall outside its scope as involving a conceptual leap. Gray states:

The High Court thus draws the apparently fine distinction between consequences which are within the scope of the common purpose, and those which are outside the scope of the common purpose and are similarly foreseen. In both cases, however, according to the High Court in \textit{McAuliffe}, the accessory is criminally liable. Within this apparently unexceptionable extension to the law of accessorial liability is concealed an important conceptual leap. This is the leap between accessorial liability based on a purpose or state of mind shared with the principal offender, and one possessed, at the time the aid or encouragement is given, by the accessory alone (p205).

\textsuperscript{318} \textit{Chan Wing-Siu v The Queen} [1985] AC 168; \textit{R v Hyde} [1991] 1 QB 134; \textit{Hui Chi-Ming v The Queen} [1992] 1 AC 34.
It has been pointed out that following the High Court decision in *McAuliffe and McAuliffe*, the distinction between additional or incidental offences within the common purpose and additional or incidental offences outside the common purpose is effectively made redundant (Brown et al, 2001:1364). Although the court did not formally abandon the distinction, the test for criminal liability of the parties other than the primary offender is the same, that is, contemplation of the possibility that the additional crime may be committed in the course of carrying out the primary criminal venture. But, if the principal offender commits an offence which goes beyond the common purpose, and that offence was not foreseen by the other parties as a possible consequence of the carrying out of the primary venture, then the other parties to that venture will not be liable for the commission of that offence\(^{319}\).

### 6.2.1.4. Doctrine of common purpose and participation in a venture not involving the commission of an offence

Commentators have raised the issue of whether or not the doctrine of common purpose can apply to participation in a venture not involving the commission of an offence. These discussions arise from the High Court decision of *Miller v The Queen*\(^{320}\). In that case, Worrell (W) killed a number of girls after having had sexual intercourse with them. Miller (M) had assisted W by driving him to find a girl and then drop him in a deserted place where W would have intercourse with her. On seven occasions, W murdered his sexual partner after having intercourse with her. M was acquitted on the charge of murdering the first victim but was convicted on the charges of murdering the other six. M appealed on the ground that the jury should have been directed that he could be held liable only if he had foreseen that, on any one occasion, the death of the victim was more probable than not. M submitted that given the large number of occasions on which W did not harm his sexual partner, on any one occasion, M had foreseen at most the possibility that W would kill his partner, and he argued this was insufficient to hold him liable for

that killing. In the judgment refusing special leave to appeal, the High Court rejected that submission stating that after the first murder had occurred, it was open to the jury to conclude that the common purpose of taking a girl for sexual intercourse had broadened into a common purpose involving the possibility of murder. The Full High Court held:

If it was within the contemplation of [Miller] and Worrell that the girl the subject of the charge might be murdered, [Miller] would be guilty of murder if she were murdered...The scope of the common purpose of the applicant and Worrell, as it applied to each occasion upon which Worrell murdered a girl, would, on any view, have included the following: the applicant driving the car throughout the enterprise; Worrell finding a suitable girl and inducing her to get into the car; the applicant driving it to a secluded site and then leaving Worrell and the girl together so that they might have sexual intercourse. It was open to the jury to conclude that after the first murder had occurred the scope of the common purpose had altered. Miller now knew that Worrell not only intended sexual intercourse with the girls but might also murder them, while Worrell knew that when Miller participated in further expeditions he was fully aware of the fatal outcome of earlier expeditions. Because of these additional elements the jury might conclude that the purpose common to them both on these subsequent expeditions had altered. Because of their knowledge of one another's state of mind a new factor would be present in the recurring common purpose of the pair: when Miller would leave Worrell and a girl together, he would no longer be leaving them merely so that they might have sexual intercourse but also so that, if the mood took him, Worrell might, in Miller's absence, murder the girl. The intended role of the girl was no longer merely that of Worrell's partner in intercourse, she had become also a possible murder victim. It was significant that Miller's evidence was that he found Worrell's murderous moods to be wholly unpredictable, sudden in their onset and due to no apparent cause, thus to his knowledge putting each girl in turn at risk of death (p25).

As Fisse (1990) suggests, it appears from this decision that the common purpose was not to commit a particular crime, but was for 'the object of satisfying PO's sexual appetite in a situation of potential danger to the consenting sexual partner' (p342). In this sense, recklessness as to the principal offence, in that case murder would suffice. However, as noted in previous chapters, liability on the basis of straightforward joint criminal enterprise involves an agreement that the crime will be committed, and liability for accessorial liability requires intentional assistance in the commission of a criminal

offence. In contrast, Miller implies that a lesser form of culpability (recklessness) is required in a situation where there is no underlying criminal enterprise. This arguably pays insufficient attention to the principle of individual autonomy, in the sense of freely choosing to engage in a criminal venture. Thus, if this interpretation of Miller is correct, it should not be followed.  

6.2.1.5. The mental requirement of the doctrine of common purpose and the mens rea of murder

At common law, the mens rea of murder is satisfied by either intent to kill or inflict grievous bodily harm upon another, or by foresight of the probability of such a consequence. In NSW, the current law of murder is found in section 18 of the Crimes Act 1900. The difference between the head of reckless murder found at common law and in section 18 of the Crimes Act, is that the latter is confined to foresight of the probability of death, not extending to foresight of the probability of grievous bodily harm. Thus, under the current law in NSW, to be liable as a perpetrator of reckless murder, foresight of the probability of death is required. However, an accessory participating in a common purpose can be found guilty of murder when that person only foresees the possibility that the perpetrator may kill another person in the course of carrying out the primary criminal venture. It has been pointed out that the doctrine of

\[\text{Further, as Bronitt and McSherry (2001:416) point out, because the judgment was delivered in the context of refusing special leave to appeal, little weight should be attached to the Court's discussion of the principles in Miller.}\]

\[\text{321 Miller [1951] VLR 346 at 355; Terry [1955] VLR 114 at 115.}\]


\[\text{323 Royall v The Queen (1990) 172 CLR 378.}\]

\[\text{324 Section 18 of the Crimes Act 1900 (NSW) provides that: "18. (1)(a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by penal servitude for life or for 25 years. (b) Every other punishable homicide shall be taken to be manslaughter. (2) (a) No act or omission which is not malicious, or for which the accused had lawful cause or excuse, shall be within this section. (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his or her own defence.}\]

\[325 See Solomon [1980] 1 NSWLR 321 at 327.\]
common purpose standard of mens rea represents a departure from the mental requirement of murder (Brown et al, 2001:1362; Bronitt & McSherry, 2001:422).

The lowering of the threshold for criminal culpability by the High Court to foresight of the possibility (instead of probability) in cases involving murder has been criticised. Odgers (1996:46) argues that, as the High Court of Australia has rejected the notion of recklessness as a sufficient mental requirement for accessorial liability in *Giorgianni*, it is anomalous to have the notion of recklessness revived in *McAuliffe and McAuliffe*326. According to this view, holding an individual criminally liable as an accessory for the commission of an offence when that person has merely foreseen its commission by the principal offender as a possibility contradicts the principle as laid down by the same court in *Giorgianni*327: intentional assistance or encouragement of the commission of an offence by the principal offender. Odgers (1996:45) further points out that the High Court’s explanation for the extension of criminal liability to members of a joint criminal enterprise who foresee the possibility of another crime being committed is remarkably thin. Similarly, Cato (1990) argues that there is ‘no compelling reason why in the public interest a secondary party to a joint enterprise should be at a greater risk of conviction for murder than a person who actually kills’ (p206). In a similar vein, Bronitt and McSherry (2001) state that ‘regrettably, while common purpose is regarded as a form of accessorial liability, there has been limited consideration by Australian courts of the lack of symmetry between the fault required for accessorial liability by aiding, abetting, counselling or procuring and common purpose’ (p415).

