

(a) Judicial creativity: the impact of precedent

Such law-making power as remains issues from the system of precedent. The trial courts (Crown Courts and Magistrates' Courts) do not set precedents although, by convention, first instance decisions at Crown Court are of persuasive authority.⁶⁷ Therefore, no ruling made by the judge in the case of *R v John Smith* will take effect as law. The appellate courts, which are in reverse order of hierarchy the Queen's Bench Divisional Court, Court of Appeal (Criminal Division) and Supreme Court, which replaced the House of Lords as the final court of appeal in October 2009, have the power to set binding precedents on courts lower in the court hierarchy. With the exception of the Supreme Court, which is free to depart from previous decisions, appellate courts will also normally be bound by their own decisions. In theory, even courts of higher standing will respect the precedent of a lower court unless it is manifestly wrong. Outside this hierarchy, decisions of the European Court must be taken into account if relevant to the proceedings.⁶⁸ Privy Council decisions are also of highly persuasive authority, and decisions from other common law jurisdictions are treated with ever-increasing respect.⁶⁹

In practice, judicial development of the law is a lot 'fuzzier' than the above scheme would appear to suggest.⁷⁰ Although judicial rule-following is overwhelmingly the norm, particularly in trial courts, judges (in accordance with their powers) sometimes overrule precedents, even those of long standing, and where they cannot or choose not to, they may refuse to follow a precedent or distinguish it. Although the occasions on which judges are now prepared to invent new offences have diminished almost to vanishing point⁷¹ they still retain, then, power to adapt and develop the common law.⁷² In effect, this power is legislative power and it can be used both to reduce and to extend the reach of the criminal sanction.⁷³ It would be reassuring to think that there are some ultimate rules governing the practice of judges in this respect but there are none which command general agreement and obedience. There are few judges of any standing who have not sometimes played 'fast and loose' with the system of precedent where it was thought desirable.⁷⁴

Examining the case of marital rape is again instructive in this regard. In the leading case of *R v R*, Owen J, at first instance, accepted the authority of Hale's rule that a husband was generally exempt from punishment for rape.⁷⁵ He nevertheless ruled that the exemption did not apply where, as here, the parties had separated, extending earlier authority where married couples were separated by court order or its equivalent. In the same year in another case a different judge came to a different conclusion. He denied that there had ever been a legally binding rule. The exemption was simply the product of the musings of an antique commentator which nobody had seen fit to doubt.⁷⁶ Finally, the Court of Appeal and House of Lords in *R v R* stated, in effect, that the fiction of implied consent could not be supported in a society where the dominant ethic was one of equal rights, both economic and political. If there was a rule, it was overruled.

⁶⁷ A.J. Ashworth, 'The Binding Effect of Crown Court Decisions' [1980] Crim LR 402.

⁶⁸ Human Rights Act 1998, s. 2.

⁶⁹ In recent years the opinions of academic writers have also become more influential.

⁷⁰ See generally S. Shapiro, *Legality*, Cambridge: Harvard University Press (2010).

⁷¹ See discussion at note 74.

⁷² A significant recent example has been the development of the common law offence of assault.

⁷³ And in its latter tendency, since judge-made law operates retrospectively, may breach the fair warning principle.

⁷⁴ For a robust attack on the quality of the appeal system of England and Wales and indeed its judges see J. Richardson 'Is the Criminal Appeal System Fit for Purpose? A Reflection to Mark the 750th Issue of *Criminal Law Week* 1997–2013'. See A. Paterson, *The Law Lords*, London: Macmillan (1982).

⁷⁵ [1991] 4 All ER 481.

⁷⁶ Simon Brown J, *R v C* [1991] 1 All ER 755.

Three important insights can be drawn from these cases. The first is that a piece of doctrine which had stood unchallenged for centuries was dismissed as if it counted for nothing. The second is that no judge, of whatever standing in the court hierarchy, had any difficulty in refusing to follow it. One judge distinguished it, another denied its binding quality, another overruled it. All that matters, it seems, is that they did not like it. The third is that the effect of each decision was to extend the scope of criminal liability retrospectively to the husband. In effect, he was punished by a law which was not in existence at the time of action. At a moral level, there can have been few people who, on hearing of the decision, did not feel that the world was a better place for the judges' decision. But the case raised two fundamental issues of principle. The first is whether it is proper for unelected and unaccountable judges to try to make the world a better place in a Parliamentary democracy. The second is whether, in trying to make the world a better place, the historically legitimated expectations of individuals that they cannot be punished for what they do in a private domain may be ignored. So abstract is this latter sentiment and so concrete is the social evil represented by marital rape, that one might prefer to dismiss it as vacuous. It is noteworthy that the decision was affirmed by the European Court of Human Rights (ECHR) despite the fact that it apparently breached Article 7 of the European Convention proscribing retrospective criminalisation.⁷⁷ The story did not end there. In 2002 it was held not to be an abuse of process for D to face, in 2002, a count of raping his wife in 1970 even where the incident occurred before the decision of *R v R*. Such a conviction did not breach a defendant's rights under the ECHR.⁷⁸

Whatever the rights and wrongs of these two cases, it must be remembered, however, that judicial power exercised for the obvious good of humankind can also be exercised for less worthy purposes. We might find it less acceptable, for instance, if judges, without the explicit authority of Parliament or the ECHR, legislated that spouses could not engage in consensual oral sex or sado-masochism for purposes of sexual stimulation, or that parents could not lawfully punish their children.⁷⁹

A model of law-making which avoids some of these dangers has sought to refine the function of judges in hard cases such as *R v R* where rule contradicts morality. It emphasises the requirement that judges should balance competing legal principles as well as blindly following legal rules. Sometimes a rule which operates to give effect to one legal principle confounds another. In such circumstances it is thought the judge should weigh the relevant principles in the balance and give effect to the principle most valued by society.⁸⁰ Applied to the case of marital rape, the two most obvious competing principles were the rights of husbands not to be punished without fair warning of the criminality of their acts, and the rights of wives to have their autonomy and privacy respected. On this view it seems, then, that the judges found the latter more descriptive of society's overall values than the former. Although this may not have been obvious to the defendant, he must have known he was 'sailing close to the wind' and so could hardly complain if he was treated like every other 'rapist'.

⁷⁷ In *SW and CR v UK* (1995) 21 EHRR 363.

⁷⁸ *R v C* [2004] EWCA Crim 292 – I.

⁷⁹ Cf. *A v UK* (1998) Crim LR 892 where the ECHR ruled that the UK was in breach of Article 3 of the European Convention (proscribing inhuman and degrading treatment) for allowing too broad a defence of reasonable chastisement. The Children Act 2004 withdraws such a defence from those who punish with cruelty or causing actual bodily harm. Cf. also *R v Emmett*, *The Times*, 15 October 1999.

⁸⁰ The progenitor of this theory is Ronald Dworkin. See R. Dworkin, *Taking Rights Seriously*, London: Duckworth (1977), cf. P. Devlin, 'Judges and Law Makers' (1976) 39 MLR 1.

the European Court for infringement of rights. These will be taken into account in the interpretation of existing law and the development of new law.¹³⁶

The manner in which Convention rights impinge on domestic law should be noted. Convention rights do not supplant domestic legislation, in the manner of European criminal law, such that the courts can strike down Convention-incompatible provisions.¹³⁷ Rather, the courts must, so far as possible, interpret legislation, whenever enacted, 'in a way which is compatible with Convention rights'.¹³⁸ Where such a compatibilist interpretation is not possible a declaration of incompatibility may be made¹³⁹ which sets in motion a legislative fast-track procedure for the amending statute.¹⁴⁰

In developing and ensuring compatibility Government ministers are expected to respond to declarations of incompatibility from the courts, and to make a declaration of compatibility with respect to all new Bills brought before Parliament, thus generating a rights-sensitive process.¹⁴¹ It has been argued that the operation of this process may be more form than substance since it has not had any discernible effect on the passage of legislation bearing significant implications for human rights.¹⁴² Likewise judges, without being bound by the jurisprudence of the Court and the European Commission on Human Rights, are bound by section 2 to take their decisions into account.¹⁴³

The Human Rights Act contains no specific procedure for dealing with incompatible common law offences and defences. Sir Richard Buxton has argued that judicial power in this respect cannot exceed that available in cases of legislative incompatibility.¹⁴⁴ On this view, it would not be proper, for example, for a Crown Court judge to amend the common law defence of parental chastisement in anticipation of amending legislation. Given that the common law rules are creatures of the judiciary, this view seems unduly restrictive.¹⁴⁵

¹³⁶ Petitions are still made regularly, however. In *James v United Kingdom* 25119/09 (2013) 56 EHRR 12 (ECHR), for example, the ECHR ruled that the failure to provide prisoners serving sentences of imprisonment for public protection with rehabilitation schemes and an effective system of review breached Article 5(1) ECHR making their detention arbitrary and unlawful. In 2012, the European Court of Human Rights ruled that Abu Qatada could not be deported to Jordan as that would be a violation of his right to a fair trial under Article 6 of the European Convention on Human Rights: *Othman (Abu Qatada) v The United Kingdom* (Application no. 8139/09).

¹³⁷ As they can be incompatible with community law.

¹³⁸ It has been suggested that this may even include reading words into statutes so as to render an otherwise incompatible provision compatible, as well as more orthodox interpretive strategies: Mrs Justice Arden DBE, 'Criminal Law at the Crossroads' [1999] Crim LR 439 at 446–7. A.J. Ashworth, 'Criminal Proceedings after the Human Rights Act: the first year' [2001] Crim LR, Nov, 855–72. Cf. *Litster v Forth Dry Dock Co. Ltd* [1990] 1 AC 546.

¹³⁹ Section 4.

¹⁴⁰ The track is not always so fast however. See note 152.

¹⁴¹ Section 19 HRA 1998. The Law Commission will also ensure that all law reform proposals are Convention compatible. See Arden, 'Criminal Law at the Crossroads' at 451–3.

