

PUBLIC
ANNEX K

**J. Horder, *Ashworth's Principles of Criminal Law* (10th edn,
Oxford University Press 2022)**

a regime which ensures maximum prevention. The 2007 Act provides for three types of sentence—publicity orders (requiring the organization to make it known that it has been convicted of this offence); remedial orders (requiring the offender to remedy the causes of the homicide); and fines (which may prove problematic for the reasons just given, and which are questionable in so far as they may have deleterious effects on the level of public service provided by organizations such as hospital trusts and the police).¹¹⁷

6.4 FAULT AND MENS REA: GENERAL PRINCIPLES

(a) MENS REA AND FAULT

It has already been argued that there should be no criminal liability without fault for imprisonable offence.¹¹⁸ Indeed, there is a respectable argument for saying that there should *never* be criminal liability without fault;¹¹⁹ but while that view seems persuasive in relation to the liability of individuals, it is perhaps less persuasive where the liability of businesses is concerned, particularly in cases where there is a defence to the crime in question of 'due diligence shown' (or the like).

The claim that criminal offences should include *mens rea*—guilty mind—requirements reflects the view that criminal liability should be imposed only on persons who can be said 'subjectively' to have associated *themselves* through their behaviour with the wrongful conduct in question (including the circumstance or consequence elements of the offence, if any). In broad terms, this occurs when people engage in wrongful conduct intentionally, knowingly, recklessly, while possessing similar mental states such as indifference, awareness, or suspicion, or when they are complicit in the wrongdoing of others. The subjective *mens rea* approach encompasses the belief principle, which holds that criminal liability should be based on what defendants believed they were doing or risking, not on facts which were unknown to them at the time.¹²⁰ For example, according to the belief principle, if D is found in possession of class A drugs, but claims he believed he was in possession of class B drugs, if the prosecution cannot prove otherwise he should be acquitted of 'possessing class A drugs'. It should not be sufficient to show that he knew he was in possession of prohibited drugs unless, of course, as under the present law, there is a specific offence of possessing 'a prohibited drug'.¹²¹

¹¹⁷ <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/corporate-manslaughter/>>.

¹¹⁸ See Chapter 4.6.

¹¹⁹ For a sophisticated defence of this view, see A. P. Simester, 'A Disintegrated Theory of Culpability', in D. Baker and J. Horder (eds), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (2013); Andrew Simester, *Fundamentals of Criminal Law* (2021), ch 3.

¹²⁰ A. Ashworth, 'Belief, Intent, and Criminal Liability', in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence*, 3rd Series (1989).

¹²¹ Misuse of Drugs Act 1972, s 5(2). The law, more generally, flouts the belief principle by taking the approach that if D knew or believed he or she was in possession of something, then it will be assumed he or she knew what that 'something' was: see *Warner* [1969] 2 AC 256 (HL).

By contrast, liability is sometimes based on a broader set of fault elements that are said to go beyond a finding of 'guilty' mind. These are fault elements traditionally thought to involve judging people, after the fact, as 'grossly negligent' or as having shown a 'lack of due care and attention'. Such evaluative ('objective') judgments are the means by which a fault-focused association between the defendant's behaviour and the wrongful conduct is brought about later *by the judgment of others* (judge or jury), rather than by the defendant him or herself in virtue of what he or she intended, knew, or realized, and so on. In relation to the belief principle as it applies to possession offences, for example, the objective, judgmental approach would ask the question, 'Should D have realized at the relevant time exactly what was in his or her possession?' If D had no reason to suppose he or she was in possession of something it is prohibited to possess, then the objective judgmental approach would advocate acquittal.