However, another view which tries to explain the rationale for the extension of liability to foresight pursuant to the doctrine of common purpose is found in the judgment of Stephen J in *Johns* (1980) 143 CLR 108 at pp117-122. According to Stephen J, criminal liability in such situations, does not relate to the crime which was the primary object of the criminal venture. His Honor explains that ‘as to that crime, one who, while not

326 The asymmetry between the mental requirement of the doctrine of common purpose and the mens rea of accessorial liability was considered in chapter 5.
327 (1985) 156 CLR 473. *Giorgianni’s* mental requirement of accessorial liability was considered in full details in chapter 5.
actually physically present and participating in its commission, nevertheless knows what is contemplated, and both approves of it and in some ways encourages it thereby becomes an accessory before the fact...his knowledge, coupled with his actions, involves him in complicity in that crime’ (p118). However, if, in the course of the execution of the primary offence, another crime is committed, the question arises in relation to the liability of those who did not directly engage in its commission. In this regard, Stephen J states that ‘the concept of common purpose provides the measure of complicity’ (p118) in that other crime. As His Honor asserts, if the scope of the common purpose of the principal offender and the accessory was found to include ‘the other crime’, then the accessory will be responsible for its commission.

According to Stephen J, determining of the scope of the common purpose can be made either by reference to what the accessory has regarded as a probable consequence of the primary venture, or it may be extended to include what the accessory has foreseen as a possibility involved in that venture. While acknowledging these alternatives, Stephen J took the view that, in cases involving the commission of another crime other than that which was the primary object of the venture ‘to apply to such a situation a criterion of what is probable, as contrasted with what is merely possible, seems singularly inappropriate’ (p118). According to him, this is because ‘the other crime’ was not the primary object of the criminal venture, and in all cases it will have been committed as a reaction to whatever response is made by the victim or by others who attempt to frustrate the venture. There can be a variety of possible responses to a criminal act, and with each of these contingencies, what the offender might conceive of as a contingent reaction to each possible response will at least be a sequence of spontaneous and relatively unpredictable events. In those circumstances, it is understandable that criminal liability should be extended to what the accessory was aware of as a possible response by the victim or others which would produce the reaction of the principal offender. Furthermore, Stephen J states that, another objection to the application of a test of probability instead of possibility, in situations like this, lies in the standard of blameworthiness and responsibility which is presupposed. According to him, if a criterion of probability is applied as a test of liability for the commission of ‘the other crime’, this would mean that
the accessory who knows that the principal is armed with a deadly weapon and is ready to use it on the victim if needed, will bear no liability for the killing which ensues so long as his or her state of mind was that he thought it rather less likely than not that the occasion for the killing would arise. Yet, his or her complicity seems clear, in that the killing was within the contemplation of the parties.

The majority (Mason, Murphy and Wilson JJ) in *Johns*\textsuperscript{328} also rejected foresight of the probability (as opposed to possibility) as the appropriate test for the extension of criminal liability to foreseen offences committed by the principal perpetrator. According to them, culpability lies in the accessory’s prior assent to participate in the criminal venture. Their Honors held:

> The narrow test of criminal liability proposed by the applicant [that parties in a common purpose should only be responsible for the probable, as distinct from the possible consequences of the execution of that common purpose] is plainly unacceptable for the reason that it stakes everything on the probability or improbability of an act, admittedly contemplated, occurring. Suppose that a plan is made by A, the principal offender, and B, the accessory before that fact, to rob premises, according to which A is to carry out the robbery. It is agreed that A will carry a loaded revolver and use it to overcome resistance in the unlikely event that the premises are attended, previous surveillance having established that the premises are invariably unattended at the time when the robbery is to be carried out. As it happens, a security officer is in attendance when A enters the premises and is shot by A. It would make nonsense to say that B is not guilty merely because it was an unlikely or improbable contingency that the premises would be attended at the time of the robbery, when we know that B assented to the shooting in the event that occurred (p131).

Between these two perspectives (the one expressed by Odgers, 1996 and Cato, 1990 and that expressed by Stephen J and the majority in *Johns*), the second is preferable. As noted above, the rationale for extending criminal liability to offences foreseen as a possible outcome of the carrying out of a primary criminal venture in situations involving more than one person, can be understood in terms of individuals’ free choice to

\textsuperscript{328} (1980) CLR 108.
participate in the venture, and it also relates to deterring group-based criminal activity. As noted in Chapters 2 and 3, the essential role of criminal law is to protect the socially permissible free action of individuals (centered upon their enjoyment of their life) through punitive redirection of the anti-social free choices of others. In group-based criminal enterprises, individuals choose to participate knowing, or at least expecting, that some undesirable consequences might ensue. If the individual is aware that it is possible that someone will be killed by one member of the group in the course of carrying out their primary criminal venture, that individual might choose to work toward changing such a possibility. He or she might even choose (from the beginning) to avoid situations of this kind which would possibly escalate into the commission of some other offences. Because the participant has freely chosen to continue to participate in the light of the relevant possibility, so he or she has chosen to expose himself or herself to criminal liability for offences which he or she has contemplated as a possible outcome of the primary venture. Arguably, the rationale for extending criminal liability to foreseen offences is crucially dependent upon these ideas.

In sum, this section has considered the basis for the extension of criminal liability to an individual for foreseen offences (committed in the course of carrying out a primary criminal venture) pursuant to the doctrine of common purpose. It was shown that the law imposes criminal liability pursuant to this doctrine when the offence committed is contemplated as a possible outcome of the carrying out of the primary criminal venture. Two major points can be emphasised here. The first relates to the relation between the doctrine of common purpose and the doctrine of straightforward joint criminal enterprise/acting in concert. It was shown that the formulation of the fault element of the former doctrine in terms of ‘joint’ contemplation of the commission of the additional offence has resulted in an overlapping between that doctrine and the doctrine of straightforward joint criminal enterprise. It was argued that such overlapping can be removed by confining the application of, or formulating the fault element of the doctrine of common purpose to ‘individual’ rather than ‘joint’ contemplation of the commission of the additional offence. The second point concerns the formulation of the fault requirement of the doctrine of common purpose in terms of contemplation of the
‘possibility’ rather than of the ‘probability’ that an additional offence will be committed in the course of carrying out the primary criminal venture. Contemplation of the ‘possibility’ rather than ‘probability’ is to be preferred because it takes into account both the individual autonomy of the victim and offender.

