**HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1969), P.296:**

1–043

"(1) The conduct is prominent in most people's view of socially threatening behaviour, and is not condoned by any significant segment of society.
(2) Subjecting it to the criminal sanction is not inconsistent with the goals of punishment.
(3) Suppressing it will not inhibit socially desirable conduct.
(4) It may be dealt with through even-handed and non-discriminatory enforcement.
(5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
(6) There are no reasonable alternatives to the criminal sanction for dealing with it.[78]

These criteria can be used in making up a kind of priority list of conduct for which the legislature might consider invoking the criminal sanction."

1–044

What conclusions are to be drawn about the example of sado-masochism used throughout this section? In *Brown,* the activities all took place with the consent of the passive partners. Was it appropriate to invoke the criminal law? The majority felt that the public interest took over at the point of actual bodily harm. Consent can thus only operate as a defence to a narrow range of activities involving minimal harm. They largely dealt with the matter as one of violence. But, surely, "violence" presupposes something that is against the will of the recipient. The whole approach of the majority amounts to little more than pure moralism. The piercing of genitals for sexual purposes is apparently unlawful. Ear-piercing and cosmetic body piercing is lawful.[79] As has been commented: "Eroticism makes a difference".[80] The minority, on the other hand, dealt with the matter as one of private sexual morality and felt that it was only when grievous bodily harm had been caused that consent should be no defence.

Ultimately, it would seem it is impossible to answer questions such as whether sado-masochism ought to be criminalised without taking a moral stance on the subject, even if one starts out from the position that conduct ought only to be criminalised if it is harmful.



**R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007), PP.130–132:**

1–045

"[A] standard liberal response [to the House of Lords decision in *Brown*] would be to argue that whether or not the physical injuries were inflicted constituted harm, the 'victims' were not wronged. '*Volenti non fit iniuria*': consent might not negate harm, but it negates the wrongfulness

78 Whilst Packer identified the need for criminal law to achieve utilitarian goals as a determinative factor in applying this criterion, Husak notes that there may often be alternatives to the criminal law in *preventing* a particular conduct or harm. However, Husak notes that punishment for crimes additionally has an *expressive* function in stigmatising conduct we wish to censure. It is this latter function which will often determine whether it is necessary to employ the criminal law: D. Husak, "The Criminal Law as Last Resort" (2004) 24 O.J.L.S. 207.

79 Note though that more extreme body modification procedures have been held not to be a legal exception, *R. v BM* [2019] Q.B. 1. See para.4–056.

80 L. Bibbings and P. Alldridge, "Sexual Expression, Body Alteration, and the Defence of Consent" (1993) 20 J. Law & Soc. 356 at 362. cf. S. Cowan, "Criminalizing SM: Disavowing the Erotic, Instantiating Violence" in Duff, *The Structures of the Criminal Law* (2011).

This desire for vengeance supposedly operates at two levels. First, it is asserted that punishment satisfies the victim's (or relatives' and friends') desire for vengeance and the State is merely exacting vengeance on their behalf to prevent private retaliation. 1–058

Secondly, it is asserted that there is a public need for vengeance. It is argued that there is an instinctive demand which is active in every human being to retaliate. This reaction is not only understandable but desirable as a socially acceptable outlet for our aggressions. If there were no punishment our aggressions would become repressed to the point when they might break out in an anti-social manner.[107] Such views find little serious support today and have been alleged to "represent the breakdown of human intelligence, as well as good will. It shows perhaps the ugliest phase of our human nature".[108]

## 2. Expiation

According to this view, the offender must be made to work off their guilt; they must be purified through suffering. This is regarded as a species of retribution in that the offender is "paying his debt" owed to society and, in so doing, becomes reconciled with that society. The focus is on the past crime; the attempt is to wipe the slate clean. These ideas stem largely from the religious influences on our culture, but some would argue that there is a deeper psychological explanation underlying an offender's need for expiation. From the time we are children we are conditioned to expect punishment when we have done wrong. Guilt is a state of tension which gives rise to a need for the removal of this tension. We are conditioned to expect this relief through punishment. The most famous illustration of this form of punishment comes from Dostoyevsky's *Crime and Punishment* in which Raskolnikov, after committing a brutal murder, becomes obsessed with feelings of guilt and eventually gives himself up as the only means of coming to terms with himself and achieving peace of mind. 1–059

While society might offer an offender the opportunity of expiation, it cannot insist or demand it as the will or desire for *true* expiation must proceed from the defendant himself. One is not necessarily dealing with true expiation of sin. Society simply deems the offender to have purged his guilt by punishment. A modern advocate of this penal theory is Duff.[109]



**R.A. DUFF, "THEORIES AND POLICIES UNDERLYING GUIDELINES SYSTEMS" (2005) 105 COLUMBIA L. REV. 1162, 1182–1183:**

"The aim . . . is that the offender should come to understand, and so to repent, that wrong as a wrong both against the individual victim (where there was one) and against the wider political community to which they both belong . . . 1–060

Central to this richer purpose is an attempt to turn the offender's punishment from a purely one-way process of communication from polity to offender into a two-way process in which there is

107 E.W. Puttkammer, *Administration of Criminal Justice* (Chicago: University of Chicago Press, 1953).
108 M.R. Cohen, "Moral Aspects of the Criminal Law" (1940) 49 Yale L.J. 987, 1025.
109 R.A. Duff, *Punishment, Communication and Community* (New York: OUP, 2001).

of punishment. Do these theories really ignore such costs completely? If not, what weight do they accord to them? In what real sense does punishment 'restore the right'? Do these theories really remove the mystery attaching to the original, simple desert principle, or are they, too, a form of moral alchemy? Or, in trying to avoid the mystery, do they not collapse into versions of utilitarian or other consequentialist justification? Even the more sophisticated versions barely rise above the level of metaphor, and leave us with the suspicion that the idea of desert cannot be distinguished from a principle of vengeance or the unappealing assertion that two wrongs somehow make a right."

1–070 According to these criticisms, it appears that "just deserts" theory struggles to stand up to critical and theoretical scrutiny. Of particular concern to critics is that the harming of wrong doers in order to rebalance the social equilibrium, rather than putting right the wrongs committed, simply increases the amount of harm that is now inflicted on individuals. Perhaps, then, a more cogently formed justification for retribution can be found in the need for public censure and denunciation.

### (ii) Just deserts as censure or denunciation

1–071 While some just deserts theorists claim that desert is in itself the only purpose of punishment in that "punishing the guilty achieves something good—namely, justice",[114] others argue that punishment based on desert is necessary to express disapproval and censure of the conduct and the offender.[115]

**ANDREW VON HIRSCH, DOING JUSTICE—THE CHOICE OF PUNISHMENTS (REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION) (1976), PP.45–49:**

1–072 "[The theory relating to eliminating an unfair advantage] does not explain why that deprivation should take the peculiar form of punishment. Punishment differs from other purposefully inflicted deprivations in the moral disapproval it expresses: punishing someone conveys in dramatic fashion that his conduct was wrong and that he is blameworthy for having committed it. Why, then, does the violator deserve to be *punished*, instead of being made to suffer another kind of deprivation that connotes no special moral stigma?