In many cases, the more subjective *mens rea* approach is supported, in broad terms, by the principle of fairness and proportionality of offence construction, set out briefly in Chapter 4.6.¹²² This approach may also be claimed to enhance the constitutional values of legality and rule of law, by reassuring citizens that they will be liable to conviction, and to the exercise of state coercion against them, only if they intentionally, knowingly, or recklessly, and so on, cause or risk causing a prohibited harm. If this were achieved, the criminal law would ensure that 'each person is guaranteed a greatest liberty, capacity and opportunity of controlling and predicting the consequences of his or her actions compatible with a like liberty, capacity and opportunity for all'.¹²³ This can also be a significant concern when choosing between (subjective) fault elements, in defining a crime. For example, in relation to the inchoate offence of assisting and encouraging crime (discussed in Chapter 13.7), the acts of assistance or encouragement must in law be intended: even recklessness will not suffice. That is because, if 'reckless assistance or encouragement' was an offence (not just intended assistance or encouragement), far too much unobjectionable conduct would fall within the scope of the offence. Every journalist who wrote a controversial article realizing it might encourage a minority of people to take up violent opposition would become guilty of encouraging violence (whether the violence took place or not). Every driver who moved from the outside lane to the middle lane to allow a driver seemingly breaking the speed limit by a large amount to pass by would be guilty of assisting dangerous driving (whether the faster driver was in fact driving dangerously or not). By requiring proof of nothing less than an *intention* to assist or encourage, the law rightly confines the scope of inchoate liability in such cases in such a way as to avoid these consequences.

English law does not, though, adopt the subjective *mens rea* approach to the definition of many crimes, even quite serious ones. For example, manslaughter may be based on a demonstration of a defendant's 'gross negligence' (an objective judgment

¹²² Cf A. Brudner, 'Agency and Welfare in Criminal Law', in S. Shute, J. Gardner, and J. Horder (eds), *Action and Value in Criminal Law* (1993), and R. Lippke, *Rethinking Imprisonment* (2007), 84–98.

¹²³ D. A. J. Richards, 'Rights, Utility and Crime', in M. Tonry and N. Morris (eds), *Crime and Justice: An Annual Review* (1981), iii, 274.

about the fault in someone else's association with a death caused). Similarly, rape can also be found in law where a defendant has non-consensual intercourse with another in the absence of a reasonable belief that the other is consenting to the intercourse.¹²⁴ the question whether a defendant's belief in consent was 'reasonable' is a matter for evaluative judgment after the fact by the jury at trial. So, the subjective *mens rea* approach involves what was referred to at the end of Chapter 4.1 as a 'permissive' principle of criminal law. This is a principle that may be permissibly applied in many circumstances, but will not necessarily be appropriately applied in many circumstances: rape is a good example of a crime where the subjective *mens rea* approach is not appropriate.¹²⁵

Moreover, there is less of a difference than is sometimes supposed between the subjective *mens rea* approach to fault and the approach to fault based on objective judgment. When someone is negligent, there is something to blame about their state of mind at the time of the offence, not just something to blame with the benefit of hindsight at trial. Where someone truly has been negligent, there will have been an absence of thought about the circumstances or the consequences where such thought could and should have been given at the time, or there will be a belief reached without proper regard for its basis.¹²⁶ In that respect, it can be argued that the objective, judgmental approach is, in fact, a *mens rea* or guilty mind-based approach to criminal culpability.

Associated with the subjective *mens rea* principle—but in fact having a more general basis—is what is commonly termed the principle of 'correspondence'.¹²⁷ This principle—also a permissive principle in English law—insists that the fault element for a crime should correspond to the conduct, circumstance, or consequence element specified for the crime. Thus, if the conduct element is 'causing serious injury', then the fault element ought to be 'intention or recklessness as to causing serious injury'; a lesser fault element, such as 'intention or recklessness as to a mere assault', would breach the principle of correspondence.¹²⁸ However, it is important to note that the correspondence principle can—and should—be applied to instances in which fault can be found on the basis of objective judgment. For example, in cases of gross negligence manslaughter, it should not be enough to show that, in causing death, the defendant was grossly negligent as to causing only some harm. The correspondence principle insists that the prosecution must prove that, in causing death, the defendant was grossly negligent as to causing death, because that is the consequence the defendant is to be held liable for bringing about.¹²⁹

¹²⁴ Sexual Offences Act 2003, s 1. See Chapter 9.5(d).