6.3. THE DOCTRINE OF COMMON PURPOSE IN JORDAN

At the outset, it must be emphasised that, there is no explicit regulation in the JPC in relation to the participants’ liability for foreseen offences committed in the course of carrying out a primary criminal venture by their co-adventurers (Alseid, 1998: 403; Alhalabi, 1997:285; Hussni, 1992:488). As established in chapter 4, Article 76 of the JPC governs only the accomplices’ criminal liability for committing an offence pursuant to their agreement or joint intention. Furthermore, in chapter 5, it was illustrated that accessorial criminal liability according to Article 80(2) of the JPC is confined to situations involving the commission of an offence (by the principal offender) which the accessory has intentionally helped or encouraged. The problem in the law of complicity arises where, in the course of carrying out a primary criminal venture, another additional or collateral offence is committed by one or more members of the group to that venture (to which other participants did not agree or render any assistance). Most typically, situations of this kind are encountered where during the course of a robbery, a person is killed by one of the robbers. The central issue here is, whether the reach of criminal liability for the killing should be extended to the participants (other than the principal offender), or not. If the answer is affirmative, the crucial question is whether the basis of culpability (for the commission of the additional offence) is different from that relied upon in deciding liability for the primary offence.
6.3.1. Individual autonomy and criminal liability pursuant to the doctrine of common purpose

As with the preceding analysis in NSW, the rationale for the extension of criminal liability to additional offences pursuant to the doctrine of common purpose under the JPC, can be understood in terms of an individual’s voluntary choice to embark upon a criminal venture with the contemplation that some other collateral offences may possibly be committed. Therefore, arguably, what has been noted above in connection with the doctrine’s rationale in NSW might apply likewise under the JPC. Notwithstanding the absence of any explicit reference in the JPC to this area of the law of complicity, the limits of criminal liability under this doctrine can be charted. Along the lines of the analysis of this issue in NSW, the extension of criminal liability in Jordan pursuant to the doctrine of common purpose to other participants other than the principal offender for foreseen offences, does not depend on any direct physical involvement in the commission of that offence. Rather, it is the participant’s earlier physical contribution to the primary criminal venture which forms the physical element of their responsibility for the additional offence.

Under the JPC, complicity cases either involve some kind of agreement between the offenders (Article 76), or, according to Article 80(2), a person can become involved in the commission of an offence by another person by intentionally helping its commission. However, many other cases of complicity can be interpreted as involving some kind of common purpose between offenders, and in this sense, the discussion of criminal liability turns into providing an answer to the following questions. What is the position in law, if one or more party to a criminal venture deviates from that venture and some undesirable consequences ensues? What is the accomplice and accessory’s liability if the principal offender commits an additional offence while carrying out the primary criminal venture? What principles should govern this area of the law of complicity? In Jordan, and in the absence of any explicit law on this area, the common approach adopted by legal commentators in answering these questions involves an analysis of this issue in relation
to both the accomplice’s liability, and the accessory’s liability, to which the following discussion turns.

6.3.1.1. The accomplice’s liability for the commission of an additional offence

As noted above, Article 76 of the JPC (which governs the liability of accomplices who commit an offence pursuant to their agreement or joint intention) does not make any reference to the liability of the accomplice if one or more of the parties act beyond the agreed offence (the subject of their primary criminal venture) and commit an additional offence. For example, suppose that P1 agrees with P2 to break into C’s house to steal some of C’s property. In the course of committing theft, C surprises P1 and P2, and in response, P1 produces a knife and stabs C causing injury. Pursuant to Article 76, both P1 and P2 are responsible for theft. But the problem in relation to the doctrine of common purpose arises in relation to P2’s liability for P1 injuring C. The common view held by legal commentators concerning the liability of P2 for the commission of the additional offence is that P2 should not be responsible for that offence unless he or she has contemplated its commission as a possible consequence of carrying out the theft, and has accepted to continue to participate in the venture (Alseid, 1998:403; Alhalabi, 1997:285-286; Mahdi, 1983:371; Behnam, 1976:485-487; Hussni, 1975:586). By contrast, if the accomplice did not foresee or contemplate the commission of the additional or alternative offence, that accomplice should not be liable for its commission. Accordingly, in the above example, if P2 did not foresee the injuring of C as a possible result of his primary venture with P1, no criminal liability should be extended to P2 for that additional crime.

The underlying philosophy for extending criminal liability to foreseen offences, based on common purpose, is culpability through conscious risk taking. In keeping with the notion of individual autonomy as the basis of criminal liability, the view held by legal commentators tends to oppose the extension of culpability for additional offences except where the individual is found to have been aware of the risk involved, and freely chosen to involve himself or herself in the criminal venture. Most importantly, in order to keep
the reach of criminal liability to this level, it is necessary that the legislature should intervene and explicitly regulate this area of the law of complicity. As the doctrine of common purpose in both NSW and Jordan appears to be underpinned by similar theoretical foundations, it can be argued that any potential reform of the JPC can be enriched by considering the principles as established at the common law. In this regard, any potential reform of the JPC regarding the accomplice's liability for the commission of the additional offence, should supplement Article 76 with a new subsection as follows:

If, during the carrying out of a primary criminal venture, an additional or alternative offence is committed by one or more of the parties, other accomplices shall not bear responsibility for the commission of that additional or alternative offence unless it is proven that the accomplice foresaw or contemplated the commission of that offence as a possible consequence of the carrying out of their primary criminal venture, and with that contemplation continues to participate in that venture.

6.3.1.2. The accessory's liability for the commission of an additional offence by the principal offender

As mentioned above, Article 80(2) of the JPC regulates accessorial liability where the offence committed by the principal offender is that for which the accessory provided help or assistance. There is no explicit reference in this Article as to the liability of the accessory where the principal offender commits an additional offence during the carrying out of the primary criminal venture. For example, suppose that A intentionally helps P to rob the house of C. To facilitate P's crime, A provides P with a gun to threaten C if C is found at home. P enters C's house, and when confronted by C, P shoots causing C serious injury. Although A's accessorial liability for theft might not raise problems, the question arises as to whether A should be held responsible for the additional offence committed by P. In the absence of explicit reference in Article 80(2) on this question, it is commonly argued by legal commentators that the principles concerning the liability of the accomplice (as discussed above) for the commission of the additional offence should likewise apply in relation to the liability of the accessory for the commission of an additional offence by the principal offender. Namely, the accessory shall not be liable for
the additional offence unless he or she has contemplated its commission as a possible consequence of the primary criminal venture and yet continued to participate in that venture (Alseid, 1988:446; Husseni, 1975:613; Behnam, 1976:486-487; Aldawoodi, 1968:399).

As with the preceding suggestion in relation to the accomplice’s liability for the additional offence, it is important that the legislature should regulate the liability of the accessory for foreseen offences with an explicit provision. In this regard, a suggested additional subsection to Article 80 should be phrased in the following terms:

If, during the carrying out of a primary criminal venture, the principal offender commits an additional or alternative offence from the one to which the accessory has provided help or assistance, that accessory shall not be liable for the commission of that additional offence unless he or she has contemplated its commission as a possible consequence of the carrying out of the primary venture, and with such contemplation the accessory continued to participate in the venture.

6.4. CONCLUSION

This chapter sought to provide insight into how the extension of criminal liability to foreseen offences resulting from the carrying out of a primary criminal venture can be understood by reference to the notion of individual autonomy under the laws of NSW and Jordan. Central to the exploration of this complex area of the law of complicity was to see how the two systems can inform each other regarding any potential reform on this issue. Based on the discussion in this chapter, it was shown that, it is the individual’s conscious risk-taking which furnishes the basis for the extension of criminal liability for the commission of the additional or alternative offence pursuant to the doctrine of common purpose. The discussion revealed that, an individual is made liable for the commission of the additional offence if he or she had contemplated its commission by his or her co-adventurer/s as a possible outcome of the carrying out of their primary criminal venture. This formulation is in line with the analysis of individual autonomy as providing the ground for culpability. In group-based criminality, blameworthiness lies in the
individuals' choice to put themselves into situations where they predict that their conscious-risk taking is possible to produce further criminal outcomes. Blameworthiness here is grounded in the individual’s capability to avoid such situations having been consciously aware of their undesirable but possible outcomes.