To answer this question it becomes necessary, we think, to focus specifically on the reprobation implicit in punishment and argue that *it* is deserved. Someone who infringes the rights of others, the argument runs, does wrong and deserves blame for his conduct. It is because he deserves blame that the sanctioning authority is entitled to choose a response that expresses moral disapproval; namely, punishment. In other words, the sanction ought not only to deprive the offender of the 'advantage' obtained by his disregard of the rules (the Kantian explanation); but do so in a manner that ascribes blame (the reprobative explanation)."



114 M.S. Moore, "The Moral Worth of Retribution" in E. Schoeman (ed), *Responsibility, Character, and the Emotions: New Essays in Moral Philosophy* (Cambridge: CUP, 1987).

115 A. von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Boston: Rutgers University Press, 1985), p.52.

Criminal Justice Act 2003. This means that sentencers can consider the purpose of restoring harm when determining an appropriate penalty for every defendant that comes before them. More recently, the Government has outlined a vision that RJ should become accessible for victims at "all stages of the criminal justice system".[202] Indeed, the Code of Practice for Victims of Crime now states that victims are entitled to receive information on Restorative Justice from the police, including how they can take part.[203] Judges also have the power to defer sentence for a restorative meeting to take place between the victim and offender before sentencing.[204]

It is yet unknown to what extent the use of RJ between conviction and sentencing will affect the sentencer's use of other theories of punishment. Indeed, many criminologists have questioned whether RJ can ever be used in conjunction with theories of punishment which focus on harming offenders as a means of resolving crime—it being considered antithetical to the restorative ideal. Others have, however, suggested that RJ can be reconciled with the current system of retribution. In particular, the act of repairing can in itself be conceived as a form of punishment due to the fact that it requires the offender to make amends while restricting their freedom to do as they please.

**L. ZEDNER, "REPARATION AND RETRIBUTION: ARE THEY RECONCILABLE?" (1994) 57 M.L.R. 228, 248–249 AND 250:**

"[I]t might be argued that both reparation and retribution derive their 'authority' from the offence itself and impose penalties according to the seriousness of the particular crime. Unlike the utilitarian aims of general deterrence or rehabilitation which import wider notions of societal good, both retribution and reparation exclude (or nearly exclude) consideration of factors beyond the particular offence. The offender's personal history, the social or economic causes of crime or the need to prevent future offending (all of which extend the limits of intrusion by the state under deterrent or rehabilitative theories) are here deemed irrelevant. As such, both retributive and reparative justice, it is said, impose strict constraints on the intrusion of the state into the lives of offenders. This apparent congruity is not, however, as close as it first seems. The seriousness of the offence is set according to two different sets of criteria. Retribution demands punishment proportional primarily to the intent of the offender, whereas reparative justice derives its 'proportionality' from the harm inflicted on the victim. Whilst intent is generally focused on outcomes, and intent and harm may thus coincide, the two may point to very different levels of gravity. If reparation and retribution were to be wholly reconciled, then it would be necessary to devise a measure which integrated intent and harm in setting offence seriousness. A greater difficulty still is that, if reparative justice is to be more than a criminal analogue to civil damages, then it should go beyond the offence itself to enquire about its wider social costs and the means to making them good . . .

1–115



202 Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System* (2012), p.5.

203 Ministry of Justice, *Code of Practice for Victims of Crime* (2015). Pursuant to the Domestic Violence, Crime and Victims Act 2004 s.33. The House of Commons Justice Committee's recent inquiry into RJ reported that "[w]e agree in principle that restorative justice should be available for all types of offence . . . We recommend a rigorous system be introduced to improve compliance with the police's requirement to inform victims about restorative justice . . . [and] [w]e recommend that the Ministry of Justice, when publishing its Action Plan progress report, provide an explanation of how they envisage restorative justice taking place across the criminal justice system": House of Commons, Justice Committee, *Restorative Justice: Fourth Report of Session 2016–17* (London: House of Commons, 2016), pp.30–31.

204 Powers of Criminal Courts (Sentencing) Act 2000 s.1ZA.

vagina, anus or mouth of another person who does not consent to the penetration.[14] With all crimes the actus reus is the external element of the crime—the objective requirement necessary to constitute the offence. Crimes can be divided into two categories and the essential elements of an actus reus depend on which of these two species of crime one is dealing with. First, there are conduct crimes, where the only external element required is the prohibited conduct itself. Thus, the actus reus of the offence of dangerous driving is simply driving a mechanically propelled vehicle on a road or other public place.[15] No consequence of that dangerous driving need be established.[16] Secondly, there are result crimes, where the external elements of the offence require proof that the conduct caused a prohibited result or consequence. Thus, the actus reus of the offence of causing death by dangerous driving is causing the "death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place".[17] Here it is necessary to establish that the dangerous driving caused the forbidden consequence specified in the actus reus, namely, the death of another person.

Conduct crimes provide a good illustration of the criminal law punishing offenders who have caused no obvious harm. However, it can be argued that in the above example there is a harm, namely causing danger to other road users. If this is indeed a harm, it is clearly a lesser harm than actually killing another road-user. Should this difference be reflected by differing penalties for the two offences? Or should one proceed on the basis that as the forbidden conduct is the same in both offences, the result (death) could be entirely fortuitous, thus not reflecting upon the driver's responsibility and consequently the two offences should carry the same penalty? This is an issue to which we shall return later in the book.

From the above it can be seen that both conduct crimes and result crimes have two elements in common: (1) both require an "act" or conduct, i.e. driving and (2) both require that the act be carried out in defined *legally relevant circumstances*, i.e. on a road or other public place. If the same act of driving the car occurred in a private field, the actus reus of the offence would not be made out. It is only dangerous driving *on a road or other public place* that is prohibited. Similarly, the actus reus of theft requires that the property "belong to another". In the absence of this circumstance, for example, if the property is owned by the would-be thief, the actus reus of the crime is not made out. Just as mens rea may or may not be required for the act and for the consequences in result crimes, liability may similarly depend upon whether the accused has the required mental state in relation to the legally defined relevant circumstances. So, in theft, if the defendant honestly believes that she is the owner of the property, there would be no mens rea in relation to a vital element of the actus reus.[18]

**2-008** With result crimes it is necessary to establish an additional third element, namely, that the act *caused* the prohibited consequence, for example, *caused* the death of another person. If poison is put into the drink of another person with intent to kill that person who subsequently dies with the drink found beside him, liability for murder cannot exist unless it was the poison that caused the death. If the deceased had died of a heart attack, the only possible charge would be attempted murder.[19]

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14 Sexual Offences Act 2003 s.1(1).
15 Road Traffic Act 1988 s.2.
16 Beyond the creation of a *danger* of injury to others or serious damage to property: the Road Traffic Act 1988 s.2A(3).
17 Road Traffic Act 1988 s.1.
18 Theft Act 1968 s.2(1)(a).
19 *R. v White (John)* [1910] 2 K.B. 124; See also *Re Hensler* (1870) 11 Cox C.C. 570.