¹²⁵ See Chapter 9.5(d).
¹²⁶ The outstanding modern discussion is that of A. P. Simester, 'Can Negligence Be Culpable?' in I. Horder (ed.), *Oxford Essays in Jurisprudence*, 4th Series (2000).

¹²⁷ A. Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 New Crim LR 232; Andrew Simester, *Fundamentals of Criminal Law* (2021), ch 13.

¹²⁸ See the discussion of this issue in Chapter 9.3(c).

¹²⁹ See *Adomako* [1995] 1 AC 171 (HL).

(b) CONSTRUCTIVE LIABILITY AND 'MORAL LUCK'

So-called constructive liability attracted a great deal of critical attention from the influential Cambridge criminal law theorists of the early twentieth century.¹³⁰ A 'constructive' liability approach is an approach that gives primacy of place to outcomes in determining liability. In itself, that might not be too contentious, but what makes constructive liability 'constructive' is what makes criminal liability turn on outcomes, at the expense of the correspondence principle as it relates to fault in bringing about those outcomes. In other words, on a constructive liability approach, one may be found liable for outcomes one brought about by engaging in certain acts, even if one did not know at the time that one's act might have these outcomes. The argument in favour of constructive liability runs something like this. If D (say) did in fact kill V, or was in fact in possession of (say) an illegal firearm, and so on, then such outcomes should form the basis for finding D criminally liable, even if—for fairness reasons, and to draw distinctions between offences according to their gravity—some fault element may also be required before conviction is appropriate. A classic case, mentioned right at the start of this chapter, is the offence of assault occasioning actual bodily harm (s 47 of the Offences Against the Person Act 1861). D is liable for occasioning the actual bodily harm—the outcome—even if he or she only had the fault element for the assault, and did not appreciate that actual bodily harm might result from that assault. All actions bring about unintended as well as intended outcomes, the argument continues, and we cannot claim credit for bringing about the good (unintended) outcomes while denying any blame for bringing about the bad (unintended) outcomes. In an outcome-generating world of action, we have to shoulder responsibility for 'moral luck' in bringing about those bad outcomes, just as we rejoice and take credit for bringing about the good outcomes.

On the other side of the argument, some theorists reject the view that someone should be found criminally liable respecting any outcome they produce, whether or not it was intended.¹³¹ On this uncompromisingly non-consequentialist view, if I stab you intending to kill you and you die of your wounds, then I should be found criminally liable only in respect of the action I controlled—the risk posed to your life—but not for the outcome which I do not exercise control over: your death. So, on this view, there could be no crime of 'murder'; only a crime of 'intentionally risking death'. Why? As German philosopher G. W. F. Hegel memorably put it (in 1820), citing an old proverb, 'the stone belongs to the devil when it leaves the hand that threw it'.¹³² However, adherents of the correspondence principle do not necessarily need to go nearly so far as this.¹³³ All they insist on is that, when criminal liability depends on consequences

¹³⁰ See Chapter 3.1 and J. W. C. Turner, 'The Mental Element in Crimes at Common Law' (1936) 6 CLJ 31.
¹³¹ L. Alexander and K. Ferzan, *Crime and Culpability: A Theory of Criminal Law* (2009).

¹³² H. B. Nisbet (trans.), G. W. F. Hegel, *Elements of The Philosophy of Right* (1991), 148, para. 119A.

¹³³ For further argument, compare A. Ashworth, 'Taking the Consequences', in S. Shute, J. Gardner, and J. Horder (eds), *Action and Value in Criminal Law* (1993) and V. Tadros, n 19, 90–8, with R. A. Duff, *Criminal Attempts* (1996), ch 12.