Following this type of reasoning, the criminal law in NSW holds responsible those who embark upon a primary criminal venture contemplating (as a possible outcome) the commission of another additional or incidental offence by the co-offender during the course of carrying out that primary criminal venture. However, there are different possibilities as to the type of contemplation required by the parties. On one view, ‘joint contemplation’ by all parties to a criminal venture that the commission of the additional or incidental offence was foreseen as a possible outcome of carrying out the primary venture is required. However, more recently, the High Court has held that individual foresight by a secondary or other offender, of the possibility that an incidental offence will be committed in carrying out a joint venture is sufficient to establish liability pursuant to that doctrine. It was argued that the application of the doctrine of common purpose is better formulated in terms requiring ‘one party or more, but not all,’ to contemplate the commission of the additional or incidental offence as a possible outcome of the carrying out of the primary criminal venture. This is because if ‘all parties jointly contemplate’ the commission of an offence and explicitly or implicitly agree to continue the execution of their venture, their liability will rest on their agreement rather than contemplation of a particular undesirable outcome. Consequently, if an agreement is to be regarded as the basis for the participants' criminal liability, then the appropriate doctrine to govern that liability would be the doctrine of straightforward joint criminal enterprise/acting in concert (as discussed in chapter 4), and not the doctrine of common purpose.

Moreover, in NSW, the mental requirement of the doctrine of common purpose has been phrased in terms of foresight of the possibility that an additional or incidental offence

might be committed during the carrying out of the primary criminal venture. As mentioned above, this formulation is inconsistent with the mental requirement of accessorial liability and murder. It was argued as to how this lack of symmetry can be removed (in chapter 5 in relation to the asymmetry between the doctrine and accessorial liability), and in the body of this chapter in relation to murder.

As established above, in NSW, an overlapping between the doctrine of common purpose and the doctrine of straightforward joint criminal enterprise (acting in concert) is evident in the case law. It was noted that, the intermingling between these two doctrines is misleading and confusing, and that it is important to distinguish between these two doctrines. It was seen (in chapter 4) that the doctrine of straightforward joint criminal enterprise/acting in concert governs criminal liability when, pursuant to an ‘agreement’ between two or more persons, they are both or all present at the scene and one or other of them does, or they do between them, all the things that are necessary to constitute the crime. Whereas, the doctrine of common purpose (as illustrated in this chapter) is a conduit through which criminal liability can be extended to the parties of a primary criminal venture when, in the course of carrying out that venture, an additional or incidental offence is committed. The basis for the extension of criminal liability pursuant to the latter doctrine is foresight of the possibility that the incidental offence will be committed.

Comparatively, it was shown that in Jordan, unlike in NSW, there is no explicit provision in the JPC on the liability of accomplices (Article 76) and accessories (Article 80(2)) for the commission of an additional or incidental offence by their co-adventurers during the course of carrying out a primary venture. As such, it is suggested that the Articles are amended in terms which reflect the substantive law in NSW which requires that an accessory or accomplice will be liable for incidental offences which were in such accomplice’s or accessory’s contemplation when carrying out the primary venture.

This chapter has again drawn upon the principles of individual autonomy to explain and guide the law in this area. In the following chapter, I tie together the main findings of this
dissertation and reflect further on the approach and findings for possible law reform, particularly in Jordan.
7. CONCLUSION

This concluding chapter ties together the main findings of this dissertation, discusses the ways in which this dissertation might contribute to new knowledge and suggests areas which could be the focus of further research and consideration in the future. The key focus of this dissertation has been a critical comparative analysis of criminal complicity in NSW and Jordan. The analysis was developed around an exploration of the extent to which individual autonomy forms a ground of culpability in the criminal law of NSW and Jordan. To this end, the first part of this chapter recapitulates the basic philosophical analysis of individual autonomy; intentionality and intentional action developed in chapters 2 and 3 of the dissertation. It shows the central logical and ethical role of this concept of autonomy in the model of individual criminal culpability in NSW and Jordan. The second part ties together the main findings from the analysis of chapters 4, 5 and 6 and the way individual autonomy underpins the law of complicity and how it helps to resolve areas of controversy in the law. It also shows how comparative analysis of the two systems has helped in highlighting some of the deficiencies encountered, particularity in the JPC, with some suggested reforms to address such shortcomings. The final part of this chapter shows how the analysis of autonomy and intentionality conducted in the earlier chapters raise further issues and problems in relation to the criminal law’s approach to individual culpability.

7.1. PART ONE: INDIVIDUAL AUTONOMY AS THE FOUNDATION OF CRIMINAL LIABILITY

This dissertation has explored the extent to which criminal law in NSW and in Jordan rests upon a common, rational and ethical foundation. The key idea here is that of individual autonomy and free action, in the sense of actions resulting from free deliberation and choice resulting in harm and restrictions upon the free action of victims. As outlined in Chapters 2 and 3, individual autonomy (along with other concepts such as
individual rights, and community welfare and harm) is a key concept in providing moral and ethical justification for the punitive intervention of criminal law to protect individual rights and autonomy from any anti-social harmful (or potentially harmful) actions. While it is a crime to infringe upon an individual's right to life by killing, personal safety by causing injuries and property by stealing or damaging it, it is now also recognised that the prevention of harm to the general welfare and common good of the community is promoted by criminalising such actions as pollution and the production of unsafe products.

In reviewing the principles of criminal liability, it was established that the doctrines of culpability are often phrased in terms of individual responsibility grounded in individual autonomy. From this perspective, those who autonomously and freely choose to break the law are considered to have chosen to expose themselves to the possibility of the punitive intervention by the criminal law. However, as noted in Chapter 3, criminal law recognises different degrees of autonomy, to which different degrees of culpability attach. At the highest level, intentionality, in the sense of intending a criminal outcome, invokes the highest degree of culpability and moral condemnation. At the lowest level, in crimes of absolute liability, the individual autonomy required is minimal and manifested in the bare requirement of voluntary action and with no requirement to intend a criminal outcome. In this sense, criminal liability of individuals, in both NSW and Jordan, is seen as resting on individual autonomy, and the autonomous actions or inactions of individuals, albeit in differing degrees. Criminal culpability is understood in terms of free individual decision and action or inaction. The basic premise in this conceptualisation of culpability is that of a conscious individual who has voluntarily chosen to engage in particular prohibited criminal behaviour (at the highest level of intentionality); or has merely chosen to act, although not necessarily intending to bring about a criminal consequence (at the lowest level of absolute liability). Thus, the model of criminal liability involves willed action or inaction of autonomous and conscious individuals.

As the discussion in Chapter 3 and the following chapters shows, consciousness is considered a necessary condition for criminal culpability. This is not merely
consciousness in the broad sense in which animals, as well as humans, are ‘aware’ of their surroundings, and experience feelings of various kinds. Rather, it is consciousness in the narrow, and possibly specifically human, sense of being able to stand back from our mental states and think about them, appraise and evaluate them. The rationale of punishment as retribution is crucially dependent upon these ideas. Individual offenders who have freely chosen to break the law, have therefore, in a sense, chosen to expose themselves to the possibility of state inflicted pain and suffering as the cost of the suffering they have inflicted upon others. The infliction of suffering upon those found guilty of criminal offences, aims to influence future free decisions by the individual concerned, and by others who might otherwise choose criminal, rather than legal means, to refrain from any such illegal choices.

Consciousness operates on different levels. At one level through representing how things are (the cognitive mode), and at another level, it represents how these things should be (the volitional mode). The latter mode is the one that links or relates individuals to the world through intentionality (being the reason for their action or the cause of that action).