¹⁴² M. Wasik, 'Legislating in the Shadow of the Human Rights Act: The Criminal Justice and Police Act 2001' [2001] Crim LR 931. A recent example of legislative procrastination concerns the failure to amend the legislation imposing a blanket ban on voting in national and European elections for convicted prisoners in detention in the UK arising out of the decision in *Greens & MT v United Kingdom* (2010) ECHR (Applications nos. 60041/08 and 60054/08). The judgment became final on 11 April 2011. A number of deadlines have come and gone. The latest is September 2013.

¹⁴³ For a radical view of what this may entail see A.J. Ashworth, 'HRA 1998 and Substantive Criminal Law' [2000] Crim LR 564 at 566. Cf. C. Gearty, 'The HRA – an academic sceptic changes his mind but not his heart' (2010) 6 EHRLR 582.

¹⁴⁴ 'The Human Rights Act and Substantive Criminal Law' [2000] Crim LR 335. See B. Malkani, 'A Rights-specific Approach to Section 2 of the Human Rights Act' (2012) 5 EHRLR 516 for a discussion of some of the difficulties involved in dealing with incompatible common law offences and defences and the three approaches the domestic courts have adopted in taking account of such jurisprudence.

¹⁴⁵ A.J. Ashworth, 'HRA 1998 and Substantive Criminal Law' [1999] Crim LR 564, at 566. See now H, *The Times* 17 May 2001.

A plausible *via media* is that such changes should be effected only by an appellate court with the appropriate constitutional jurisdiction, and only then when such a change would be consistent with other Convention rights.¹⁴⁶

When considering the scope for doctrinal development post enactment of the 1998 Act the major Convention rights likely to form the basis of legal challenges to domestic substantive law, or otherwise influence legal development, are as follows and include examples of how they have been or may be used. Article 2, which protects the right to life, has been referred to in a case assessing the legality of an operation to separate conjoined twins and other cases involving the legality of mercy killing.¹⁴⁷ In *Menson*, a case involving a racially motivated attack in London,¹⁴⁸ the European Court of Human Rights indicated that this may require States to enact special legislation to provide for vulnerable groups to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.¹⁴⁹ It is also likely to have a future impact on the rules governing mistake and reasonable force in self-defence, effecting arrest and the prevention of crime, since domestic law affords a rather broader justification (reasonableness) for the use of deadly force than that envisaged by Article 2 (absolutely necessary and strictly proportionate).¹⁵⁰

Article 3, which protects the right not to be subjected to torture or to inhuman or degrading treatment or punishment, was the basis for changes to the rules governing parental chastisement effected by the Children Act 2004. Article 3 also formed a major plank in the case brought by Diane Pretty who argued that the criminal law should permit her husband to help her take her life when she was in the final throes of motor neurone disease, to vindicate her right not to suffer unnecessarily.¹⁵¹

Article 5, which protects the right to liberty and security of the person, was the basis for a challenge in *Gillian and Quinton v UK* by reason of the applicants having been stopped and searched by police officers, pursuant to their powers under the Terrorism Act 2000 sections 44 to 47, whilst on the way to a demonstration.¹⁵² It also has ramifications for the criminal law's definition of insanity, in particular the internal/external mental abnormality test of insanity and the court's powers to commit to hospital.¹⁵³

Article 6, which guarantees a right to a fair and public hearing, was the basis for a challenge to the definition of 'drunkenness' for being unduly vague for the purpose of the offence of being drunk on an aircraft.¹⁵⁴ The joint enterprise rules in relation to convicting accessories for murder have been (unsuccessfully) challenged.¹⁵⁵ A number of cases have involved challenges to the use of strict liability and reverse burdens of proof.

¹⁴⁶ Notably Article 7, prohibiting retrospective criminalisation.

¹⁴⁷ *Re A (conjoined twins)* [2000] 4 All ER 961; *R (on the application of Pretty) v DPP* [2002] 1 All ER 1 HL; *R (Purdy) v DPP* [2009] UKHL 45; *R (Nicklinson) v Ministry of Justice*; *R (AM) v Director of Public Prosecutions and others* [2012] LS Gazette, 30 August 30, 17, DC.

¹⁴⁸ *Menson and others v United Kingdom* (App. 47916/99) Decision of Court (Second Section) as to admissibility, 6 May 2003.

¹⁴⁹ J.K. Goodall, 'Conceptualising "racism" in criminal law', (2012) Legal Studies.

¹⁵⁰ A.J. Ashworth, 'The European Convention and the Criminal Law' in *The Human Rights Act and the Criminal Justice and Regulatory Process*, Cambridge Centre for Public Law (1999).

¹⁵¹ See previous note.

¹⁵² [2010] Crim LR 415 (case comment).

¹⁵³ Sutherland and Gearty, 'Insanity and the European Court of Human Rights' [1992] Crim LR 418. See Chapter 9.

¹⁵⁴ *Tagg*, *The Times*, 14 June 2001.

¹⁵⁵ In *R v Concannon* the Court of Appeal, refusing leave to appeal against conviction, rejected the defendant's argument that the mismatch between the *mens rea* necessary to convict the principal and that necessary to convict an accessory was a breach of Article 6 ECHR.

to be law-abiding.⁴⁹ Indeed, if good consequences were all that mattered we might expect punishment to be far more draconian than utilitarians are prepared to advocate. If our justification for punishing people is to make society a better place, it might justify deterrence, rehabilitation or physical incapacitation far in excess of what the offender deserves. Drunken drivers could lose their licence for life; thieves could have their hands cut off; company fraudsters could be sent to a monastery to learn morality and lose acquisitiveness; sex offenders could be castrated; transportation to the uninhabited islands off our coastline could be introduced. One could go further. If desert does not matter there is no obvious reason why society needs to find the real offender at all. Punishing a confirmed recidivist would be just as effective, if not more so. Such punishment protects society by incapacitating a dangerous person, perhaps far more dangerous than the actual offender. It educates society in the rewards for wrongdoing. It satisfies the blood lust of victims, their families and the wider community. It has a general deterrent effect. From a consequentialist perspective it is not even obvious why we need punish anybody. The above purposes could equally well be served by punishing nobody while the impression is created, by skilful use of the media and rumour, that all calumny is treated with unbending vigour and ferocity; thus keeping potentially reformable offenders away from the insidious influence of prison.

The standard response to these objections is that utilitarianism does not work like this. In the real world oppression is counter-productive and people find out about injustices. The social consequences of unjust victimisation can be immense and lasting.⁵⁰ If moral values were ignored in judging the correct response to crime enforcement, both the legitimacy of the system would be imperilled and the feeling of 'well-being' which crime control exerts itself to promote would be dissipated through the indignation and anxiety of the rule-breakers and law-abiding alike. Both potential consequences argue against unjust, inhumane punishment.⁵¹

While the response is persuasive it should be noted that it is, however, parasitic on the existence of moral values lying outside itself. Utilitarianism does not seem to work, in other words, unless it is informed by a value system which is itself not consequentialist. At the heart of this objection lies the intuition crystallised in desert theory that only actual offenders must be punished and that criminal justice demands recognition of the relevance of desert both in terms of the question who, and how much, to punish. This intuition is confirmed by the very structure of criminal law, evidence and procedure. How can desert not matter where we have procedural and evidential safeguards such as the presumption of innocence, the 'beyond reasonable doubt' standard of proof in criminal trials, the centrality of responsibility and fault within the criminal trial, and so on? A theory of punishment is seriously flawed if it is capable of justifying practices of punishment which are fundamentally inconsistent with the ethical constraints informing the operation of an actual criminal justice system.⁵²

⁴⁹ D.M. Farrell 'Using Wrongdoers Rightly: Tadros on the Justification of General Deterrence' (December 2012) Criminal Law & Philosophy [online version not assigned to issue].

⁵⁰ As the unfortunate instances of Dreyfus and Saccho and Vanzetti demonstrate.

⁵¹ Utilitarianism, it should be noted, was the major penal influence against capital punishment and transportation.

⁵² However, not all of the practices within the criminal justice system are susceptible to this analysis. Strict liability offences, for example, can only be justified on grounds of utility but there is no suggestion that strict liability is a potential model for the future development of our system: H.L.A. Hart, *Punishment and Responsibility* (1968) 12; Lacey (1988) 44–6; cf. B. Wooton, *Crime and the Criminal Law*, London: Sweet & Maxwell (1981) 46–57; K.W. Simons, 'Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?' (2012) 32(3) OJLS 445.

(b) Practical objections: the efficacy of punishment

Although utilitarianism is concerned more with the functions of, rather than the moral justifications for, punishment it must be understood that the theory does not 'collapse' into a description of punishment's functions. It is a normative rather than descriptive theory.⁵³ It says 'do not punish unless punishment functions to reduce crime' in one of the above ways. This leads to consideration of the efficacy of punishment. The revival of retributivism in recent years is largely attributable to the perceived inefficacy of punishment rather than its actual or potential disregard for justice.⁵⁴ Although there is evidence to suggest that the threat of imprisonment⁵⁵ has a general deterrent effect, there is little evidence to suggest that it discourages individual offenders from reoffending.⁵⁶ Similarly, the rehabilitative ideal has been shown to be an empty one, even if it could be successfully married to the need to show individual offenders justice in punishment.⁵⁷ Indeed, statistics indicate that the more a defendant has been incarcerated, with whatever object in mind, the more likely it is that he will reoffend. Such statistical evidence⁵⁸ is supported by the intuitions gained from social scientific studies of prison life and general anecdotal evidence⁵⁹ that prison is a very effective training ground for villainy, both in its moral and ideological aspects and in its technical demands. What better way of creating a villain than removing him from the society of the law-abiding, placing him in the company of experts in, and apologists for, villainy⁶⁰ and effectively disabling him from securing meaningful employment on his release?⁶¹

The one obviously reductive function which seems immune from these objections is that of incapacitation. The simple idea informing general protectionist policies is that if an offender is incarcerated it means that he, at least, no longer constitutes a danger to society. It is most sustainable in the context of sex offences and crimes of violence, since the ability of such offenders to offend is thereby minimised and their disposition to offend may be reduced with the passing of years. With other offences, most notably property offences, such a function is less plausible. In the long term, the effect of incarceration may simply be to increase the disposition to commit offences on release.⁶² Moreover, in the short and medium term, much criminal activity is simply removed to a different environment where 'offences' are, paradoxically, less likely to be acknowledged and recorded. The associated social harms, one would hazard, are no less burdensome for the fact that they occur outside the public gaze.