FIELD, CIRCUIT JUSTICE (charging jury):

"Now, in the case of a person falling overboard from a ship at sea, whether a passenger or seaman, when he is not killed by the fall, there is no question as to the duty of the commander. He is bound, both by law and by contract, to do everything consistent with the safety of the ship and of the passengers and crew, necessary to rescue the person overboard, and for that purpose to stop the vessel, lower the boats, and throw to him such buoys or other articles which can be readily obtained, that may serve to support him in the water until he is reached by the boats and saved. No matter what delay in the voyage may be occasioned, or what expense to the owners may be incurred, nothing will excuse the commander for any omission to take these steps to save the person overboard, provided they can be taken with a due regard to the safety of the ship and others remaining on board. Subject to this condition, every person at sea, whether passenger or seaman, has a right to all reasonable efforts of the commander of the vessel for his rescue, in case he should by accident fall or be thrown overboard. Any neglect to make such efforts would be criminal, and if followed by the loss of the person overboard, when by them he might have been saved, the commander would be guilty of manslaughter . . .

If you are satisfied that the fall was not immediately fatal, the next inquiry will be whether Swainson could have been saved by any reasonable efforts of the captain, in the then condition of the sea and weather. That the wind was high there can be no doubt. The vessel was going at the time, at the rate of twelve knots an hour; it had averaged, for several hours, ten knots an hour. A wind capable of propelling a vessel at that speed would, in a few hours, create a strong sea. To stop the ship, change its course, go back to the position where the seaman fell overboard, and lower the boats, would have required a good deal of time, according to the testimony of several witnesses. In the meanwhile, the man overboard must have drifted a good way from the spot where he fell. To these considerations, you will add the probable shock and consequent exhaustion which Swainson must have experienced from the fall, even supposing that he was not immediately killed.

It is not sufficient for you to believe that possibly he might have been saved. To find the defendant guilty, you must come to the conclusion that he would, beyond a reasonable doubt, have been saved if proper efforts to save him had been reasonably made, and that his death was the consequence of the defendant's negligence in this respect. Beside the condition of the weather and sea, you must also take into consideration the character of the boats attached to the ship. According to testimony of the mate, they were small and unfit for a rough sea."

*The jury returned a verdict of acquittal*



## VEHICLE INSPECTORATE V NUTTALL [1999] 1 W.L.R. 629 (HOUSE OF LORDS)

2–044

The defendant, an owner of a coach business, did not examine charts produced by tachographs installed in his vehicles and was convicted of permitting his drivers to contravene various requirements of the Transport Act 1968 s.96(11A).

[Fanny] was eccentric in many ways. She was morbidly and unnecessarily anxious about putting on weight and so denied herself proper meals. She would take to her room for days . . .

[T]here can be no doubt that Fanny's condition over the succeeding weeks and months must have deteriorated rapidly. By July 1975 she was, it seems, unable or unwilling to leave her bed and, on July 19, the next-door neighbour, Mrs Wilson, gallantly volunteered to help the female appellant to wash Fanny. She states:

> 'On July 19 Mrs Dobinson and I went to Fanny's room in order to clean her up. When I went into the room there was not a strong smell until I moved her. Her nightdress was wet and messed with her own excreta and the dress had to be cut off. I saw her back was sore; I hadn't seen anything like that before. I took the bedclothes off the bed. They were all wet through and messed. And so was the mattress. I was there for about two hours and Mrs Dobinson helped. She was raw, her back, shoulders, bottom and down below between her legs. Mrs Dobinson appeared to me to be upset because Fanny had never let her attend to her before. I advised Mrs Dobinson to go to the social services.'

Emily West, the licensee of the local public house, the Crossed Daggers, gave evidence to the effect that during the whole of the period, from July 19 onwards, the appellants came to the public house every night at about 7 pm The appellant Dobinson was worried and told Emily West that Fanny would not wash, go to the toilet or eat or drink. As a result Emily West immediately advised Dobinson to get a doctor and when told that Fanny's doctor lived at Doncaster, Emily West suggested getting a local one. It seems that some efforts were made to get a local doctor, but the neighbour who volunteered to do the telephoning (the appellants being incapable of managing the instrument themselves) was unsuccessful.

On August 2, 1975 Fanny was found by Dobinson to be dead in her bed. The police were called. On arrival they found there was no ventilation in the bedroom . . . Under the bed was an empty polythene bucket. Otherwise there was no food, washing or toilet facilities in the room. There was excrement on the bed and floor. It was a scene of dreadful degradation.

The pathologist, Dr Usher, gave evidence that the deceased was naked, emaciated, weighing five stone and five pounds, her body ingrained with dirt, lying in a pool of excrement . . . There was a tidemark of excreta corresponding with the position in which her body was lying. At the mortuary, Dr Usher found the deceased's body to be ulcerated over the right hip joint and on the underside of the left knee; in each case the ulceration went down to the bone. There were maggots in the ulcers . . . Such ulcers could not have been produced in less than two or three weeks . . . Her stomach contained no food products but a lot of bile stained fluid. She had not eaten recently. He found no natural disease. The disinclination to eat was a condition of anorexia nervosa which was not a physical condition but a condition of the brain or mind. She had been requiring urgent medical attention for some days or even weeks. He said:

> 'If two weeks prior to my seeing the body she had gone into hospital there is a distinct possibility that they may have saved her; and three weeks earlier the chances would

over which they have no control (as opposed to self-induced inadequacies such as the drunkenness in *Caldwell*).

*(b) A variable meaning*

The concept of recklessness is employed in both statutory and common law offences. During the period that the law employed two tests of recklessness, a critical issue was whether recklessness bore its *Cunningham* or its *Caldwell/Lawrence* meaning. **2–193**

In *Seymour*,[251] the House of Lords indicated that recklessness should bear its *Caldwell/Lawrence* meaning throughout the criminal law, whether the offence was a statutory or a common law one. However, in *Reid* it was made clear that recklessness could be interpreted differently for different offences. Lord Goff said of recklessness that "as used in our law, it has more than one meaning". Lord Browne-Wilkinson said that he did "not accept that the constituent elements of recklessness must be the same in all statutes. In particular [various] factors may lead to the word being given different meanings in different statutes".[252]

The unfortunate result was that for some offences recklessness bore its *Caldwell/Lawrence* meaning but for other offences it bore its *Cunningham* meaning. For example, the *Caldwell/Lawrence* test of recklessness applied to criminal damage and was held to be applicable to several lesser-known offences.[253] On the other hand, it had become established that the subjective *Cunningham* test applies to aiding and abetting offences,[254] to conspiracy to damage property being reckless as to whether life is endangered[255] and to false imprisonment.[256] It had also become widely accepted as being applicable to the central offences against the person such as common assault and assault occasioning actual bodily harm,[257] and as being applicable to other lesser-known offences.[258]

The result was confusion and unpredictability. The stage was thus set for the courts and/or Parliament to make a choice between the two tests.