It was established that intentionality is central to the model of criminal liability of individuals in both NSW and Jordan. Building particularly upon the ideas of the analytical philosopher John Searle, this model was explained as involving individuals who act pursuant to their ‘prior intention’ (involving the stage of deliberation and reasoning), which causes their bodily movement which in itself involves their intention-in-action. In this model of criminal liability, free will enters the picture in the space between the individual’s reason and decision. Here, individuals can stop and reconsider or rethink what they are going to do. This gap between reason and decision allows for the individual to consider other possibilities, obligations or commitments that might conflict with or override the performance of their actions. It was established that as the gap between desire and decision allows for the possibility of deliberation prior to decision, so does the gap between decision and action and possible gaps within ongoing sequences of actions allow for further reconsideration, and for changes of mind. For
instance, it is open for us to still ‘change our mind’ even after we have embarked upon a particular ‘course of action’.

This is the paradigm case. But it was shown that this basic principle can be extended to two other sorts of cases involving intentional inaction and spontaneous action. With regard to intentional inaction, it was shown that ‘inaction’ in specific situations can be a result of a particular prior decision to refrain from performing some actions. An individual can decide to refrain from action in a situation with a view of achieving certain consequences. Similarly, it is possible that our past decisions could contribute to cases of spontaneous inaction without any direct prior intention. Although in certain situations an individual’s actions do not involve prior intention, it was argued that those actions can still be seen as intentional insofar as they involve the individual’s intention-in-action. Absence of prior deliberation before the commission of an act does not necessarily render the action unintentional or unwanted. In such a case, ‘criminal responsibility’ would rest on the prediction or contemplation of the likely or possible outcome of one’s own action. In putting oneself in a particular situation of a particular type it is certainly possible that earlier ‘free choices’ can be relevant in causing such spontaneous responses.

Criminal law regards autonomous individuals as capable of choosing to avoid situations if they realise that these situations involve risks and that the course of events involved is likely to produce some undesirable outcomes which they do not wish. Here autonomous individuals are seen to possess the capacity to predict their own likely future action in particular situations on the basis of knowledge of their past behaviour in similar situations. Their memories of such past behaviour serve as raw material for inductive generalisation and causal explanation, as a basis for rational choice in the present. The law consistently recognises such situations not to be fundamentally different from those involving action directed by the individual’s prior intention. Here again, the individual could still have chosen to avoid such situations.

As outlined in chapter 3, ethicists distinguish three different dimensions of autonomy which go along with different sorts and degrees of possible obstacles and restrictions to
free conscious action. First, there is autonomy as liberty of action. An individual is autonomous in this sense if his or her action results from his or her conscious intention and is not the result of external coercion or duress. Second, there is autonomy as freedom of choice. This refers to the range of real choices actually available to an individual — in terms of access to material means for the realisation of particular goals or desires. Third, there is autonomy as effective deliberation. This refers to internal, rather than external, resources available for, or restrictions upon, the exercise of individual autonomy; specifically to the individual's capacity for making rational and informed decisions.

In similar fashion, criminal law in both NSW and Jordan does not perceive of individual autonomy as 'absolute'. Rather, it recognises the fact that it can be limited, compromised and even absent. In doing so, the law leaves outside the legitimate scope of culpability those individual actions which were not the product of voluntary and conscious intention. The criminal law allows a range of specific defences, closely corresponding to the restrictions on individual autonomy as identified by moral philosophers. For example, actions coerced or compelled by other individuals or by circumstances (seen as restricting autonomy as liberty of action), individual actions which are not the product of sound and rational effective deliberation because of reasons including insanity for instance (absence of autonomy as effective deliberation), and actions not resulting from individual free choice (autonomy as freedom of choice), remain outside the scope of culpability in both NSW and Jordan.

The application of these principles more specifically to the requirements of criminal culpability in NSW and Jordan revealed the following. First of all, the law requires that the actus reus be 'voluntary'. In practice, this means it has to be an intentional action: a bodily movement which is the product of an intention-in-action (or a failure to act when there is a recognised legal duty). The law does not generally hold individuals responsible for bodily movements which are seen as caused by anything other than such an intention-in-action on the part of the individual concerned. The legal category of 'automatism' refers to non-intentional bodily movements that occur when an individual's conscious awareness is seriously impaired in some way, namely, when the ordinary link between
mind and body is absent. Where automatism is caused by something other than an ‘unsound mind’ or serious mental illness (such as sleep-walking, diabetes, major stress, or a blow to the head) it can be seen to render action involuntary and hence not criminally culpable. However, as with the preceding analysis of spontaneous actions and unintended movements as consequences of prior choices, those who freely choose to put themselves in situations where they foresee it is possible or likely they will be drawn into involuntary movements with criminal consequences (such as unintentionally discharging firearms during armed robberies), can also be held liable for such consequences.

Secondly, for many offences, the criminal law requires a subjective mens rea in which a person must intend or at least foresee the consequences of his or her criminal actions or inactions. This intention or foresight must be directly focused on the criminal consequences of the intended action, and in such cases, the prior intention or intention-in-action must therefore focus on such criminal consequences. Thus, criminal culpability in situations of this type rests on a high degree of autonomy, and it can be said that a person who embarks on such behaviour is freely choosing to engage in criminal actions or inactions. On the other hand, statute based criminal law increasingly recognises non-subjective forms of mens rea which require a lesser degree of autonomy in the sense that it is not necessary to inquire into whether or not the individual who is acting intends the criminal consequence. For negligence, the degree of autonomy expected of an individual is that he or she exercises his or her autonomy to the standard of a reasonable person. As argued in Chapter 3, for a particular individual, such a standard will not adequately respect the notion of individual autonomy unless that individual is capable of acting to the standard of a reasonable person. In cases of absolute liability, the extent to which individual autonomy underpins criminal culpability is minimal, and only extends to requiring that the action be ‘voluntary’.

Thirdly, the criminal law does not hold individuals responsible for criminal acts which are seen as products of duress, where an individual commits an offence under threat of physical harm to themselves or another person. Here, the prior intention is, indeed, to perform the forbidden act – of theft or whatever. And this ‘criminal’ prior intention is the
cause of a ‘criminal’ intention-in-action. But the goal or purpose of the action is to avoid serious and unjustified harm to the individual concerned or to another, rather than to gain unjustified personal enrichment. Duress involves a very severe restriction of the options available to the individual concerned. The individuals forced to make a coerced choice from morally unacceptable options. And where circumstances other than the threat of serious violence or harm by another person similarly restrict the options available to a person, such that they can only avoid ‘irreparable evil’ through the commission of some criminal act (involving a lesser evil), they can apply the defence of ‘necessity’ (or duress of circumstances). Self-defence is understood in a similar way. The decision and intentional use of force is justified if the individual believes, on reasonable grounds, that such force is necessary to defend himself or herself against an unwelcome attack.

Likewise, where the individual’s internal decision making capacities have been radically compromised by a mental illness or by some ‘abnormality of mind’ which has had a ‘substantial effect’ upon their perception, understanding, judgement, feeling or control, the law allows defences of insanity and diminished responsibility or substantial impairment. The former allows for excusing the individual of criminal liability in any offence. A related defence is that of provocation, insofar as this is understood as ‘a sudden and temporary loss of self-control’ brought about by acts or words of the victim. The idea here seems to be that of a spontaneous response which it is not reasonable to expect the individual to have taken steps to avoid. The criminal law’s treatment of intoxication also appears to be in tune with the preceding analysis of individual responsibility in relation to spontaneous actions. Individuals are not criminally liable for actions committed in extreme states of intoxication – where their action ceases to be voluntary – if such intoxication does not result from their own free choice. If they have ‘freely chosen’ to become intoxicated, then so have they chosen what they know to be possible of likely criminal consequences.
7.2. PART TWO: INDIVIDUAL AUTONOMY AND COMPLICITY

In Chapters 4, 5 and 6, the extent to which individual autonomy and free individual action or inaction informs the law of criminal complicity (primary criminal liability, accessorio liability and the doctrine of common purpose) in both NSW and Jordan was considered. By and large, it was confirmed that the law requires a high degree of individual autonomy in all of these areas, and that a consideration of individual autonomy is useful for resolving areas of controversy and inconsistency. In this way, the comparative analysis revealed that reference to the basic principles of autonomy and free action can usefully guide some straightforward law reforms.