⁵³ H. Carvalho, 'Terrorism, Punishment, and Recognition' (2012) 15(3) New Criminal LR 345.

⁵⁴ See for example S.R. Brody, *The Effectiveness of Sentencing: A review of the literature* (Home Office Research Study No. 35, 1976).

⁵⁵ And other punishments.

⁵⁶ See for example J. Adenaes, 'The General Preventive Effects of Punishment' (1966) 114 U Pa LR 949; Duff and Garland 21–8; N. Hanna, 'Facing the Consequences' (April 2013) Criminal Law & Philosophy [online version not yet assigned to issue].

⁵⁷ See for example Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, New Haven: Yale University Press (1981); A.E. Bottoms, 'An Introduction to the Coming Crisis' in A.E. Bottoms and R.H. Preston, *The Coming Penal Crisis*, Edinburgh: Scottish Academic Press (1980); A. von Hirsch, *Doing Justice – The Choice of Punishments* (Report of the Committee for the Study of Incarceration) (1976); S.R. Brody, op. cit.; S. Sverdlik, 'Punishment and Reform' (April 2013) Criminal Law & Philosophy [online version not yet assigned to an issue].

⁵⁸ R. Martinson, "'What Works?'" Questions and Answers about Prison Reform' (1974) 35 Public Interest 22–54.

⁵⁹ W. Young, 'The Effects of Imprisonment on Offending: A Judge's Perspective' [2010] Crim LR 3; I. Dennis, 'Sentencing, Rehabilitation and the Prison Population' [2010] Crim LR 591.

⁶⁰ This has always been understood. Early prisons typically forbade communication between prisoners even to the extent of providing jaw clamps to prevent talking; Walsingham Jail Museum archive.

⁶¹ One of the (many) theories of the workhouse was the obviation of this problem.

⁶² W. Young, 'The Effects of Imprisonment on Offending: a Judge's Perspective' 3–18.

are thus socially validated, rather than simply an expression of a potentially contentious moral etiquette.

3 Circumstances giving rise to a duty to act: duty situations

The ruling view is that enunciated in *Kenny's Outlines*, 'No-one is held criminally responsible, at common law, for the harmful consequence of his omission to act, whether that omission be careless or intentional, unless the prosecution can prove that he was under a legal obligation to take action in the particular circumstances in which he was placed.'⁹¹ The general pattern of liability is that obligations of action are imposed upon citizens in the case of certain special relationships such as spouses and parents and children, or where the defendant has assumed a responsibility of care for the victim, whether informally or by contract or other legal duty. More recently an obligation to intervene to prevent a risk of injury materialising has been imposed upon the creator of such a risk. There is probably room for creation of further duty situations, as will be seen.

(a) Special relationships

The formal reason for legal obligations to be restricted in this way is that society evinces no consensus about the moral obligations other people should satisfy beyond those the latter are themselves prepared to acknowledge or assume, whether by agreement or operation of law.⁹² So, a parent can be guilty of murder for starving his child to death,⁹³ and of manslaughter for failing to secure medical attention where it is dangerously ill.⁹⁴ Similar responsibilities attach in the case of spouses.⁹⁵ On the other hand a duty does not arise automatically in respect of informal relationships in the absence of a formal assumption of care. In *People v Beardsley*⁹⁶ the defendant was held not to be under any duty to his lover who had taken an overdose of morphine in his presence.

It is probably not, however, the fact of being a spouse/parent/carer which grounds the duty. Rather it is the fact that such persons have placed themselves in the frame (causal and moral) by their status/role/conduct and in so doing excite expectations, whether in the victim or the wider society, which render the victim vulnerable if those expectations are not fulfilled. Confounded expectations can cause harm.⁹⁷ On this analysis a person who assumes a life-saving role, say he promises the victim's wife that he will act as the latter's bodyguard, will be liable for the consequences of failure only if there is detrimental reliance⁹⁸ – if, for example, the wife or victim failed to engage another bodyguard on the strength of that promise or if the victim entered a dangerous situation he would not otherwise have entered.⁹⁹

⁹¹ Kenny, at 16.

⁹² See G. Mead, 'Contracting into Crime: A Theory of Criminal Omissions' (1991) 11 OJLS 147.

⁹³ *Gibbins and Proctor* (1918) 13 Cr App R 134.

⁹⁴ *Downes* (1875) 13 Cox CC 111.

⁹⁵ *Bonnyman* (1942) 28 Cr App R 131.

⁹⁶ (1967) 113 NW 1128. Cf. *R v Evans*, *infra* note 124.

⁹⁷ See Glazebrook (1960); A. Leavens, 'A Causation Approach to Criminal Omissions' (1988) 76 Calif LR 547; W. Wilson, *Central Issues in Criminal Theory* (2002) ch. 3; L. Alexander, 'Criminal Liability for Omissions' in Shute and Simester (eds), *Criminal Law Theory: Doctrines of the General Part*, Oxford: OUP (2002).

⁹⁸ A similar view is voiced by Alexander, who emphasises the need for detrimental reliance for liability to be incurred.

⁹⁹ Likewise it seems probable that a person who has promised to alert the victim if her deadly enemy, bent on killing the victim, should arrive in the neighbourhood, and whose identity he alone knows, is not guilty of murder for the deliberate failure. This is not apparently the position in American law. See Alexander, note 98 above.

(b) Contractual relationships

A requirement of detrimental reliance accounts for the finding in *Pittwood*¹⁰⁰ that a contractual duty owed by P to B could form the basis of a duty of action in favour of C. It was held, in line with the earlier case of *Instan*,¹⁰¹ that the defendant level crossing keeper who had failed to close the crossing was responsible for the death of the driver of a haycart struck while crossing the line. By acting as a level crossing keeper, he had undertaken to keep him and other road users safe. The expectation had developed, since railways had first arrived, that those engaged in managing them would, as a matter of routine, ensure that the public were given due warning of the arrival of trains. Once such expectation existed it followed that the moral obligation of warning should be enforced. It explains also the superficially inconsistent case of *Smith*, decided earlier at a time when no such expectation existed because the responsibility had not been publicised.¹⁰² Here G, an employee of H, left his post against instructions and so was unable to give warning to pedestrians of the approach of trams crossing a turnpike. On an indictment for manslaughter of a pedestrian who was run over and killed by a tram it was held that G was the private servant of H and under no duty to the deceased.

(c) Informal assumptions of duty

The clearest example of the moral basis underlying the duty to act is where such a duty is imposed upon those who voluntarily assume the responsibility of caring for another. Such a duty was initially thought to be generated by some semblance of a contract existing between the carer and the person cared for. Thus in the important case of *Instan*, the defendant had neglected to feed and seek medical care for her aunt despite the fact that she knew that she was very sick. This resulted in the aunt's death. The defendant was convicted of manslaughter. The Court said that not every moral duty to provide succour and assistance imposed a corollary legal duty. They justified imposing such a duty here by reason of the fact that both the aunt and niece were fed from the aunt's money and 'that it was only through the instrumentality of the (niece) that the deceased could get the food'.

Later decisions have avoided emphasising this contractual pattern, stressing that the assumption of responsibility for another typically generates the kind of dependency which demands to be satisfied. On this view, it is not the provision of money *per se* which imposed the obligation in *Instan*. What attracted the obligation was the fact that the parties knew and understood, evidenced by the provision of money, that this was a relationship of dependence. Taking the money confirmed the reciprocal understanding¹⁰³ but more importantly, perhaps, discouraged the aunt from seeking help elsewhere.

Again, in *R v Stone and Dobinson* it was stated that where a couple assumed the duty of caring for an infirm relative, the very assumption of that duty imposed a legal obligation to satisfy it.¹⁰⁴ The importance of the duty being voluntarily assumed is that it allows a proper reconciliation to be effected between respect for individual autonomy and duties of good citizenship. It is proper to sanction breaches of the duty assumed, both because of the potentially 'dangerous' expectations such an assumption excites and also because, by taking on the responsibility, the defendant has thereby chosen to restrict his own freedom

¹⁰⁰ (1902) 19 TLR 37.

¹⁰¹ *Instan* [1893] 1 QB 450.

¹⁰² *Smith* (1869) 11 Cox CC 210.

¹⁰³ Cf. G. Fletcher, *Rethinking Criminal Law* (1978) 615.

¹⁰⁴ [1977] 2 All ER 341. The decision can be criticised for other reasons. See section on Non-medical contexts, below. For a recent example *R v Barrass* [2011] EWCA Crim 2629; [2012] Crim LR 147.

in seriousness from minor harm (s. 47) to serious harm (s. 20) to death (homicide). *Mens rea* also operates to structure harms vertically. For example, section 18 of the Offences Against the Person Act makes it an offence to cause someone grievous bodily harm (GBH) with intent to cause GBH. Section 20 of the same Act makes it an offence simply to inflict GBH maliciously (intentionally or recklessly). The former state of mind is singled out as being more culpable than the latter and the offence carries a higher maximum sentence. The *mens rea* words contained within the definition of offences generally reflect degrees of choice. They are not, strictly speaking, signifiers of villainy or bad character.¹¹ A person intends to kill for the purpose of the law of murder, whether she does it to get her hands on the deceased's money or, at the deceased's request, to put a stop to the pain of his terminal illness. This supports the view that people tend to be punished for their choices rather than their character. If their character is not adequately reflected in their choice, this is a reason to mitigate sentence, not to excuse entirely. Apart from the strict liability offences just mentioned, the majority of common crimes of *mens rea* have intention and recklessness as alternative fault elements. It is the fact of choosing to do harm which thus fixes a person with responsibility rather than the degree of commitment shown to the outcome.