## 3. Present law

As will be seen later, both tests had supporters but one thing was agreed upon: with the exception of some of the (now repealed) driving offences requiring recklessness, the two tests of recklessness should not be allowed to co-exist. The matter was brought to a head and largely resolved by the following leading House of Lords' decision. While the ratio of this decision is limited to criminal damage, **2–194**

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251 *R. v Seymour (Edward John)* [1983] 2 A.C. 493.
252 *R. v Seymour (Edward John)* [1983] 2 A.C. 493 at 412. Lord Ackner endorsed this view (at 402).
253 Air Navigation Order 1980 art.45, made under the Civil Aviation Act 1982 ss.60 and 61 prohibiting reckless acts likely to endanger aircraft or persons therein (*Warburton-Pitt* (1991) 92 Cr. App. R. 135); Data Protection Act 1984 s.5 (subsequently repealed by the Data Protection Act 1998) (*Data Protection Registrar v Amnesty International* [1995] Crim. L.R. 633).
254 *Blakely v DPP* [1991] Crim. L.R. 763.
255 *Mir, The Independent*, 23 May 1994.
256 *James, The Times*, 2 October 1997.
257 This point was, however, not beyond doubt: see the 5th edition of this book, pp.164–165.
258 e.g. the Sea Fishing (Enforcement of Community Control Measures) Regulations 1985 reg.3(2) (*Large v Mainprize* [1990] 1 All E.R. 331).

> Parliament now thinks it preferable for the 1971 Act to cover culpably inadvertent as well as advertent wrongdoers, it can so enact."
>
> *Appeal allowed*

This unanimous decision by the House of Lords adopts the *Cunningham* view that recklessness involves foresight of the possibility of an unjustified risk. **2–198**

Three further points emerge from the judgments. First, Lord Steyn, added that "if a defendant closes his mind to a risk he must realise that there is a risk" and so will be reckless. In *Booth v CPS*,[259] the defendant ran across a road without checking whether it was safe to cross; he collided with a car, denting it. It was held that:

> ". . . aware of those risks (risk of collision and damage to property), he then deliberately put them out of his mind . . . The magistrates have found that the appellant was aware of the risk and closed his mind to it . . . [Accordingly], they had applied the correct test [of recklessness as laid down in *G*]."

Secondly, the law on self-induced intoxication (which was the context in which *Caldwell* was decided) is unaffected. Lord Bingham exempted self-induced intoxication stating that "one instinctively recoils from the notion that a defendant can escape the criminal consequences of his injurious conduct by drinking himself into a state where he is blind to the risk he is causing to others". The law on self-induced intoxication is discussed in Ch.4.

Thirdly, and very importantly, Lord Bingham (with whom all their Lordships agreed) restricted his judgment to the meaning of recklessness in the Criminal Damage Act 1971: **2–199**

> "I mean to make it as plain as I can that I am not addressing the meaning of 'recklessness' in any other statute or common law context."

In particular, he approved the *Lawrence* meaning of recklessness adopted for offences involving reckless driving. Lord Rodger also stated that that *Caldwell* "may be better suited to some offences than to others. For example, in the context of reckless driving".

However, all offences involving reckless driving have been abolished and replaced by offences requiring dangerous driving. Prior to *G*, *Caldwell* had become largely restricted to the offence of criminal damage and, as regards that offence at least, it has been overruled. As was stated in *Brady*,[260] "many of their Lordships observations [in *G*] have much wider application" and apply to crimes other than criminal

259 *Booth v CPS* [2006] EWHC 192 (Admin).
260 *Brady* [2006] EWCA Crim 2413.

established in art.6(2).[34] Such a "reading down" will almost always be possible[35] but, if the provision cannot be "read down", then as a last resort under the Human Rights Act 1998 s.4 the court should declare the reverse burden incompatible with art.6(2).

The result of this approach is inevitable uncertainty. It is difficult to see why "a strong public interest in bladed articles not being carried in public" makes a due diligence defence a proportionate response while a similar defence to possession of drugs is a disproportionate response. We shall see in the next section that since the coming into force of the Human Rights Act 1998 the English courts have considered the status of some strict liability offences and have held that they are not, per se, incompatible with the European Convention. If such (admittedly lesser) offences without due diligence defences represent a proportionate response to a problem, it would be odd to hold that affording a due diligence defence with a reverse burden of legal proof (admittedly for more serious offences) could be incompatible with the ECHR. We shall shortly examine the many objections to offences of strict liability. As a response to these problems, courts in some Commonwealth countries, such as Canada, have declared that all strict liability offences should presumptively be construed as incorporating due diligence defences[36] and the Law Commission of England and Wales has also consulted on whether courts should be given a power to apply a due diligence defence to any statutory offence not requiring fault.[37]

## 4. Strict liability and the European Convention on Human Rights

As seen above, in certain circumstances strict liability offences with reverse burdens of proof could be incompatible with art.6(2) of the European Convention. There is, however, a further argument that some strict liability offences could, in dispensing with any fault element, contravene other articles of the Convention. This approach has not been adopted by the English courts.[38] 3–024



### MUHAMAD V R. [2003] 2 W.L.R. 1050 (COURT OF APPEAL, CRIMINAL DIVISION):

3–025

The appellant was convicted of materially contributing to the extent of his insolvency by gambling, contrary to the Insolvency Act 1986 s.362(1)(a).

DYSON LJ:

"[It is argued that art.7] requires the criminal law to be sufficiently accessible and precise to enable an individual to know in advance whether his conduct is criminal. No gambler can necessarily know, when he places his bet, whether he runs a real risk of prosecution if he loses. The only way to avoid running this risk is not to gamble at all, or to gamble for low

34 A similar approach was approved in *R. v DPP Ex p. Kebeline* [2000] 1 Cr. App. R. 275 and applied in *Sheldrake v DPP* [2005] 1 A.C. 264.
35 I. Dennis, "Reverse Onuses and the Presumption of Innocence: In Search of Principle" [2005] Crim. L.R. 901.
36 *R. v City of Sault Ste Marie* (1978) 85 D.L.R. (3d) 161.
37 Law Commission Consultation Paper No.195, *Criminal Liability in Regulatory Contexts* (2010), para.1.68. The paper considers whether the test of due diligence should be less strict than is currently formulated (paras 1.78–1.79).
38 See generally, G.R. Sullivan, "Strict Liability for Criminal Offences in England and Wales Following Incorporation into English Law of the European Convention on Human Rights" in Simester (ed), *Appraising Strict Liability* (2005).

offence. Individual persons who are directly implicated in offences may be difficult or impossible to prosecute successfully, and those who influence the commission of offences indirectly may fall outside the scope of liability for complicity or other ancillary heads of criminal liability . . . Companies value a good reputation for its own sake, just as do universities, sporting clubs and government agencies. Individuals who take on positions of power within such organisations, even if they as individuals do not personally feel any deterrent effects of shaming directed at their organisation, may find that they confront role expectations to protect and enhance the repute of the organisation . . . Another factor which tends to limit the deterrent efficacy of individual criminal liability for corporate crime is the expendability of individuals within organizations . . . [T]he corporation 'marches on its elephantine way almost indifferent to its succession of riders.' The risk thus arises of rogue corporations exploiting their capacity to toss off a succession of individual riders and, if necessary, to indemnify them in some way . . . Consider also the extreme tactic adopted by some companies of setting up internal lines of accountability so as to have a 'vice-president responsible for going to jail.' By offering an attractive sacrifice the hope is that prosecutors will feel sufficiently satisfied with their efforts to refrain from pressing charges against the corporation or members of its managerial elite . . .