Through a comparative analysis of the principles of complicity under the criminal laws of NSW and Jordan, it was established that the principles relating to primary criminal liability of individuals (chapter 4), and their accessorio liability (chapter 5), and the extension of criminal liability to individuals pursuant to the doctrine of common purpose (chapter 6) are underpinned, and can be understood by reference to the notion of individual autonomy. It was established that in both jurisdictions, the underlying idea of culpability in relation to these principles, is that of a responsible person who has chosen to break the rules in association with, or by the usage of, another or others. Thus, in this area of law, a high degree of autonomy is required before a person can be rendered criminally liable.

In relation to primary criminal liability, it was shown in Chapter 4 that in NSW, a person is liable for the commission of an offence when the person enters into an agreement with another person or persons to commit that offence, and is present during the commission of that offence, whether or not the person physically contributes to its commission. Similar, although not identical principles apply under Articles 75 and 76 of the JPC (each party to the joint enterprise must contribute in some way to the commission of the physical elements of the offence). A joint criminal enterprise necessarily implies the formation of prior intention to commit a crime by the participants and the transformation

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of such intention into action by the bringing about of the physical element of that offence (intention-in-action). Even if the agreement is reached spontaneously at the time of the commission of the offence, the individuals’ actions will still be considered intentional as they will involve their intention-in-action. However, even though it was established in Chapter 3 that only autonomous individuals can enter into an agreement with each other based on their deliberation to make rational and informed decisions, the law in NSW allows someone who might be considered legally insane to nevertheless enter into an agreement. This is an anomaly in terms of individual autonomy underpinning this type of criminal liability. Arguably, this anomaly can be resolved by employing the doctrine of innocent agent which would be more appropriate in such situations. As discussed in Chapter 4, the doctrine of innocent agent renders an individual liable for the commission of an offence if that individual intentionally commits that offence through the actions of a legally non-autonomous person. The principal in such cases uses his or her autonomy to influence the actions of the innocent agent. The innocent agent is not considered legally autonomous because his or her autonomy has been impinged upon. This may be autonomy as liberty of action (if for example they are under duress) or effective deliberation (for example as a result of internal stimuli such as some form of insanity which affects his or her rational decision making), or freedom of choice (if for example the principal creates a situation of legal necessity).

Comparatively, it was illustrated that the JPC is silent on such matters, and Article 75 of the JPC (which defines the perpetrator of the offence) falls short in dealing with legal problems relating the doctrine of the moral perpetrator of crime (as the doctrine is referred to in Jordan). As argued in Chapter 4, the doctrine of the moral perpetrator of crime is concerned with situations in which the principal offender uses other persons as they might use an inanimate object in a more conventional action. The manipulation and domination over the innocent agent is at the heart of this doctrine. It follows from this that the application of this doctrine should be limited to situations involving intentional manipulation of the agent, since it is difficult to imagine how the principal could manipulate another to commit a crime by being merely negligent, or by omitting to act. Limiting the formulation of the doctrine to situations of intentional manipulation by the
principal also reflects the principle of requiring a high degree of individual autonomy in crimes of complicity. Similarly, the issue of whether or not the doctrine of moral perpetrator of crime (and the doctrine of innocent agent in NSW) should apply to crimes which imply personal performance, or require that the perpetrator belongs to a particular class, can be resolved in favour of including such crimes in the doctrine, by considering the principle of individual autonomy underlying the doctrine, namely the intentional manipulation of the innocent agent. Further, the issue of whether the moral perpetrator should benefit from any defence which may be available to the innocent agent may be resolved by considering the autonomy of the moral perpetrator and lack of the agent’s autonomy in favour of the view that the moral perpetrator should not benefit from any defence which may be available to the agent.

In the light of these various considerations, while acknowledging that some legal commentators consider the doctrine of moral perpetrator to be covered under the existing articles of the JPC, it is nevertheless more strongly arguable that such a doctrine falls outside the JPC as it in its current form. Thus, to ensure that the doctrine of innocent agent is part of the laws of Jordan, the following changes (informed by a critical analysis of the laws of NSW) should be implemented into the JPC.

1. A person who intentionally uses or utilises an innocent agent to perpetrate the physical element of a crime is liable for the commission of that crime, as if the person has personally perpetrated that crime, and this person is referred to as the moral perpetrator of the crime.

2. It is irrelevant to the criminal liability of the moral perpetrator that the offence is phrased in terms which imply that it requires personal performance by the actual perpetrator. It is also irrelevant that the offence is phrased in terms which imply that it can only be committed by a certain class of persons to which the actual perpetrator (the agent) may not belong.
3. Negligence or a lesser state of mind other than intention is not sufficient to satisfy the mental requirement on the part of the moral perpetrator.

4. If the moral perpetrator uses an agent who is proved not to be innocent or who had formed a certain state of mind toward the offence in question, then both the moral perpetrator and the agent should be liable according to the respective state of mind of each one of them. If the agent is exculpated from criminal liability because the agent is found entitled to a justificatory or excusatory defence, such a defence will not exculpate the moral perpetrator from liability.

5. A person cannot commit a crime of omission by utilising an innocent agent to perpetrate the physical element of that offence.

In relation to the principles of accessorial liability discussed in Chapter 5, it was established that it is the autonomous contribution (free decision and action/inaction) of an individual to the commission of an offence by another which forms the basis of accessorial liability in both NSW and Jordan. This mode of criminal liability (accessorial liability) was explained in terms which illustrated that it is underpinned by a requirement of a high degree of individual autonomy in both jurisdictions. As discussed in chapter 5, accessories to the commission of a crime act from their prior intention to assist or encourage that crime. This prior intention involves their conscious knowledge of the ingredients of the offence in question, and with that knowledge they proceed to counsel, procure, aid and abet its commission, which involves their intention-in-action. It was also shown that an individual’s intentional inaction which amounts to assistance or encouragement in the commission of an offence may form the basis of their accessorial liability.

It was established that in NSW the mental requirement of accessorial liability is defined in terms of intentional assistance or encouragement of the principal offence which is based on the knowledge of the essential matters of that offence. This formulation excludes any lesser state of mind such as foresight of the probability or possibility as a
sufficient mental state for accessorial liability. Such a high level of individual autonomy (intention) is required to avoid potential liability for persons such as sellers of goods who are reckless, in the sense that they could foresee the possibility that such goods could be used for criminal purposes.

Comparatively, it was shown that the wording of Article 80(2) of the JPC includes terms like 'purpose' and 'knowledge' to describe the mental requirement for accessorial liability without any further exposition in the body of that Article as to the scope of the accessory's knowledge or what that knowledge should include. Therefore, in the light of such lack of clarity on this matter, it is suggested that the JPC be informed by the principles as established at common law in NSW. The principle of individual autonomy also helps to resolve the issue of whether or not an accessory should be liable for assisting or encouraging the commission of an unintended offence. Because the focus of accessorial liability is on the accessory's intention to assist or encourage the commission of an offence, it should not matter whether such an offence is intentional or unintentional. Thus, it is suggested that the mental requirement of accessorial liability in the JPC be drafted in the following terms:

1. For a person to be liable as an accessory to the commission of an offence, the person must have knowledge of the essential matters which constitute that offence, and with that knowledge intentionally assists or encourages its commission.