Where intention is a sole mental element this will often be because having the relevant intention is constitutive of the wrongdoing prohibited by the offence rather than simply a fault element. For example, taking a person's property without permission only becomes a criminal offence if it is done with the intention of depriving the owner permanently of the property.¹² It is this intention which makes the taking *wrongful* rather than making it simply *blameworthy*. It is theft, not borrowing without permission, which the law prohibits.

6.5 THE *MENS REA* WORDS AND THEIR MEANINGS

When a jury is asked to decide whether the accused 'intended' a consequence or was 'reckless' or 'dishonest' the first problem it will face is what the relevant word means. Does the judge tell them or do they apply their own understanding? Judicial activity in the field of *mens rea* shows a somewhat schizophrenic attitude towards the *mens rea* words and their meanings. Occasionally judges insist upon a technical meaning to an everyday word.¹³ On the other hand, judges and academic commentators¹⁴ often express the preference that the *mens rea* words carry their everyday meaning. The most compelling reason for this is that by allowing words such as intention, recklessness and dishonesty to embody popular usage, citizens will be in a better position to pitch their conduct in accordance with the rules. If the meaning of dishonesty in the law of theft, for example, were to carry some arcane legal nuance, violence might be done to the reasonable expectations of ordinary citizens.

Case 2

Adam, who needs some motor oil, takes some from his mother Eve's garage, knowing that she will consent.

¹¹ In property crimes the fault term 'dishonesty' is an exception.

¹² J. Horder, 'Crimes of Ulterior Intent', in A. Simister and A. Smith (eds), *Harm and Culpability*, Oxford: Clarendon Press (1996) 153.

¹³ Malice is an example of a word with a technical meaning. See generally A.R. White, *Misleading Cases*, Oxford: Clarendon Press (1991) ch. 1.

¹⁴ See for example the infamous *Brutus v Cozens* [1973] AC 854 where the House of Lords insisted that non-technical words in a statute should be left, undefined, to the tribunal of fact; cf. A.R. White *Misleading Cases*, Oxford: Clarendon Press (1991).

A conviction for theft requires proof of dishonesty. This requirement protects honest citizens from conviction for taking things without permission if, as here, the context renders the taking perfectly socially acceptable. Dishonesty should not then carry a meaning contrary to our moral 'common sense'.

There are numerous examples of judges advocating an 'ordinary language' approach to the meaning of the *mens rea* words and then not reaching agreement upon such meaning,¹⁵ or reaching agreement upon a meaning other than that presented in ordinary speech.¹⁶ As we shall see, it is not always possible to discern whether the reason for disagreement is due to ambiguities of language, conceptual fallacy, or simply the understandable desire to put dangerous villains behind bars. Where a gap is opened up between popular and judicial usage it is pretty rare, however, that such a gap favours individual defendants.

6.6 INTENTION

In theory, intention is central to a cogent notion of criminal responsibility. What marks human action off from other events in the natural world, like the movement of the stars and the snarling of dogs, is that our action has meaning for us. We have intentionality. If we see a human being raise a gun to his eye, aim it at another person, and pull the trigger we (think we) know what he means by this action. We know he intends to shoot, if not kill the victim. He may fail, but we know what is in his mind. If we saw a monkey do likewise we would not know what was in the monkey's mind. We cannot plausibly assert, therefore, that the meaning to be attributed to the monkey's behaviour is the same as in the former case. We have no concept of monkey intentionality. Shooting the gun for the monkey, then, may mean nothing. It may be just an incident of 'monkeyness', like fire is an incident of volcanoes.

From one point of view, therefore, if it is intentionality which separates our actions from the behaviour of monkeys and volcanoes then it is intentionality which forms the basic building block of choice upon which criminal responsibility is founded. Intention is the obvious and clearest form of mental attitude grounding responsibility, but not necessarily the only one.¹⁷ It would make no sense for a criminal justice system only to punish those harms which were specifically aimed at. There must be space for punishing examples of culpable risk-taking, for example.

'Intention', like other *mens rea* words, (presumptively) reflects a degree of fault. Ideally, therefore, the criminal law incorporates a meaning which does the job required, in this case supporting a rational system of blame and punishment. Such a system, as we have seen, should enable crimes involving similar harms to be differentiated consistently according to the defendant's mental element. For instance, it should enable murder (a crime of intention) to be distinguished from less serious killings. With this former crime in mind for purposes of illustration, what is it, then, to intend a consequence?

¹⁵ Cf. *Cato* [1976] 1 WLR 110 and *Caldwell* [1982] AC 341.

¹⁶ See *Hyam v DPP* [1974] 2 All ER 41: *R v Caldwell*, above.

¹⁷ R.A. Duff, 'Acting, Trying and Criminal Liability' in Shute *et al.* (eds), *Action and Value in the Criminal Law* 77; and generally R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*, Oxford: Basil Blackwell (1990); I. Kugler, *Direct and Oblique Intention in the Criminal Law*, Aldershot: Ashgate 2002.

accused was charged under the same section. This time, however, he knew the girl to be under age but did not know her to be in the custody of her father. It was held that proof of *mens rea* as to this latter element was necessary.⁹ A strict liability offence is not necessarily, therefore, an offence in which liability is strict as to all the elements of the offence. It is one where such liability exists in respect of one or more elements.

More recently, offences dealing with the possession of proscribed drugs have been construed to carry strict liability as to the fact of possession.¹⁰ Neither of these offences, it will be appreciated, has the general character of 'public welfare offences'. They attack a form of wrongdoing rather than regulate the performance of potentially dangerous activities. This is seen most obviously in *Hibbert* and *Prince*, where it is difficult to account for the inconsistency of treatment unless the court was influenced by the greater moral 'wrong' involved in taking a girl from the known custody of her father, than simply taking a girl, of any age, 'off the streets'.¹¹ The modern trend is for a *mens rea* requirement to be presumed in the absence of cogent reasons to the contrary, particularly as regards offences of patent moral wrongdoing. This has led to the welcome marginalisation of *Prince*,¹² although recent decisions indicate that, at least in the area of sexual activity with minors, liability continues to survive the absence of *mens rea*.¹³ Most recently the Supreme Court effected a robust restatement of the 'unswerving' policy of strict liability in this area in *R v Brown*.¹⁴

7.3 JUSTIFYING STRICT LIABILITY OFFENCES

The obvious justification for strict liability offences is that they serve society's purposes. Indeed, it has been argued that strict liability should be the norm for all offences, the idea being that state punishment can only be justified on preventive utilitarian grounds.¹⁵ Questions of desert on this view should be relevant to sentencing, not conviction.

The advantage of this latter proposal is that it would link the resources of the criminal justice system more closely to the needs of society (what do we do with this offender?) rather than those of the individual (is he to blame?). Rather than 500 person hours spent deciding whether Mrs Hyam was guilty of murder and five hours deciding what to do with her, human and financial resources should be primarily devoted to the latter question. After all, that is where the state's primary interest is located.

Clearly such justification stands in opposition to the idea of no liability in the absence of fault, upon which the moral authority of the criminal law is premised. It assumes the operation of the criminal justice system to be at the sole disposal of society. The organising ethic underlying the operation of the criminal law opposes this, and rightly so. The main output of the system is criminal justice which requires, at least as a general principle, individual rights to trump utility rather than the other way around. This means that individuals should not be subject to state coercion except upon proof of culpable nonconformity to

⁹ Compare also *Cundy v LeCocq* (1884) 13 QBD 207 and *Sherras v De Rutzen* [1895] 1 QB 918.

¹⁰ *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; cf. *Sweet v Parsley* [1969] 1 All ER 347 for another example of inconsistency.

¹¹ In theory, this should be irrelevant for crimes of strict liability where harm prevention, rather than punishment for wrongdoing, is the accepted basis for liability; cf. A. Norrie (1993) 90–4.

¹² See for example *B (a minor) v DPP* [2000] 1 All ER 833, below.

¹³ *R v G* [2008] UKHL 37. Court of Appeal ruled that strict liability for the crime of unlawful sexual intercourse with a minor was not incompatible with Article 6. See J. Stanton-Ife, 'Strict Liability: Stigma and Regret' (2007) 27 OJLS 151.

¹⁴ [2013] UKSC 43.

¹⁵ Lady Barbara Wootton, *Crime and the Criminal Law* (1963) 35–55.

coercive rules.¹⁶ Such ideas have underpinned recent claims that strict liability offences are contrary to Art. 6(2) ECHR as they effectively negate the presumption of innocence.¹⁷ Such an argument has not borne fruit in the European Court, which treats the presumption as a matter of procedural rather than substantive import.

The utilitarian justification is, however, perfectly cogent in the case of public welfare offences of a regulatory nature which have a preventive rather than a censuring function.¹⁸ The point of strict liability for regulatory offences is to make effective enforcement possible.¹⁹ The *mens rea* requirement is an obvious hindrance to efficient and effective social regulation for the benefit of all. In *Lim Chin Aik v The Queen*²⁰ the policy behind this was discussed:

Where the subject-matter of the statute is the regulation for the public of welfare of a particular activity – statutes regulating the sale of food and drink are to be found among the earliest examples – it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability.²¹ The presumption is that the statute . . . can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with.

It is not difficult to understand how strict liability might first have been thought justifiable in cases of tobacco or liquor adulteration.²² The associated social harm was the avoidance of excise duty. By mixing dutiable material with non-dutiable material the duty payable could be reduced. The point of strict liability is to remove the easy strategy of mixing fifty per cent tobacco with fifty per cent straw, paying duty on only the tobacco and then denying all knowledge of how the adulteration may have come about.