[I]n some respects corporations may be better endowed than individuals to be the subject of responsibility. Corporations, it may be argued, have a number of advantages when it comes to rational decision-making, including access to a pool of intelligence and the resources to acquire a superior knowledge of legal and other obligations. The conclusion is thus invited that although corporations do not have a 'soul to be damned' they can deserve to be blamed . . .

[With regard to the argument that punishing companies amounts to punishment of innocent shareholders etc] [f]irst, cost-bearing associates are not themselves subject to the stigma of conviction and criminal punishment—they are not convicts but corporate distributees. Secondly, employees and stockholders accede to a distributional scheme in which profits and losses from corporate activities are distributed on the basis of position in the company or type of investment rather than degree of deserved praise or blame . . . Thirdly, and above all, not to punish an enterprise at fault would be to allow corporations to accumulate and distribute to associates a pool of resources which does not reflect the social cost of production. Justice as fairness requires, as a minimum, that the cost of corporate offences be internalised by the enterprise."



3–058 Many large corporations have complex structures which make it difficult for outsiders to ascertain who is responsible for a particular decision. Punishing the company can trigger the most appropriate institutional response in that the company is in the best position to identify and discipline its employees. In many cases, prosecution of individuals might be inappropriate as it ignores the corporate pressures that might have been placed upon them by the corporate structure; these pressures will often remain even after the individual has been sacrificed. It is only by punishment of the company itself that one can hope for a corporate response to the wrongdoing by the implementation of the appropriate safety procedures.

Modern companies now often promote themselves as distinct identifiable entities. Such advertising:

> "... proving that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the contravened law; or proving that the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law."[121]

Corporate culture is defined to mean:

> "... an attitude, policy, rule, course of conduct or practice existing within the corporation generally or in that part of the corporation where the relevant conduct happens."[122]

3–082 In assessing whether a relevant corporate culture exists it is relevant to consider whether the employee etc. who committed the offence reasonably believed that senior managers of the corporation would have authorised or permitted the commission of the offence. (This would capture situations where, although corporate policy ostensibly prohibits conduct, it is in fact encouraged by management.)

Academic commentators[123] have suggested that the following factors could be relevant in establishing a corporate culture.

- Hierarchy of corporation: does the Board make efforts to comply with the law? Is the management structure organised in such a way as to encourage non-compliance (e.g. insulating certain officers from responsibility)?
- Corporate goals: are these realistic or so unrealistic as to encourage unlawful behaviour?
- Monitoring compliance: monitoring systems/internal audits/channels of communication for employees to report concerns.
- Circumstances of offence.
- Reactions to past violations.
- Incentives and indemnification.

We shall see later in this section that English law has endorsed a version of this approach in establishing liability for the offence of corporate manslaughter.

## E. CORPORATE HOMICIDE

3–083 The issues discussed above apply to all criminal offences that can be committed by corporations. However, it was the application of these rules in cases where workers or others had been killed or injured at work or through other corporate operations (such as transport) that proved most controversial. The result was a sustained and vigorous campaign for reform of the law which culminated in the Corporate Manslaughter and Corporate Homicide Act 2007. Before the provisions of this Act are

121 ACT s.51(2)(c) and (d).
122 ACT s.51(6).
123 Cited in J. Clough and C. Mulhern, *The Prosecution of Companies* (Melbourne: OUP, 2002).

### (iii) Senior management failure

**CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 S.1:**

3–098

"(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1) . . .

(4)(c) 'senior management', in relation to an organisation, means the persons who play significant roles in—

(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or

(ii) the actual managing or organising of the whole or a substantial part of those activities."

**MINISTRY OF JUSTICE, UNDERSTANDING THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 (2007), PP.12–14:**

3–099

"The offence is concerned with the way in which activities were managed or organised. This represents a new approach to establishing corporate liability for manslaughter . . . and does not require the prosecution to establish failure on the part of particular individuals or managers. It is instead concerned with how an activity was being managed and the adequacy of those arrangements.

- This approach is not confined to a particular level of management within an organisation: the test considers how an activity was managed within the organisation as a whole. However, it will not be possible to convict an organisation unless a substantial part of the organisation's failure lay at a senior management level . . .
- Exactly who is a member of an organisation's senior management will depend on the nature and scale of an organisation's activities. Apart from directors and similar senior management positions, roles likely to be under consideration include regional managers in national organisations and the managers of different operational divisions . . .

Can the offence be avoided by senior management delegating responsibility for health and safety?

- No. The Act is concerned with the way an activity was being managed or organised and will consider how responsibility was being discharged at different levels of the organisation. Failures by senior managers to manage health and safety adequately, including through inappropriate delegation of health and safety matters, will therefore leave organisations vulnerable to corporate manslaughter . . . charges."

On the other hand, where a defendant suffers from a mental disorder caused by the misuse of intoxicants, such as alcohol-induced psychosis,[541] or delirium tremens,[542] but is sober at the time of committing an offence, then that mental disorder may be regarded as a "disease of the mind".[543]

This discussion demonstrates that the internal/external factor distinction is unable to bear the weight of distinguishing insanity from non-insane automatism. It highlights the failure of the insanity test (and perhaps, any insanity test) to come to terms with the issue of the responsibility of the individual defendant on the one hand, and the protection of the public (and the defendant himself) against harm on the other. We shall return to this question later, once the remaining elements of the test of insanity, and the proposals for reform thereof, have been considered.

*(2) Defect of reason*

Assuming that the defendant is suffering from a disease of the mind, the next hurdle to be overcome is that this disease of the mind must induce a "*defect of reason*". The reasoning ability of the defendant must be affected; it is not enough that he or she simply failed to use powers of reasoning which they had.[544] This aspect of the insanity test is classically illustrative of one of the basic premises of responsibility in law: guilt cannot be adduced in the absence of the *capacity* to reason. **4–241**

*(3) Nature and quality of the act*

Having passed over the initial hurdles, the defendant may be brought within the ambit of the special verdict if either of two further conditions are satisfied. **4–242**

First, the defendant must not know "*the nature and quality of his acts*". The Administrative Court in *Loake* cited three vivid examples of this[545]:

> "Three examples often given where it could be said that the defendant did not know the nature and quality of his act are: (a) where A kills B under an insane delusion that he is breaking a jar (Stephen, *A Digest of the Criminal Law*, 8th Edn, p8); (b) where a madman cuts a woman's throat under the delusion that he is cutting a loaf of bread (CS Kenny, *Outlines of the Criminal Law* (19th Edn, 1966, by JWC Turner, p76); (c) where a drunken nurse puts a baby on the fire thinking it is a log: *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349, 381, citing an 18th century case."