2. A person may be liable as an accessory to the commission of an unintended offence provided that person has intentionally assisted or encouraged the commission of that offence.

3. Any state of mind less than intention will be an insufficient state of mind for accessorial liability.

In respect of the doctrine of common purpose, it was illustrated in Chapter 6 that in both NSW and Jordan the extension of criminal liability to foreseen offences committed in the course of carrying out a primary criminal venture can be understood and explained in
terms of the individual's free choice to embark on a criminal venture. The discussion showed that in NSW, an individual is made liable for the commission of the additional or incidental offence if the individual had contemplated its commission by his or her co-adventurer/s as a possible outcome of the carrying out of their primary criminal venture. It was argued that this formulation is compatible with, or reflects the notion of individual autonomy. That is, the absence of prior intention (that the incidental offence be committed) on the part of an individual while engaging in the primary criminal venture does not necessarily mean that the outcomes of that venture are undesired or unwanted. Blameworthiness in this sort of case rests on the individual's choice to put him or herself into a situation where he or she predicts that it is possible that his or her conscious-risk taking may produce an unpleasant outcome. Blameworthiness here is grounded more in the individual's capability to avoid such a situation, having been consciously aware of its undesirable but possible outcomes.

In Chapter 6, it was also demonstrated that the doctrine of common purpose is another area of the law of complicity in the JPC which is not the subject of explicit regulation. A proposed reform regarding the accomplice's liability for the commission of the additional offence, was suggested to supplement Article 76 with a new subsection as follows:

If, during the carrying out of a primary criminal venture, another additional or alternative offence is committed by one or more of the parties, other accomplices shall not bear responsibility for the commission of that additional or alternative offence unless it is proven that the accomplice foresaw or contemplated the commission of that offence as a possible consequence of the carrying out of their primary criminal venture, and with that contemplation continues to participate in that venture.

Similarly, it was argued that it is important that the legislature regulate the liability of the accessory for foreseen offences by an explicit provision, such as:

If, during the carrying out of a primary criminal venture, the principal offender commits an additional or alternative offence from the one to which the accessory has provided help or assistance, that accessory shall not be liable for the commission of that additional offence unless he or she has contemplated its
commission as a possible consequence of the carrying out of the primary venture, and with such contemplation the accessory continued to participate in the venture.

It was evident from the analysis in Chapters 4, 5 and 6 that the degree of autonomy required for primary criminal liability (Chapter 4) and accessorional liability (Chapter 5), namely intentional agreement for the enterprise, or intentional assistance or encouragement respectively, is a higher degree of autonomy than that required for the doctrine of common purpose (Chapter 6), namely recklessness in the form of the foresight of the possibility that the additional offence would be committed in the course of the criminal venture. Again, the principle of individual autonomy can be used to justify this seeming discrepancy. Even though the doctrine of common purpose only requires foresight of the possibility that the additional offence will be committed, there is an underlying high degree of autonomy of such an offender in the sense of his or her intentional involvement in the primary criminal venture. Therefore, all three forms of complicity rest on the intentional involvement in a primary criminal venture. Arguably, this high degree of autonomy required for crimes of complicity is in accordance with individual autonomy being an underpinning principle of criminal culpability. However, as the analysis in Chapters 2 to 6 demonstrated, there are some areas of the criminal law in NSW and Jordan which do not adequately take into consideration the limits of individual autonomy which an offender may experience when committing crime. In the final section of this dissertation, I raise these issues which could form the basis of further consideration in the future.

7.3. PART THREE: INDIVIDUAL AUTONOMY AND ISSUES FOR FURTHER CONSIDERATION

The analysis of the issues raised in Chapters 2 to 6 demonstrates that there is a level of logical and ethical coherence in the extent to which individual autonomy underpins notions of criminal culpability in both NSW and Jordan. However, a deeper consideration of the logical and ethical foundations outlined above, raises some important issues for
lawmakers to take into account in the future. Thus, while the criminal law in NSW and Jordan is indeed in line with the same broad categories of restriction of freedom of the will as identified by moral philosophers, it departs from such analysis in certain significant aspects. In particular, it seems to adopt a black and white approach, which does not reflect the complexity of the real world.

To start with, an analysis of legal defences demonstrates that such defences recognise limitations on autonomy as liberty of action, freedom of choice and effective deliberation, but this recognition is limited. For example, ideas of legally relevant insanity in both NSW and Jordan have been restricted to extreme states of mental illness where the defendant was, at the time of the crime, labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act the person was doing, or if did know it, then the person did not know that what was being done was wrong. This narrow test covers only those who, in extreme cases of mental illness, are unaware of what they are doing or of the significance of their actions. While diminished responsibility (or substantial impairment) would cover lesser mental problems, this defence does not exist in Jordan, and in NSW it is only available as a partial defence to murder, merely reducing murder to manslaughter. Further, juries can return a verdict of murder even where there is medical evidence of the appropriate sort of mental abnormality or impairment. Thus, while these defences attempt to accommodate limitations on autonomy as effective deliberation, they do so inadequately.

Similarly, while acting under duress by another is recognised as a legal defence, it is limited to situations involving the threat of immediate death or serious personal violence where such immediate threat either overbears the ordinary power of human resistance or provokes legitimate resistance in self-defence. In the same vein, the defence of necessity (duress of circumstances) is also limited to circumstances involving the threat of immediate death or very serious injury by such natural disasters as fire or earthquake.

The defence of provoked is also only available in limited, albeit different, circumstances in NSW and Jordan. In NSW, provocation only operates as a partial
defence to murder, reducing it to manslaughter in circumstances where the actions of the deceased were of such a character as would cause an ordinary person to lose his or her self-control to such an extent as to act as the killer has acted. The changes to the law in NSW which allow provocative actions of the deceased ‘at any time before’ the homicide, were designed to accommodate histories of extreme domestic violence in relation to ‘battered woman’ syndrome. In Jordan, the defence of provocation in the context of martial infidelity (Article 340) serves as a mitigating excuse which operates to reduce the perpetrator’s punishment. The mitigating defence of provocation in Article 98 limits the defence to a response to an unlawful and dangerous act. Beyond this point, in both jurisdictions the only other way the law recognises that an individual’s autonomy is limited by the actions of another, is where another person causes the individual to become intoxicated, and such intoxication leads the individual to commit a crime.

In reality, however, there are many different forms and degrees of freedom and determinism, autonomy and restriction and many sorts of ways in which the actions of some can effect and constrain the decisions and spontaneous actions of others, and thereby increase the likelihood of criminal behaviour. Most importantly, it is difficult to make sense of specific cases of choice, as free choice, without reference to the detailed processes of decision-making involved. This is, after all, the essence of ‘free will’, on the analysis developed so far. Free will exists where an individual is in a position to make a real choice between genuine alternatives on the basis of rational and informed deliberation. Such deliberation generates the reasons for an individual’s action. It is only by examining the details and context of specific decision-making that can we rationally assess the extent and nature of such restrictions to the processes in question.

As discussed in chapter three, and to quote Norrie (2001):

Human agency is essentially composed of motives and intention. Human beings conceive desired ends by a complex psychological and sociological process (the creation of motives for actions), and formulate intentions and perform action designed to achieve those ends. It is impossible in practice to imagine people forming intentions without having motives as it is to imagine them developing motives without creating intention to put them into effect...People act from motives and intention, and it is indeed ‘childish’ to imagine that the culpability
can be properly evaluated with reference to intention alone. Motive is crucial, in terms of our evaluation of the goodness or badness of a person (pp 36, 44).