Associated with this justification is the presumption that the nature and degree of punishment for strict liability offences should be governed by preventive rather than blaming criteria. Fines are the obvious insignia of strict liability offences as imprisonment is of core crimes. Fines have an obvious (and effective) preventive function if they are pitched at the right level.²³ Most public welfare offences seek to regulate potentially dangerous corporate activities.²⁴ Fines are a cost like any other business cost. Efficient businesses ensure that unnecessary costs are not incurred to ensure maximum profitability. The highest standards of care can best be maintained where there is a refusal on the part of the legal system to take into account how the standard came to be breached. By fining, businesses can be forced not simply to be reasonably careful but to be scrupulously careful.²⁵ This may be

¹⁶ See H.L.A. Hart, *Punishment and Responsibility* (1968) generally, and for his critique of Lady Wootton's proposals see *ibid.* (2nd edn) Oxford: OUP (2008), ch. 7; K. Simons, 'Criminal Law: When is Strict Liability Just?' (1997) 87 *Journal of Criminal Law & Criminology* 1075.

¹⁷ *R v G* [2008] UKHL 37; R.A. Duff, 'Strict Liability, Legal Presumptions and the Presumption of Innocence' in A.P. Simester (ed.), *Appraising Strict Liability*, Oxford: OUP (2006).

¹⁸ Cf. F. Sayre, 'Public Welfare Offences' (1933) 33 *Col LR* 55 at 80.

¹⁹ See W.G. Carson, *op. cit.* generally.

²⁰ [1963] AC 160 PC.

²¹ Cf. *Salabiaku v France* (1988) 13 EHRR 379.

²² In fact a number of such regulatory measures predated the Factories Acts.

²³ In practice they are not what makes this analysis less plausible; cf. A. Hutchinson, 'Note on *Sault Ste Marie*' (1979) 17 *Osgoode Hall Law Journal* 415.

²⁴ Preventing pollution is a typical contemporary illustration of the need for heightened corporate due diligence warranting strict liability. See for example *R v Ezechukwu* [2012] EWCA Crim 2064; [2013] Env LR 15; *R (on the application of Thames Water Utilities Ltd) v Bromley Magistrates' Court* [2013] EWHC 472 (Admin) [2013] Env LR 25.

²⁵ See generally C. Howard, 'Strict Responsibility in the High Court of Australia' (1960) 76 *LQR* 547; A. Kenny, *Freewill and Responsibility*, Oxford: OUP (1978) 93.

him of murder? The doctrine of transferred malice seems to be demanded by general principles of liability rather than being an exception to it. In this respect it has an obvious affinity with transferred defences. As we shall see, if A fires a gun at B in self-defence that defence transfers to excuse the killing of C if C is the unintended recipient of the bullet.²³

Williams also believes the doctrine contrary to principle²⁴ and suggests that liability should not be imposed where the defendant was not at least negligent as to the outcome occurring.²⁵ This would mean that at least in Cases 8, 10, 11 and 12, the doctrine would not apply. It is difficult to see any merit in this suggestion.²⁶ Either we embrace liability for unintended events or we do not. If we do, all we need to be convinced of is that punishing the outcome rather than the intention is morally justifiable. Since the evil outcome is formally identical to the outcome intended, it seems obvious that it is.

(b) *Definitional non-correspondence*

The reader who has followed carefully the discussion on concurrence might be forgiven for supposing that a person's conditions of liability generally require the prosecution to prove a perfect coincidence between the outcome for which it is sought to punish the accused and his mental attitude. The general message which appears is that cases such as *Thabo Meli*, *Fagan*, *Miller*, and the doctrine of transferred malice are not significant exceptions to the principle that criminal liability is incurred for chosen outcomes rather than for the accidents of fate which can be causally attributed to the accused's wrongful conduct. This latter form of liability is known as *constructive liability*. It is liability imposed on the accused rather than liability chosen by his decision and/or willingness to bring about the prohibited result. Liability for chosen consequences is generally assumed to be the principled norm of criminal liability, with constructive liability an unprincipled throwback to the penal excesses of less civilised times. If we examine criminal doctrine more closely, however, it is possible to discern another pattern to the construction of criminal liability – one which reflects the enduring popularity of constructive liability. In particular, criminal doctrine is full of examples appearing to confound the 'correspondence principle' which is a particular application of the requirement of definitional concurrence. The principle has been described as follows: 'If the offence is defined in terms of certain consequences and certain circumstances, the mental element ought to correspond with that by referring to those consequences or circumstances. If a mental element as to a lesser consequence were acceptable, this would amount to constructive liability'.²⁷

The principle holds, in other words, that where *actus reus* and *mens rea* do not correspond, the liability of the accused should not exceed the harm actually encompassed by his own *mens rea*. The major problem which breaches of the correspondence principle are thought to engender is the risk of unfair labelling. Consider, for example, the crime of manslaughter. Compliance with the correspondence principle would require A to be guilty

²³ See also *Pagett* (above, p. 104). J. Horder insists that the resulting defense is an excuse rather than a justification. See J. Horder, 'Self-defence, Necessity and Duress' (1998) *Can J Law and Juris* 143 at 145–9; M. Bohlander, 'Transferred Malice and Transferred Defences' (2010) *NCLR* 555–624.

²⁴ G. Williams, *CLGP* (2nd edn) 135–7.

²⁵ *Ibid.* 132–4; cf. J. Horder, 'Transferred Malice and the Remoteness of Unexpected Outcomes' [2006] *Crim LR* 383.

²⁶ Cf. Smith and Hogan, *op. cit.* 93–5.

²⁷ Ashworth and Campbell, 'Recklessness in Assault – And in General?' (1991) 107 *LQR* 187 at 192. For a penetrating review of the interplay of these and other principles and policies of the criminal law, see A.J. Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) *NCLR* 232; B. Mitchell, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence of One-punch Killers' (2008) 72 *Journal of Criminal Law* 537–47.

of a crime of *homicide* if, and only if, the mental element corresponded with its *actus reus* (conduct causing death) by 'referring to (that) consequence'.²⁸ In fact, liability for manslaughter does not require such correspondence. Far from requiring the *mens rea* to refer to the consequence of death, it requires not even a recognition on the accused's part that his conduct was likely to cause harm. The supposed unfairness of this is that A is labelled for the 'wrong' crime. Constructive manslaughter is, as its title suggests, the quintessential example of constructive liability. Murder, itself, seems to breach the correspondence principle. Liability does not depend upon the accused intending (or foreseeing) death as a result of his actions. Intending serious bodily harm, without more, is enough. Other examples of the principle not being followed are assault occasioning actual bodily harm²⁹ and the unlawful infliction of grievous bodily harm.³⁰ In both cases liability may be incurred where the harm intended or foreseen by the accused was less than the harm referred to in the offence definition.³¹

A strong case can be made that the correspondence principle, unlike other applications of the concurrence principle, does not, in fact, describe an ethical standard underscoring actual criminal doctrine, and it is for this reason that it is more honoured in the breach than in the observance. Non-observance is not intrinsically objectionable.³² It only becomes so if it results in the defendant being labelled unfairly with the wrong crime. What must be sought, it has been argued, is a proper balance between the gravity of the crime charged and the gravity of the defendant's conduct in relation to the crime charged.³³

Consider the following cases, suggested by Horder, as support for a reconsideration of our attitude to the correspondence principle.

Case 15

A, a driver, speeding home from the office to put his children to bed, knocks over and kills a pedestrian. He was aware, because of the speed he was travelling, that any crash he might have would be likely to be fatal.

Case 16

X, an evil surgeon, removes B's kidney without consent under local anaesthetic. He gives no thought to the risk that B might not survive the shock, which she does not.

It is fairly clear here that if either of these wrongdoers should be guilty of murder it should be X, and yet it is A, not X, who has a *mens rea* which corresponds with the *actus reus* of murder, X giving no thought to the possibility of death. This is reason to doubt the general value of the correspondence principle.³⁴ Where causal responsibility for the same

²⁸ This is basically the position adopted by the Criminal Law Revision Committee, 14th Report (1980, Cmnd 7844) (hereafter CLRC).

²⁹ Contrary to s. 47, *Offences Against the Person Act* 1861. See Chapter 11.

³⁰ Contrary to s. 20, *Offences Against the Person Act* 1861. See Chapter 11.

³¹ See generally A.J. Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) *NCLR* 232.

³² J. Horder, 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 *LQR* 95.

³³ See generally J. Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] *Crim LR* 759; J. Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Camb LJ* 502; B. Mitchell, 'In Defence of a Principle of Correspondence' [1999] *Crim LR* 195; J. Horder, 'Questioning the Correspondence Principle – A Reply' [1999] *Crim LR* 206.

³⁴ Horder concedes it has value in limiting criminal liability for crimes of basic intent. For such crimes, for example unlawful infliction of grievous bodily harm, the *mens rea* should, at least, require some foresight of that consequence.

per se and automatism can be understood by examining *Beard*. Beard was unable to claim automatism as he was not acting involuntarily. His action was conscious and purposive. However, he was able to rely on his intoxication for the purpose of negating the specific intent necessary of murder. This intoxication did not avail him for manslaughter or rape, both of which are basic intent crimes.

Intoxication may be pertinent to liability in the following circumstances, however. First, where a pathological change in the brain has occurred due to the aggravating effects of prolonged alcohol or drug abuse. In such a case a disease of the mind may be established sufficient to satisfy the *M'Naghten* rules.²⁹⁶ In principle any mental derangement should suffice, even in the absence of organic degeneration,²⁹⁷ as long as it is not simply a state of intoxication. The law 'has to consider the state of mind the accused is in, not how he got there'.²⁹⁸ Thus if drunkenness produces temporary insanity, for example delirium tremens (DTs), this should be sufficient to come within the rules.²⁹⁹

Mental abnormality, falling short of *M'Naghten* insanity, which results from intoxication will otherwise not affect responsibility unless the defendant's condition falls within the scope of s. 2 Homicide Act. Intoxication alone cannot support this defence unless it constituted a recognised medical condition. Alcoholism *per se* does not constitute diminished responsibility.³⁰⁰

E Conclusion

The present law on intoxication treads a fine line between social defence and the principle of responsibility.³⁰¹ If intoxication is involuntary the defendant will escape liability if the effect of the intoxication was to negate *mens rea*, but not otherwise. This means that the defendant is offered no excuse at all for crimes of inattention or inadvertence or for crimes of *mens rea* where the effect was merely disinhibitory. If intoxication is voluntary the defendant will escape liability where the effect is to negate any intention present in the definition of the offence. For crimes of inadvertence, including criminal damage, evidence of intoxication is irrelevant to liability and, indeed, may well supply the necessary fault element. For crimes where proof of awareness forms part of the mental element the general legal position is accurately expressed in relation to the fault elements of certain offences under the Public Order Act 1995. By section 6(5) '... a person whose awareness is impaired by intoxication, shall be taken to be aware of that which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment'.³⁰² Although restricted to public order offences this provision is widely accepted as being an accurate description of the law's approach for all crimes.³⁰³

²⁹⁶ *Davis* (1881) 14 Cox CC 563.