However, a defendant will also not know the "nature and quality of his acts" where, because of his "disease of the mind", at the time of his act, "he did not know what he was doing"[546] at all, and was

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541 *R. v Harris (Darren)* [2013] EWCA Crim 223 at [56] at [59]–[60].
542 *R. v Davis* (1881) 14 Cox C.C. 563.
543 *R. v Davis* (1881) 14 Cox C.C. 563, approved in *R. v Beard* (1920) 14 Cr. App. R. 160, Lord Birkenhead LC, 194; *R. v Harris (Darren)* [2013] EWCA Crim 223 at [59]–[60]. cf. *R. v Taj (Simon)* [2018] EWCA Crim 1743; [2019] Q.B. 655. See para.4–XXX.
544 *R. v Clarke (May)* [1972] 1 All E.R. 219.
545 *Loake (Aline) v Crown Prosecution Service* [2017] EWHC 2855 (Admin) at [38].
546 *R. v Sullivan* [1984] A.C. 156 at 173.

## GEORGE P. FLETCHER, "RETHINKING CRIMINAL LAW" (1978), PP.847–848:

4–332

"His fault in rendering himself non-responsible at the time of the violent act is constant, whether he commits a burglary, a rape, or a murder. To bring the scope of his liability into line with his culpability in getting drunk, the law seeks a compromise. There has to be some accommodation between (1) the principle that if someone gets drunk, he is liable for the violent consequences, and (2) the principle that liability and punishment should be graded in proportion to actual culpability.

German law and American law reveal two different approaches to reconciling these conflicting principles. German law includes intoxication along with mental illness as a basis for denying the capacity to be held accountable for a wrongful act. Deference to the conflicting principle of liability for the risk implicit in getting drunk is found in a special section of the Code, which is here translated in full:

(1) Whoever intentionally or negligently becomes intoxicated through the use of alcohol or other intoxicating substances is punishable up to five years in prison, if while in that intoxicated condition he commits a wrongful act and if by virtue of the intoxication is not responsible for that act (or his non-responsibility is a possibility).
(2) In no event may the punishment be greater than that for the wrongful act committed in the state of intoxication.

The concept of negligence underlying this provision is negligence as to the risk of committing a crime while intoxicated. If the suspect takes adequate precautions against committing a crime while intoxicated, there is no negligence. If, for example, he hires someone to supervise his conduct while he is intoxicated and the hired person unexpectedly fails to restrain him, there would be a good case against liability. If he gets drunk in a bar and while in a state of non-responsibility he throws a bottle at a valuable mirror, he is not punished for the wrongful act of intentionally destroying the property of another; rather he is punished for the wrongful act of creating a risk that he would behave non-responsibly and intentionally destroy property . . .

[T]he theory of the provision is not simply that he negligently take the risk that he might do some harm. The requirement of a wrongful act while intoxicated is an important limitation.

Indeed the limitation suggests that the theory underlying the provision is not simply one of negligently endangering other persons. If risk-taking were the essence of the crime, there would be no concern about the wrongfulness of the intoxicated act and indeed it would be hard to explain why the subsequent act should be required at all."

4–333

Over the past few decades, English law reform bodies have vacillated between proposals to modify *Majewski* and the more radical proposal of abolishing *Majewski* and replacing it with a separate offence.

### (ii) Mens rea

At first sight, the mens rea requirement under s.44 appears straightforward: the defendant must intend by his act to assist or encourage the commission of the offence. Section 44(2) states that such a defendant cannot be taken to have intended to encourage or assist merely because such encouragement or assistance was a foreseeable consequence of his conduct. Thus, only intention suffices.[265] However, beyond this the provisions become much more complex. **5–126**

**SERIOUS CRIME ACT 2007 S.47:** **5–127**

"47 Proving an offence under this Part

(1) Sections 44, 45, and 46 are to be read in accordance with this section.

(5) In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence—

(a) if the offence is one requiring proof of fault, it must be proved that—

(i) D believed that, were the act to be done, it would be done with that fault;
(ii) D was reckless as to whether or not it would be done with that fault; or
(iii) D's state of mind was such that, were he to do it, it would be done with that fault; and

(b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that—

(i) D believed that, were the act to be done, it would be done in those circumstances or with those consequences; or
(ii) D was reckless as to whether or not it would be done in those circumstances or with those consequences."



Section 44 penalises the encouragement or assistance of *an offence*; thus, where that offence requires proof of fault the defendant must also have mens rea in relation to it. By virtue of s.47(5)(a), for offences requiring proof of fault, it must be proved that: (i) the defendant intended[266] or believed that the act would be done with the necessary fault, (ii) was reckless whether it would be done with that fault, or (iii) that the defendant's state of mind was such that, were they to do it, it would be done with that fault.[267] **5–128**

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265 It is not clear whether oblique intention suffices here. The *Woollin* test requiring foresight of virtual certainty could well be applicable as this involves a far greater degree of foresight than merely being a "foreseeable consequence".

266 Serious Crime Act 2007 s.47(7)(a).

267 The Supreme Court in *Jogee* [2016] UKSC 8; [2016] 2 W.L.R. 651, Lords Hughes and Toulson at [86], appear to have failed to appreciate that, by virtue of s.47(5)(a), recklessness might be sufficient mens rea for the s.44 offence: ". . . Parliament has provided that foresight is not sufficient mens rea for the offence of intentionally encouraging or assisting another to commit an offence." See G. Virgo, "The relationship between inchoate and accessorial liability after *Jogee*" [2016] 9 *Archbold Review* 6.

### R. v Bourne (1952) 36 Cr. App. R. 125 (Court of Criminal Appeal):

6–054

The defendant terrorised his wife into committing buggery with a dog. He was convicted of aiding and abetting his wife to commit buggery with a dog. He appealed.

LORD GODDARD CJ:

"I am willing to assume for the purpose of this case . . . that if this woman had been charged herself with committing the offence, she could have set up the plea of duress, not as showing that no offence had been committed, but as showing that she had no *mens rea* because her will was overborne by threats of imprisonment or violence so that she would be excused from punishment . . . [T]he offence of buggery . . . depends on the act, and if an act of buggery is committed, the felony is committed . . .

The evidence was . . . that he caused his wife to have connection with a dog, and . . . he is guilty, whether you call him an aider and abettor or an accessory, as a principal in the second degree."

*Appeal dismissed*

### R. v Cogan and Leak [1976] Q.B. 217 (Court of Appeal, Criminal Division):

6–055

Leak compelled his wife to have sexual intercourse with Cogan, who believed that she consented. As Cogan's conviction was quashed on the strength of his belief, it became necessary to decide whether Leak's conviction as aider and abettor could stand.