Yet in the criminal law, intention is considered central to culpability, and motive occupies a peripheral role. ‘Motives’ typically enter the discussion only at the level of prior intention, where such intention is part of the definition of the offence. For example, for theft, did the individual really intend to permanently deprive the victim of his or her property? Was this his or her motive or reason for taking it? In other words, there is no consideration of the ultimate goal of the action, of the reasons why this goal was chosen or why these means were employed. The only situations where the individual’s reasoning process and resulting goal or purpose, in performing the criminal action, is considered relevant to the issue of culpability are those involving duress and self-defence.

In reality, reference to jealousy and greed, anger and love, ‘desire for money and perverted lust’ alone, contributes little in the way of real explanation of criminal activity. Everyone experiences such thoughts and feelings more or less frequently. The real issue is how and why such feelings come to take the particular forms they do and contribute to particular consequences, criminal or otherwise. And to understand this, it is necessary to consider the social context and psychological makeup of the individual and the actions concerned. Here again, as outlined in Chapter 3, there is a crucial link between motives and social causes. This is not to suggest that a person’s liability or otherwise should be determined by reference to motive alone, or the ends to which he or she has gone to give effect to his or her motive should be disregarded. The point here is that mens rea cannot be seen in isolation from motive.

On the sociological side331, criminal law might take into account the reality of contemporary economic life while determining the liability of individuals. For example, in a capitalist society, some individuals (usually rich people) enjoy a higher degree of

autonomy than others. They are autonomous in that they are largely free of day-to-day external economic duress. They have freedom of choice in terms of real options and access to a wholly different quality and quantity of material resources and information for rational decision-making. They can choose the work they want, and are more likely to be able to participate in the formulation of legislation. In contrast, those with limited material resources fall well below these levels of autonomy in relation to both effective power and decision-making. Many such individuals do not enjoy their jobs, or much of what they do at work. But they work in order to get money to live. Part of their lives consists of economically coerced rather than free action. Their limited incomes reduce the options available to them.

The hierarchy of the social class structure can therefore be seen to map out a hierarchy of degrees of freedom of choice, with reduced free will and increased economic duress further down the system. And such decreased autonomy as freedom of choice goes a long way towards explaining patterns of crime amongst those lower down in the hierarchy. Those who are lacking in sufficient material resources are more likely to commit crimes such as theft and so forth. Those faced with poverty and the ignominy of long-term unemployment, or a life of powerless drudgery with minimum respect and remuneration, may engage in a life of property crime, or drug dealing which can offer, or appear to offer, a viable and rational alternative. Most common types of violent interaction identified as crimes of violence are ‘confrontational violence between males, typically young and of marginal socio-economic status’, and ‘violent interaction between family members and other intimates’, both often involving alcohol\textsuperscript{332}.

In cases of this type, we can trace a path of causal determination from income inequality and discrimination, through disrespect and powerlessness, to street violence associated with the defence of honour. The greater the scale of income and social power inequality, the more those at the bottom of the scale, experiencing comparatively greater poverty and powerlessness, and corresponding social disrespect, feel that they have to defend the

\textsuperscript{332} See for example, Hogg R & Brown D, \textit{Rethinking Law and Order}, Pluto Press, Annandale (NSW), 1998.
vestiges of self-respect they have left. Physical violence is sometimes seen as the only means at their disposal to do so. The greater their general powerlessness and lack of autonomy, the greater their sensitivity to anything seen as disrespect on the part of their peers. In psychoanalytic terms, the poor and the powerless employ the defence of displacement of their anger, away from those who really oppress them (who remain outside the scope of their effective action) and onto the closer targets offered by hostile peers and family members. Otherwise, the anger is turned inward themselves.

From a gendered perspective, the fact that a large proportion of violent crime is committed by socially marginal males also raises complex issues about the structure of masculinity and why it is that economically marginal men engage in violence to a greater extent than economically marginal women. Indeed, the greater preponderance of men than women who commit crime raises issues about the importance of gender for the exercise of individual autonomy. The way defences are defined has also been analysed as gendered. Such analysis has led to reform of the law of provocation in NSW so that this defence can be employed by women who have experienced serious domestic violence, and not just by 'jealous men'. The law of provocation in Jordan also provides that women, and not just men, can benefit from the defence of provocation in the context of marital infidelity, and such recognising a form of gendered analysis.

On the psychological side, individual life paths, including free decision making, are profoundly shaped by personality structures established in early childhood. And different sorts of personalities impose different sorts of restrictions upon individual autonomy and free will. Particularly significant here are issues of self-esteem. Those who do not achieve

333 See for example, Messerschmidt J, Masculinities and Crime: Critique and Conceptualisation of Theory, Rowman and Littlefield, Maryland, 1993.
a 'built in sense of self esteem' in childhood (because of insufficient parental love, affirmation and praise) tend to develop depressive personality structures, leaving them vulnerable to self-blame and feelings of hopelessness and worthlessness in face of reverses and difficulties. Such individuals are more than usually dependent upon the good opinion of their fellows, needing repeated assurance of others' good opinion in order to maintain their own psychic good health. Such a need for recognition and reassurance can over-ride both principled objections to criminal activity and fear of criminal penalty in motivating such individuals to participate in joint criminal operations, doing their part to retain the love or respect of other members of the gang or criminal 'community'.

Hysterical personalities are similarly 'dominated by the urgent need to please others in order to mask the fear of being unable to do so.' As a result of being disregarded in childhood, their needs not appreciated, they become demanding and attention-seeking as adults. People with hysterical personalities and with their propensity to drama and risk-taking by trying to mask frightening possibilities by initiating them, can get them into criminal legal difficulties. Particularly serious problems of early childhood development lead to more extreme forms of such behavioural tendencies and greater likelihood of serious psychopathology. Particular sorts of personality structures also predispose individuals to particular sorts of psychopathology depending upon their later social experiences. Tangential to, but interacting with, such issues of personality are issues of intellectual development and disability. Here again, some individuals will be significantly disadvantaged by their heredity, or by development damage, and will not necessarily receive the special assistance they might need to realise their full potential.

This discussion thus demonstrates how motive can be very relevant in providing an explanation of human behaviour. Its connection with social cause is crucial in this regard. Should those enjoying greater autonomy be exposed to the circumstances of those whose autonomy is restricted by their circumstances, it is highly likely that they would respond in similar fashion. Their minds are not different; it is their social circumstances that are different, leading to different behaviour or very different responses to such

circumstances. The criminal law seeks to hold individuals culpable only for their 'free' and 'un-coerced' criminal choices. In order to really achieve this goal, it is important that criminal law should not impose culpability determined only by the seriousness of the crime, without reference to the circumstances of the individual punished. It should consider the extent of real coercive pressure of circumstances driving the perpetrator to commit the crime. The law should take into account the degree of real freedom of choice exercised by the perpetrator, if it is to take into account the radical disparities of autonomy and freedom of choice across the social class structure.

Although issues of this type including 'motive for action' can be taken, or might be seen to be relevant at the stage of sentencing, the question arises as to whether such issues should be taken into account at a prior stage, that is the stage of determining individual criminal liability if the criminal law is to really take seriously the notion of individual autonomy as providing the grounds for such culpability.

The findings in this dissertation indicate that the notion of individual autonomy as defined by moral philosophers can not only clarify an understanding of an existing legal system, but can also point towards possible deeper structural reforms.
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