²⁹⁷ *Devlin J* in *Kemp* [1957] 1 QB 399.

²⁹⁸ *Devlin J*, *ibid.* at 407.

²⁹⁹ *Davis*, above.

³⁰⁰ *R v Wood* [2009] 1 WLR 496 Court of Appeal; *R v Stewart* [2009] 1 WLR 2507; cf. *Tandy* [1989] 1 All ER 267; *R v Dowds* [2012] EWCA Crim 281; [2012] Crim LR 612 and see M. Gibson, 'Intoxicants and Diminished Responsibility: the Impact of the Coroners and Justice Act 2009' [2011] Crim LR 909.

³⁰¹ That is, that people should not be found guilty of a crime for which they lack fault.

³⁰² The American Model Penal Code takes a similar position, which itself was approved in *Majewski*.

³⁰³ Cf. A.J. Ashworth (2010) 218; Smith and Hogan *op. cit.* 251. This is the final conclusion of the Law Commission who recommend the codification of the existing law, including a provision similar to that appearing in s. 6(5) Law Com. No. 229 (1995). A draft Bill of 1998 incorporates a similar provision; Home Office, Violence: Reforming the Offences Against the Person Act 1861 (1998) Draft Bill cl. 19.

The principled objection to the present law on intoxication is that if getting drunk is not the *mens rea* for wounding with intent to cause grievous bodily harm, it is no more the *mens rea* for malicious wounding. Accordingly if drunken unawareness, inattention, or dangerousness is a serious policy problem (and clearly it is a widespread problem), perhaps it should be drunken unawareness, inattention or dangerousness which should be punished rather than allow the courts to continue to impose fictionalised responsibility for a crime where *mens rea* is clearly lacking.³⁰⁴ The 'policy hole' could be filled by a conduct crime of 'dangerous intoxication', which was the recommended option of the Butler Committee,³⁰⁵ alternatively, by a result crime of 'causing harm while intoxicated'. This was once the recommended option of the Law Commission.³⁰⁶ A later recommendation followed the pragmatic line of codifying the existing law, including a provision similar to that appearing in section 6(5).³⁰⁷ Since it is common knowledge that intoxication disposes people to commit crime, voluntary intoxication supplies the fault element which intention and recklessness normally express. It is not necessarily contrary to principle, therefore, to hold a person responsible for an unforeseen harm if both the harm and the lack of foresight were occasioned by voluntary intoxication (a mind at fault).³⁰⁸ A more elegant solution would be to remove entirely the need to rely on such 'constructive recklessness'. This could be done by replacing *Cunningham* recklessness by a humanised form of *Caldwell* recklessness, requiring the risk to be foreseen unless the failure to foresee the risk was itself culpable, as the fault element in crimes of violence.³⁰⁹ The desirable consequence which would follow is that voluntary intoxication would lose its capacity to excuse for all crimes of recklessness, without challenging the law's internal consistency, inadvertence due to intoxication³¹⁰ being culpable under such a test.³¹¹

The latest Law Commission thinking is that the specific/basic intent dichotomy fails to do the job it should be doing and should be abandoned. It proposes a substitute scheme which comprises no rigid categorisation of offences but instead concentrates on whether voluntary intoxication can, as an inherently reckless form of behaviour, be substituted for the fault element of the offence in question (as it can in arson and in most of what are currently accepted as basic intent crimes). The general rule is then that in determining whether the allegation has been proved, D is to be treated as having been aware at the material time of anything which D would then have been aware of but for the intoxication. It then lists five cases in which the general rule does not apply: in those cases, evidence of D's intoxication may be taken into account in determining whether the allegation has been proved, namely that at the material time –

- (a) D intended a particular result (but this does not include merely intending to do the acts which constitute the conduct element of the offence),

³⁰⁴ This is a solution advocated by Ashworth: also LCCP No. 127 (1993). On this see G. Virgo, 'The Law Commission Consultation Paper on Intoxication and Criminal Liability' [1993] Crim LR 415.

³⁰⁵ Report of the Committee on Mentally Abnormal Offenders, Cmnd 6244 (1975).

³⁰⁶ In LCCP No. 127 (1993) the Law Commission has subsequently resiled from this latter position in 'Legislating the Criminal Code' in which they recommend a 'codification' of the present law 'based upon *Majewski*'.

³⁰⁷ Law Com. No. 229 (1995); for a useful review of reform suggestions see R.D. Mackay, *Mental Condition Defences in the Criminal Law*, Oxford: Clarendon Press (1995) 171–9.

³⁰⁸ Cf. J. Plamenatz, 'Responsibility, Blame and Punishment' in P. Laslett and W.G. Runciman (eds), *Philosophy, Politics and Society*, 3rd Series (1989) at 182; S. Cough, 'Surviving Without *Majewski*' [2000] Crim LR 719.

³⁰⁹ S. Gardner, 'The Importance of *Majewski*' (1993) 14 OJLS 279; also note at (1993) 109 LQR 21.

³¹⁰ Or anger, haste, etc.

³¹¹ See *Reid* [1992] 3 All ER 673. This would be unlikely to have any serious detrimental effect on conviction rates for crimes of violence.

Adam is entitled to use reasonable force:

- (a) in the defence of property (wine);
- (b) to prevent a crime from being committed; and
- (c) to effect the arrest of Eve.

The reasonableness of Adam's use of force will depend upon whether force of the type and gravity used¹⁷⁶ was immediately necessary to effect whichever of these purposes Adam acted to discharge. So, in *Attwater* it was held that the defendant was unable to rely on the defence of prevention of crime when the force used (dangerous driving to prevent the escape of a driver who had caused an accident) occurred after the driver's offence had already taken place.¹⁷⁷

There are two separate aspects to the reasonableness requirement, reflecting the justificatory nature of the defence. First, the use of force must be necessary. Second, the degree of force used must be proportionate to the threat encountered.

1 The use of force must be necessary

The use of force in private defence is dependent upon the existence of a justifying 'trigger' – self-defence, prevention of crime and so on. It includes the prevention or termination of a trespass so that a person can use reasonable force to remove a trespasser from his land and, apparently, any moveable object such as a motor vehicle.¹⁷⁸ However, the right is not absolute. In *R v Burns*¹⁷⁹ the defendant physically ejected a prostitute from his car when, upon seeing her properly, he thought better of it. She had asked him to be returned to the pick-up spot but he refused. The Court of Appeal agreed with the trial judge that the use of force was unlawful. Although it was lawful to use force to remove a trespasser from property, including a vehicle, this was so only if no other reasonable method of terminating the trespass existed. In this case there was, namely to return the woman, as agreed, to the pick-up spot.

(a) Other options?

The use of force will not be reasonable if it is not immediately necessary. If, therefore, as in *Burns*, there are other defence options available the use of force may not be reasonable. In Case 9 the objective necessity for using violence requires consideration to be given to what Adam was trying to achieve and what other means were available for this purpose. If Adam wished to capture and arrest Eve, or simply prevent his wine being stolen, the use of violence would only be immediately necessary if simple restraint (locking the cellar door) was not an option.¹⁸⁰ However, if Eve was entering the cellar for the purpose of committing criminal damage to the wine, the use of such violence might become necessary. Whether Adam's conduct was justifiable in the light of this would depend upon whether the amount of force used was proportionate to the threat posed. This will be covered below.

¹⁷⁶ That is, violence rather than restraint.

¹⁷⁷ [2011] RTR 173; Cf. *R v Morris*, unreported, 16 April 2013 CA.

¹⁷⁸ D.J. Lanham, 'Defence of Property in Criminal Law' [1966] Crim LR 366.

¹⁷⁹ [2010] EWCA Crim 1023.

¹⁸⁰ Imprisoning Eve, under these circumstances, is independently lawful under s. 24 Police and Criminal Evidence Act 1984.

(b) A duty of retreat?

At common law, a duty to retreat was imposed in cases of self-defence such that failure disentitled the victim of aggression to rely on self-defence.¹⁸¹ There is no longer a duty to retreat for self-defence. However, the reasonableness of a person's reaction to a threat of force might well, in appropriate circumstances, hinge upon whether the person availed himself of a reasonable opportunity to withdraw or otherwise defuse the situation.¹⁸² There is no doubt, however, that English law supports the right of the individual to stand their ground if they are not otherwise acting unlawfully. In *R v Field* F was told that B was coming round to get him. F remained where he was and, in repelling B's attack, killed him. The prosecution case was that his use of force was unreasonable since he had the opportunity to retreat and seek police protection. The Court of Appeal rejected this argument and allowed the defence. Section 76 makes no change in this respect.¹⁸³

Case 10

Cain and Abel square up to each other in a pub. Abel, in a vain attempt to avoid a fight, threatens to smash Cain's head in. Cain punches Abel on the nose.