LAWTON LJ:

"Leak's appeal against conviction was based on the proposition that he could not be found guilty of aiding and abetting Cogan to rape his wife if Cogan was acquitted of that offence as he was deemed in law to have been when his conviction was quashed . . .

[A]s was said by this court in *R. v Quick* [1973] Q.B. 910 at 923, when considering this kind of problem:

> 'The facts of each case . . . have to be considered and in particular what is alleged to have been done by way of aiding and abetting.'

The only case which counsel for Leak submitted had a direct bearing on the problem of Leak's guilt was *Walters v Lunt* [1951] 2 All E.R. 645. In that case the respondents had been charged under the Larceny Act 1916 s.33(1), with receiving from a child aged seven years, certain articles knowing them to have been stolen. In 1951 a child under eight years was deemed in law to be incapable of committing a crime: it followed that at the time of receipt by the respondents the articles had not been stolen and that the charges had not been proved. That case is very different from this because here one fact is clear—the wife had been raped.

In concluding that 'actual bodily harm' is capable of including psychiatric injury Hobhouse LJ emphasised that:

> 'it does not include mere emotions such as fear or distress or panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition.'

He observed that in the absence of psychiatric evidence a question whether or not an assault occasioned psychiatric injury should not be left to the jury . . .

In my view the ruling in [*Chan-Fook*] was based on principled and cogent reasoning and it marked a sound and essential clarification of the law. I would hold that 'bodily harm' in ss.18, 20 and 47 must be interpreted so as to include recognisable psychiatric illness."

**7–039** In *Morris*,[104] the conviction of a stalker, who had allegedly caused his victim to suffer pains, sleeplessness, tension and fear of being alone, was quashed because the trial judge had allowed the issue of whether the assault had occasioned psychiatric injury to be left to the jury without expert evidence. Even with respect to her physical pains, psychiatric evidence should have been adduced to testify that they were the result of the defendant's non-physical attack.

In *Dhaliwal*,[105] a clear distinction was drawn between psychological injury (for example, palpitations, breathing difficulties, cold sweats, anxiety, inability to sleep and so on) and recognisable psychiatric illness. Only the latter can constitute bodily harm. It was stated that any blurring of this distinction would introduce uncertainty into the law. As Horder and McGowan state:

> "[This is] the serious difficulty . . . of drawing a distinction in any given case between genuine psychological harm, and the normal human emotions of grief, anxiety, fear, and so forth (even if relatively severe). It seems unlikely that we have yet reached a stage where, in the absence of some further consideration such as a threat to public order, unjustifiably and culpably to cause another to experience severe emotional disturbance should be regarded as a criminal wrong."[106]



*(b) Mens rea*

**7–040** Section 47 makes no express reference to any mens rea requirement, but it is settled that liability is established if the defendant has the mens rea of common assault.

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104 *R. v Morris (Clarence Barrington)* [1998] 1 Cr. App. R. 386.
105 *R. v D* [2006] 2 Cr. App. R. 24.
106 "Manslaughter by Causing Another's Suicide" [2006] Crim. L.R. 1035 at 1038.

say, both (or all) participants have it as their purpose to engage in sexual activity. Freedom to choose will often align with conduct that is welcomed and where either party might have initiated the encounter.[278] Yet the notion of "freedom" is far from uncontroversial. MacKinnon has argued that any attempt to distinguish rape from sexual intercourse on the basis of free choice, and thus consent, is naïve.[279] That is because women must make their "free" choices to consent in a society where they are socialised to passive receptivity and where sex is something men *do* to them. In a gendered world where women are still treated unequally, it is not always (if ever) clear when a woman has consented independently of external pressures, and when she has consented subject to the social constraints of male dominion.

Even if one eschews the more far-reaching critique of the use of the concept of freedom within the context of consent, it is obvious that not all sexual choices are completely freely made and yet a form of consent may well have been given. Palmer reflects that "[b]etween [the] two poles of totalizing patriarchal dominance and almost unfettered free choice, lies the reality of sexual agency".[280] An individual's free choice may be constrained for all sorts of reasons: it may be a desire to avoid the row that will follow if sex is not forthcoming; a need for cash; a need to keep one's job; a fear of being beaten or even killed. If a person says "yes" in any of these scenarios—or if she permits intercourse after persuading the assailant to wear a condom[281]—is this consent real? The difficult task for the law has been to determine when such constraints operate to nullify consent. If rape is viewed predominantly as a crime of violence the answer is relatively unproblematic. Traditionally, only threats of death or serious harm would vitiate an apparent consent. However, as rape is now perceived as an offence against sexual autonomy, the more open-ended have become the types of constraints which may nullify consent.[282]

In *Olugboja*,[283] a case decided under the old law, the victim had intercourse with the defendant after his companion had raped her and her friend. The defendant claimed that these circumstances did not nullify her consent since only a threat of death or serious harm would suffice. The Court of Appeal held that, using the "ordinary meaning" of the word consent, the victim could not be said to have consented to sexual intercourse. The court held that there was a difference between the state of mind of real consent[284] and that of mere submission. The difference between the two was a matter of degree and it was for the jury to decide which side of the line a particular sequence of events falls. For example, a jury would almost inevitably decide that a wife who "reluctantly acquiesced" to intercourse to avoid a sulking husband, though submitting, would nevertheless have consented.



278 M. Chamallas, "Consent, Equality and the Legal Control of Sexual Conduct" (1988) 61 Southern Calif. L. Rev. 777.

279 C. McKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

280 T. Palmer, "Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate" in A. Reed, M. Bohlander, N. Wake and E. Smith (eds), *Consent: domestic and comparative perspectives. Substantive issues in criminal law* (Oxford: Routledge, 2017).

281 In 1992, in Texas, a grand jury refused to indict a man who had broken into a house at night, held a knife to a woman's throat and then had intercourse with her on the ground that, because she had begged him to put on a condom, she had consented: *The Washington Post*, 31 October 1992.

282 J. Gardner, "Appreciating Olugboja" [1996] 16 *Legal Studies* 275 at 277–282.

283 *R. v Olugboja (Stephen)* [1982] Q.B. 320.