Whether or not Cain's use of force was necessary is a matter for the jury. They will take into account any statement of Cain as to why he threw the punch rather than, say, retreat or present a non-combative demeanour. They may conclude that Cain's conduct was more suggestive of his own aggressive intentions, or a response to Abel's provocative words. On the other hand, if Cain thought it was merely a matter of time before Abel threw his own punch and did not feel able to retreat effectively or defuse the situation, they may conclude that Cain's punch was necessary from his own point of view and, particularly if it was not followed up, also proportionate.¹⁸⁴

There is no rule of law which disentitles a person to rely on self-defence where he is the initial aggressor. The position was summed up in the Scottish case of *Burns v HM Advocate*:

It is not accurate to say that a person who kills someone in a quarrel which he himself started, by provoking it, or entering into it willingly, cannot plead self-defence if his victim then retaliates. The question whether the plea of self-defence is available depends, in a case of that kind, on whether the retaliation is such that the accused is entitled then to defend himself. That depends on whether the violence offered by the victim was so out of proportion to the accused's own actions as to give rise to the reasonable apprehension that he was in immediate danger from which he had no other means of escape, and whether the violence which he then used was no more than was necessary to preserve his own life or protect himself from serious injury.¹⁸⁵

The position is different if he deliberately provokes a fight so as to give himself an excuse for injuring or killing the victim.¹⁸⁶ In both private and public defence motive makes the difference between lawful and unlawful aggression.

¹⁸¹ J.H. Beale, 'Retreat from a Murderous Assault' (1903) 16 Harv LR 567; for a useful review of the authorities on this matter see Dressler (1987) ch. 18. No such duty applied in the case in defence of public interests.

¹⁸² See *Bird* [1985] 2 All ER 513; Draft Criminal Law Bill 1993, cl. 28(8).

¹⁸³ *Field* [1972] Crim LR 435; *Redmond-Bate* [1999] Crim LR 998. And see most recently *Duffy v Chief Constable of Cleveland* [2007] EWHC 3169 (Admin).

¹⁸⁴ Cf. *Shannon* (1980) 71 Cr App R 192.

¹⁸⁵ *Burns v HM Advocate* 1995 SLT 1090 applied in *R v Harvey* [2009] EWCA Crim 469; *R v Rashford* [2005] EWCA Crim 377.

¹⁸⁶ *Ibid.*

made an attempt to clarify when criminal prosecutions were appropriate for injuries effected in the course of contact sports. The defendant was convicted in the course of an amateur football game of inflicting grievous bodily harm for effecting a robust tackle which broke the victim's leg. The Court concluded, quashing the conviction, that resort to the criminal courts should be exceptional and should require a sufficiently grave breach of rules that resort to criminal proceedings was appropriate rather than the game's own internal disciplinary system. In this context consent would be presumed unless what occurred had gone beyond what a player 'might reasonably be regarded as having accepted by taking part in the sport'. Context was everything, including the type of sport, the level at which it was played,²⁴⁴ the nature of the act, the degree of force used, the risk of injury, and the state of mind of the defendant, in particular whether the evidence suggested misjudgement in the heat of the moment or something more violent and calculated.²⁴⁵ In cases of intentional injury a player does not (and cannot reasonably be expected to) consent.²⁴⁶

By this same reasoning, the presumption is that other sports in which the intentional causing of injury do not figure such as karate, judo and wrestling are subjected to similar principles.²⁴⁷ Participants in such organised contests consent only to those contacts allowed by the rules of the contest and probably also to those other contacts the risk of whose occurrence the participants are reasonably expected to assume.²⁴⁸ Hitting below the belt would fall into this category. Hitting the victim while on the floor or between rounds would not.

(ii) Horseplay

Also recognised as an activity for which valid consent can be given to dangerous risk-taking is what has been termed 'horseplay'. This has been deemed lawful, even where the degree of harm to which the participants are exposed is severe. So, in *Jones and Others* the Court of Appeal ruled that a defence of consent could be raised to a charge of s. 20 where the defendants concerned were boys who had caused others a broken arm and a ruptured spleen, during the course of rough horseplay. It is important to remember what is at issue. Obviously the injuries themselves were not consented to. Moreover, in law, they **could not be consented to**. If the boys had said to the victim, 'we are going to break your arm and rupture your spleen. How about it?', the victim's consent, if he had been fool enough to grant it, would have been ineffective. The decision is, rather, that it is **nevertheless** in (or not contrary to) the public interest for people to be free to engage in certain activities which involve a risk of serious injury so long as the point of the activity is not to realise that risk.

Surprisingly perhaps, the legality of such activities is not fed by the presence of either express or implied consent.²⁴⁹ Horseplay can be relied upon not only where V actually does consent expressly or impliedly but also where D genuinely believes that is the case²⁵⁰ and the victim understands that the purpose is not hostile.²⁵¹ This seems implicit in the case of

²⁴⁴ In practice prosecutions occur most often in amateur sport. When they do occur, sentences on conviction can be surprisingly harsh *Davies* [1991] Crim LR 70 (six months); *Lloyd* (1989) 11 Cr App R 36 (eighteen months); *Chapman* (1989) 11 Cr App R 303 (eighteen months).

²⁴⁵ *Ibid.*

²⁴⁶ *Barnes* [2004] EWCA Crim 3246 per Lord Woolf at 511.

²⁴⁷ See LCCP No. 139 (1995) 165–70.

²⁴⁸ See *Billingshurst* [1978] Crim LR 553.

²⁴⁹ For a different view see R. Leng, note 255 below.

²⁵⁰ *R v A* [2005] All ER (D) 38 (4 July 2005).

²⁵¹ *Griffin* (1869) 11 Cox CC 402.

Jones and also in *Aitken*.²⁵² In the former the defendants had thrown their victim into the air and failed to catch him. In *Aitken* the defendants, as a 'prank', had doused their fellow officer's flying suit with spirit and had set light to it. In neither case was there evidence of consent sufficient to, say, negate the *actus reus* of rape. In effect, the judges in both cases were saying 'you have to put up with a bit of rough and tumble if you are a "lad" – an unfortunate qualification of the principle of autonomy, particularly if you are thinking of joining the armed forces. Without such a qualification, however, criminal liability might be too easily sustained by the young and inexperienced. Just how dangerous were the 'bumps' I incurred on my twenty-first birthday? Fortunately I will never know.

(iii) Sexually transmitted disease

It is now clear that a person can consent to the risk of contracting a sexually transmitted disease, provided that that consent is informed and the disease was not deliberately passed on.²⁵³ Consent, in other words is not a defence to the section 18 offence where the harm caused is a sexually transmitted disease. The Crown Prosecution Service have issued the following policy statement concerning prosecution, which seems to encapsulate the state of substantive law at the present time:

The informed consent of the complainant (that is, knowledge of the defendant's specific infected status) to take the risk of being infected by engaging in sexual activity with a person who is infectious in cases where the defendant cannot be shown to have intentionally passed on the infection – is a defence in cases of section 20 grievous bodily harm. This does not necessarily mean that the defendant must have disclosed his or her condition to the complainant. A complainant may be regarded as being 'informed' for the purposes of giving consent where a third party informs the complainant of the defendant's condition, and the complainant then engages in unprotected sexual activity with the defendant. Similarly, a complainant may be regarded as being 'informed' if they become aware of certain circumstances that indicate that the defendant is suffering from a sexually transmitted infection, such as visiting the defendant while he or she is undergoing treatment for the infection in hospital.

Whether the complainant gave his or her informed consent is a matter for the jury.²⁵⁴

4 Consent and the Law Commission

The Law Commission has published two consultation papers on the role of consent in offences against the person. In the latest,²⁵⁵ the general proposal made is that individuals should have the right to consent to any injury falling short of serious disablement.²⁵⁶ This would include controversial contexts such as sado-masochism²⁵⁷ as well as those already provided for under the present law. Unorganised fighting should remain unlawful as long as the activity falls clearly outside the context of 'undisciplined, consensual horseplay'.²⁵⁸ In cases of sports injuries the further proposal made is that liability should be dependent

²⁵² Cf. *Aitken* (1992) 95 Cr App R 304; *Jones* (1986) 83 Cr App R 375.

²⁵³ See *Dica*, *supra*.

²⁵⁴ Policy for prosecuting cases involving the intentional or reckless sexual transmission of infection 2009.

²⁵⁵ R. Leng, 'Consent and Offences against the Person'; Law Commission Consultation Paper No. 134 (1994) Crim LR 480; LCCP No. 139 'Consent in the Criminal Law' (1995).

²⁵⁶ See generally S. Shute, 'The Second Law Commission Consultation Paper on Consent: Something Old, Something New, Something Borrowed: Three Aspects of the Project' [1996] Crim LR 684; D.C Ormerod and M.J. Gunn, 'The Second Law Commission Consultation Paper on Consent: Consent – A Second Bash' [1996] Crim LR 694.

²⁵⁷ 10.52.

²⁵⁸ 14.19.

B Offences against children under 16 but over 13

The Sexual Offences Act 2003 creates a number of other offences designed to protect children from sexual abuse. Sections 9 and 10 run parallel to the provisions in sections 7 and 8. The conduct element in s. 9 is again an intentional sexual touching, and in s. 10 is intentionally causing or inciting a child to engage in sexual activity. There are no specific offences of 'rape' and 'assault by penetration' when the victim is over 13 but under 16. These offences are covered by the general prohibitions of sections 1 and 2. The key differentiating feature in these offences is that liability is strict where the victim is under 13. However, for victims over 13 there is a defence of reasonable belief that the child is over 16. These offences are also differentiated according to whether the defendant is under or over 18.¹¹³ In the former case the maximum penalty is mitigated.

The point of differentiating in this way is the extreme seriousness of sexual activity with persons under the age of 13, particularly in the case of adults. This is no doubt true but it is not clear why there should be cut off points of such penal significance when the circumstances differentiating the two cases may be morally insignificant. Is there any reason to treat a person's belief that a child over 13 but under 16 was in fact over 16 so very differently from a defendant's belief that a child under 13 was in fact over 16? The defendant's testimony of an honest belief may be less credible in the case of the child under 13, but should the issue not be left to the jury? Again is there any reason to treat the testimony of a defendant of 18 years and one month so very differently from that of a defendant of 17 years and 11 months when the appearance of the victim, the nature of the relationship between the two and the cogency of the belief are not materially different?