284 In *R. v C* [2012] EWCA Crim 2034 the Court of Appeal held that there is a distinction to be drawn between "apparent" consent and "real" consent. The defendant was charged with 18 sexual offences perpetrated against his step-daughter from when she was five years old until she was 25. The court held that the jury were entitled to find that her *apparent* consent when she was an adult was not, in fact, real given the abusive and controlling conduct of the defendant since the victim's childhood.

makes the selection of an appropriate charge problematic. More controversial, however, is the fact that all consensual sexual touching between young people under 16 is unlawful. Lord Millett has argued that:

> "... the age of consent has long ceased to reflect ordinary life, and in this respect Parliament has signally failed to discharge its responsibility for keeping the criminal law in touch with the needs of society."[421]

While setting the age of consent at 16 has much to commend it, as Spencer has commented, the offences "are so far out of line with the sexual behaviour of the young . . . they will eventually make indictable offenders of the whole population".[422] If the offences are not prosecuted, as one would hope would be the case with consensual sexual exploration, children may come to perceive them as empty threats. If offences are prosecuted, not only may individual injustices result, but also other children may be deterred from seeking medical advice or treatment. In the light of *G*, the CPS has issued detailed guidelines for prosecutors and it is to be hoped that this will help to ensure that prosecutions are brought in appropriate circumstances and for the appropriate offence.[423]

## 5. Other sexual offences

The SOA 2003 and other legislation create various other sexual offences, a full exploration of which are outside the scope of this book. Below is a list of some of the main offences: **7–159**

- "revenge porn" (disclosing private sexual photographs and films with intent to cause distress) (Criminal Justice and Courts Act 2015 s.33);
- making indecent photographs of persons aged 16 or 17 (Sexual Offences Act 2003 s.45)[424];
- paying for sexual services of a prostitute subjected to force etc (Sexual Offences Act 2003 s.53A);
- exposure (Sexual Offences Act 2003 s.66);
- voyeurism (Sexual Offences Act 2003 ss.67–68);
- "upskirting" (voyeurism: additional offences) (Sexual Offences Act 2003 s.67A);
- intercourse with an animal (Sexual Offences Act 2003 s.69);
- sexual penetration of a corpse (Sexual Offences Act 2003 s.70);
- sexual activity in a public lavatory (Sexual Offences Act 2003 s.71).



421 *R. v K* [2002] 1 A.C. 462 at [44].

422 Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences" [2004] Crim. L.R. 347 at 354, and Keating, "'When the Kissing Has to Stop': Children, Sexual Behaviour and the Criminal Law" in Freeman (ed), *Law and Childhood Studies* (Oxford: OUP, 2012).

423 CPS, *Rape and Sexual Offences: Chapter 11: Youths* at *https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-11-youths* [Accessed 5 May 2020].

424 The Law Commission is undertaking a review of taking, making and sharing intimate images without consent: *http://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent* [Accessed 5 May 2020].

**ALAN NORRIE, "LEGAL AND SOCIAL MURDER: WHAT'S THE DIFFERENCE?" [2018] CRIM. L.R. 531–542:**

**8–028**

"The nature of the morally negative motive that might be identified in Grenfell is somewhat different from these existing examples. But if it were to be found there had been a reckless disregard for human life leading to the Grenfell fire; if a flagrant danger was found to have been set loose in the world through decision-making that was judged callous as to the value of human life; if a meretricious motive of putting costcutting above lives was considered to have been at play; and if all this were put together with the analysis of system risk discussed above, then there could be a question as to whether the law of murder ought to reflect deaths that occur in such conditions. There is, as we have seen, a certain openness of the law as to how it finds the mens rea of murder, and into that opening may emerge ideas of wicked recklessness, indiscriminate malice or moral callousness as interpretive ancillaries to finding intention for murder. The law remains to a degree formally open: it is a matter of a rule of evidence and an 'entitlement to find' rather than a clearly stated law, leaving a gap for negative moral judgment in the legal form. If juries may respond to good motives by refusing to apply the virtual certainty rule in such cases, might they not also do so in the way they respond to callous, wickedly reckless, indiscriminately malicious forms of behaviour that produce injury and lead to death? Might they then find it possible to call these murder? I repeat that these are questions for a jury and here, where the law is vague, this is particularly so."

**8–029**

Such an approach is, however, a recipe for unpredictability and opens the door to irrelevant factors being taken into consideration. Fair labelling requires an open acknowledgment of what forms of killing are murder. In order to determine this, two questions present themselves for consideration. Was the House of Lords in *Moloney* and *Hancock* justified in overruling *Hyam* and so narrowing the mens rea of murder? Secondly, if so, did they go far enough? Should not the crime of murder have been restricted to those who *directly* intend to kill (or cause grievous bodily harm)?

The argument for limiting the mens rea of murder to a *direct* intention is a two-fold one. Murder is the most serious crime under English law and carries the most severe penalty. It should be reserved for the worst cases which are directly intended killings. In such cases, the defendant has acted with a degree of control and deliberation that enhances his responsibility for the outcome of his actions and affects our judgement of him as a moral agent. He is not simply showing indifference to the value of human life; he is actually taking positive and purposeful steps towards the ending of the life of another. This evil aim marks him out as more blameworthy. Also, a person who is trying to achieve a result is usually more likely to succeed than someone who merely foresees that result as a by-product of her actions, and can thus perhaps be regarded as more blameworthy than one who engages in conduct with a lesser chance of harm.

Secondly, such an approach avoids all problems of having to draw fine lines on the continuum of risk taking—for example, distinguishing between foresight of the virtually certain (murder) and foresight of the extremely probable (manslaughter).

## A. INVOLUNTARY MANSLAUGHTER

"[O]f all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions."[70] 8–041

This is because manslaughters range from killings just short of murder to killings only just above the accidental.[71] This can be represented diagrammatically[72]:

| | A | B | |
|---|---|---|---|
| | | | |
| MURDER | MANSLAUGHTER | ACCIDENTAL KILLINGS | |
| | | | |

In assessing the parameters of the crime of manslaughter, attention must be focused on two questions.

(a) How is manslaughter distinguished from murder (A)? Despite the minimal discussion of manslaughter in *Woollin* and the other leading cases, the House of Lords, in defining the parameters of the crime of murder was, in essence, focusing on the distinction between murder and manslaughter. The point at which this line was drawn was considered above.
(b) How is manslaughter distinguished from accidental or non-culpable killings (B)? What factors make a killing sufficiently blameworthy to justify liability for manslaughter as opposed to liability for some lesser offence or no liability at all?

It is this question that requires close consideration in this section. It might be useful to note at the outset, however, that many cases of manslaughter start out as cases of murder, only to be reduced to manslaughter either due to acceptance of a guilty plea to that offence, or following trial. In a survey of cases resulting in convictions for involuntary manslaughter, Mitchell and Mackay found that only 13 of the 152 defendants had been indicted for manslaughter (six of those 13 having originally been charged with murder); the majority had been indicted for murder.[73] It seems that in most cases of homicide arising out of violence the prosecution will chance its arm on a murder charge, and it is not clear what factors influence the decision to charge only manslaughter from the outset.

During the last 30 years or so, the law of involuntary manslaughter has been the subject of very considerable change. It is now common to assert that it takes three forms: 8–042

(1) (subjective) reckless manslaughter;
(2) constructive or unlawful act manslaughter;
(3) gross negligence manslaughter.

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70 *Andrews v DPP* [1937] A.C. 576 per Lord Atkin.
71 For a flavour of the variations in culpability exhibited by those convicted of involuntary manslaughter, see B. Mitchell and R. Mackay, "Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases" (2011) 31 O.J.L.S. 165–191.
72 Justifiable killings have not been included in this diagram.
73 Mitchell and Mackay, "Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases" (2011) 31 O.J.L.S. 165–191 at 178.