Sections 11–15 create new offences relating to children. These include 'engaging in sexual activity in the presence of a child' (s. 11), 'causing a child to watch a sexual act' (s. 12), 'arranging or facilitating commission of a child sexual offence' (s. 14) and 'meeting a child following sexual grooming' (s. 15). Again these defences are differentiated according to the age of the victim and defendant. Except for section 14 where no such defence applies, for the other offences there is a defence of reasonable belief in consent where the victim is over 13 but under 16. Sections 11 and 12 mirror sections 9 and 10 in that lesser maximum penalties apply for defendants under 18. Sections 14 and 15 do not have this provision. In relation to section 15 the offence only applies to defendants over 18 and in relation to section 14, although the offence may be committed by a person under 18, no lesser sentence applies.

C Engaging in sexual activity in the presence of a child

By section 11:

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) he intentionally engages in an activity,
 - (b) the activity is sexual,
 - (c) for the purpose of obtaining sexual gratification, he engages in it –
 - (i) when another person (B) is present or is in a place from which A can be observed, and
 - (ii) knowing or believing that B is aware, or intending that B should be aware, that he is engaging in it, and

¹¹³ Under the previous law there was a young man's defence. Those under the age of 24 were given one opportunity to escape liability on the basis of a claim of mistake as to victim's age.

- (d) either –
 - (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
 - (ii) B is under 13.
- (2) A person guilty of an offence under this section is liable –
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

The rationale of this and the succeeding section is to protect children from the corruptive influence of witnessing sexual activity. However, they are pitched at defendants whose purpose is corruptive and/or exploitative. For both offences, therefore, the mere fact of engaging in or showing the activity in the presence of a child is insufficient; the defendant must have as his purpose in engaging in the activity sexual gratification derived from the presence of the child. So parents who have sex in the presence of their offspring or lovers who have sex in a public park where children are present, or teachers who show a sex education film to pupils do not commit the offence unless sexual gratification is created or enhanced by the presence of the child. The offence requires the victim's presence in the place where the activity takes place or his/her presence in a place from which the activity can be observed. It is not necessary for the victim to see the sexual activity. It is sufficient that D believes or intends that the victim is aware that he is engaging in it. The fact that the victim refuses to look therefore is not fatal to a conviction.

D Causing a child to watch a sexual act

By section 12:

- (1) A person aged 18 or over (A) commits an offence if –
 - (a) for the purpose of obtaining sexual gratification, he intentionally causes another person (B) to watch a third person engaging in an activity, or to look at an image of any person engaging in an activity,
 - (b) the activity is sexual, and
 - (c) either –
 - (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
 - (ii) B is under 13.

The offence in section 12 of comparable purpose to that of section 11 refers to 'causing' the child to watch a sexual act except that here there is no need for the defendant to engage in the relevant activity. The act may be live, or in photographic form, sexual activity need not take place 'live' but may be conveyed through a photograph, a pseudo-photograph, drawing or film. It may be for immediate sexual gratification as where A derives gratification from showing V pornographic films or for the purpose of gaining sexual gratification at a later stage where the causing is done to put the child 'in the mood' for sexual activity.¹¹⁴

E Arranging or facilitating commission of a child sexual offence

By Section 14:

- (1) A person commits an offence if –
 - (a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and

¹¹⁴ *R v Abullahi* [2006] EWCA Crim 2060.

diabetes coupled with marriage problems were all found capable of grounding the defence.¹⁷⁶ Although such conditions may act as behavioural triggers they exhibit no common characteristics other than their tendency to elicit jury sympathy and understanding. The recognised 'medical condition' requirement means, in theory, that such reaction will no longer be determinative. Problems will still remain, however. Some of these were raised in responses to the Ministry of Justice Consultation Paper. While the phrase 'recognised medical condition' will clearly encompass all relevant mental disorders which are officially recognised¹⁷⁷ it is not restricted to these. As Mackay points out, it must cover both 'psychological' and 'physical' conditions including conditions like epilepsy, sleep disorders and diabetes.¹⁷⁸ Recognised medical conditions can be found in authoritative classificatory lists, including the World Health Organisation's International Classification of Diseases and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. It is likely that the following conditions, which grounded the old law, will continue to be accepted as recognised mental conditions, developmental disorders: depression, *R v Gittens* (1984); bipolar, *R v Inglis* (2010) EWCA Crim 2269; paranoid schizophrenia, *R v Sutcliffe* (1981), *R v Petrolini* [2012] EWCA Crim 2055; brain damage, psychopathy, *Byrne* (1960); paranoid personality disorder, *Martin* [2002], post-natal depression, *Reynolds* (1988). One can add to these, one assumes, autism and battered women's syndrome.

The new law, therefore, will require the testimony of expert witnesses in any case where the condition relied upon by the defendant is contested or ambiguous.¹⁷⁹ Contested examples which were accepted as a basis for the defence under the old law include battered women's syndrome (*Ahluwalia*, *R v Hobson* (1997) CA) and premenstrual syndrome (*R v Sadie Smith* 1982). Nevertheless the decision is ultimately one for the judge. In *R v Osborne* (2010) EWCA Crim 547 the Court of Appeal ruled that attention deficit hyperactivity disorder (ADHD) would not afford any ground for allowing the appeal against conviction on the basis of diminished responsibility.

(a) Drugs and alcoholism

A difficulty encountered under the previous law was the availability of the defence in cases of alcoholism or drug abuse, since both can be treated as causing or synonymous with mental abnormality and, for the purpose of the new defence, lead to loss of rational judgement, loss of self-control and so on. Three situations should be distinguished.¹⁸⁰ The first is a case involving intoxication alone. This does not support the defence under new or old law since the defendant's condition will not be due to disease or 'inherent cause' (old law) or 'arise from a recognised medical condition' (new law).¹⁸¹ The second is where the defendant is an alcoholic who commits a criminal harm attributable to the brain damage or psychosis which may be caused by this condition. In *Tandy* the Court of Appeal acknowledged that chronic alcoholism could be a cause of mental abnormality

¹⁷⁶ TCL 692-4. *Nichols* (1974) *The Times*, 5 October. Also *Price*, below. Compare the facts, and outcome, of this case with *Hennessy* [1989] 2 All ER 9, above.

¹⁷⁷ As in the Diagnostic and Statistical Manual of the American Psychiatric Association.

¹⁷⁸ R.D. Mackay, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea' [2010] Crim LR.

¹⁷⁹ Though the jury are not bound to accept the medical evidence – *R v Sanders* [1991] Crim LR 781.

¹⁸⁰ M. Gibson, 'Intoxicants and Diminished Responsibility: The Impact of the Coroners and Justice Act 2009' [2011] Crim LR 909.

¹⁸¹ *R v Dowds* [2012] 1 Cr App R 455.

within the meaning of s. 2.¹⁸² Presumably this will continue to be the case as chronic alcoholism is a recognised medical condition. The third is where the defendant is an alcoholic who commits a criminal harm as a result of becoming intoxicated consequent upon suffering from this condition. In *Tandy*, the defence was refused on this basis, despite evidence of serious addiction. Since the basis for excusing defendants is the defendant's inability to make rational choices as to how he would like to act, tying this excuse to a specific cause is arguably an unjustifiable restriction. What is important, surely, is whether responsibility is lacking rather than why it is lacking. The apparent reason for restricting the operation of the defence to specific causes is to reduce the scope for raising spurious excuses. If so, the rationale for the restriction is here unclear. If alcoholism is a condition relevant to responsibility at all, it is, almost by definition, a condition involving reduced willpower. In *R v Stewart* the Court of Appeal clarified the position following *Tandy* indicating that alcohol dependency syndrome could be considered a mental condition capable of producing, where it caused involuntary consumption of alcohol depending upon the evidence, an abnormality of mind. This decision is presumably equally applicable to the notion of mental functioning (loss of rational judgement or self-control) under the new law.

A related problem is the position where the defendant suffers from abnormality of mind and, in this condition, becomes intoxicated. The position here is complicated, and one which demands a lot of the jury. In *Egan*¹⁸³ the Court of Appeal said that the jury should be directed to ignore the effect of the intoxication and consider whether 'the combined effect of the other matters which do fall within the section amounted to such abnormality of mind as substantially impaired the defendant's mental responsibility'.¹⁸⁴ In short, this requires the defendant to prove that the killing was due to his abnormality rather than the voluntary consumption of alcohol. In *Dietschmann* the House of Lords nevertheless ruled that diminished responsibility could be relied upon where a mentally abnormal man killed while intoxicated so long as the mental abnormality played a part in the killing.¹⁸⁵ This presumably will continue to be the case under the new law, always assuming that the mental abnormality is a recognised mental condition.

3 Substantially impaired D's ability to do one or more of the things mentioned in subsection (1A)

This provision tightens up the previous formulation which referred to 'substantial impairment of responsibility'. Whether it is a substantive improvement is a matter of opinion but it will no doubt be easier for medical experts to reach a considered opinion based upon clinical criteria. In each case it was previously a matter for the jury as to whether the defendant's condition is such as to substantially impair his responsibility and was a matter of degree.¹⁸⁶ In *Lloyd*¹⁸⁷ it was suggested that juries should be asked to approach the notion of substantial impairment in a broad common-sense way, referring to impairments which are more

¹⁸² *Tandy* (1988) 87 Cr App Rep 45; cf. *Inseal* [1992] Crim LR 35.

¹⁸³ [1992] 4 All ER 470.

¹⁸⁴ [1992] 4 All ER 470; approving the direction in *Gittens* [1984] 3 All ER 252; also the guidance given by Professor Smith in his commentary on the case in [1984] Crim LR 553. Followed in *R v Wood* [2008] EWCA Crim 1305.

¹⁸⁵ *Dietschmann* [2003] UK HL 10. Followed in *R v Wood* [2008] EWCA Crim 1305 and *R v Stewart* [2009] EWCA 593. G.R. Sullivan, 'Intoxicants and Diminished Responsibility' [1994] Crim LR 156.

¹⁸⁶ *Byrne* [1960] 3 All ER 1.

¹⁸⁷ [1966] 1 All ER 107.