USE OF THESES

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RECONCEPTUALISING FAULT IN THE CRIMINAL LAW:
A Defence of Reasonable Mistake of Law

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PART 1

RECONCEPTUALISING FAULT IN THE CRIMINAL LAW

INTRODUCTION

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INTRODUCTION

Ignorantia juris non excusat - ignorance of law is no defence in criminal matters. It will be argued in this thesis that rendering an accused’s ignorance or mistake of the law irrelevant to criminal culpability is unfair and contrary to the fundamental principle of the criminal law that the morally innocent should never be subject to criminal liability. The criminal law strives to reflect this through the doctrine of mens rea:

No person can be sent to prison without mens rea, or a guilty mind, and the seriousness of the offence must not be disproportionate to the degree of moral fault. Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied. ... Thus when considering the constitutionality of the requirement of foreseeability of bodily harm, the question is not whether the general rule of symmetry between mens rea and the consequences prohibited by the offence is met, but rather whether the fundamental principle of justice is satisfied that the gravity and blameworthiness of an offence must be commensurate with the moral fault engaged by that offence.¹

This statement of mens rea links it inextricably with moral blameworthiness. It will be argued that the doctrine of mens rea, as it has evolved over the last two centuries, does not adequately reflect this element of moral blameworthiness. This thesis seeks to reconstruct the doctrine of mens rea so that it expressly includes consideration of moral blameworthiness. The arguments in the thesis are developed through theoretical, historical, doctrinal and comparative analysis. The aspiration is that the proposals might be immediately and successfully applied. The thesis is thus limited to the reconstruction of mens rea within the existing framework. The broader questions of the structure and nature of criminal law and criminalisation are not challenged. This limitation necessarily restricts any ambitious theoretical reconstruction. However, the goal is to construct a practical theoretical alternative that can evolve from the status quo, rather than a perfect theoretical alternative from first principles.

¹ R v Creighton [1993] 3 SCR 3 at 54 per McLachlin J.
The thesis has two inter-related aims. The first aim is to reconstruct the doctrine of mens rea by reconceptualising fault in the criminal. The second aim is to challenge the ignorantia juris non excusat rule and propose a defence of reasonable mistake of law. Thus, the thesis naturally divides itself into two parts, the first being devoted to the reconceptualisation of fault in the criminal law, the second to the criminal law of mistake. Before proceeding any further, a brief explanation of some terms and concepts is necessary as they have specific or multiple meanings.

- **descriptive/psychological** – the terms “descriptive” and “psychological” are used to describe the orthodox theory of mens rea. These terms can be used interchangeably. The descriptive theory of mens rea insists on subjectivism and relies on technical definitions of particular mental states for particular offences.

- **normative** – The term “normative” connotes value judgments and is prescriptive in nature. It denotes when something ought to be. The normative theory of mens rea is a theory that requires moral judgment as to whether a person deserves to be blamed. This is contrasted with the descriptive theory of mens rea which merely sets out the conditions under which a person can be held liable under the law.

- **criminal culpability/blameworthiness/moral blameworthiness** – Criminal culpability and blameworthiness can be used interchangeably and denote moral guilt so profound as to call criminal, i.e. when a person deserves punishment or condemnation. This is contrasted to legal guilt, which is a more technical notion.

- **criminal liability/punishment/criminal condemnation** – These terms can be used interchangeably. They mean that an accused has to bear the penal or legal consequences of criminal law.

- **criminal fault** – Criminal fault refers to the necessary conditions to hold a person blameworthy. To explain the last three terms in relation to each other – crimin. This is contrasted to legal guilt, which is a more technical notion. Fault is necessary to show that a person is blameworthy, and blameworthiness is necessary for a person to be criminally liable.

- **strict liability** – Strict liability generally refers to the absence of a requ. This is contrasted to legal guilt, which is a more technical notion. It is used to prove mens rea. Strict liability also has a narrower meaning where the context makes it clear.
Therefore in jurisdictions such as Australia and Canada, strict liability offences are those which do not require proof of mens rea, but permit a defence of honest and reasonable mistake of fact

- absolute liability – Absolute liability refers to strict liability. This is contrasted to legal guilt, which is a more technical notion offences which do not permit any defence at all

- knowledge of wrongfulness – This denotes kn. This is contrasted to legal guilt, which is a more technical notion knowledge that the activity engaged is wrongful, either in the sense that it is illegal, immoral, unethical or improper

- knowledge of illegality – This is. This is contrasted to legal guilt, which is a more technical notion a narrow form of knowledge that is limited to knowledge of the legal status of the wrong

- ignorance and m. This is contrasted to legal guilt, which is a more technical notion mistake – While ignorance and mistake are conceptually different, for the purposes of this thesis the two terms are sometimes used interchangeably. However, in many parts of the thesis these terms have their narrower meanings and the context will make it clear that the terms are being used in the narrower sense.

OVERVIEW OF THE THESIS

The crux of this thesis is that fault in the criminal law should include an objectively assessed element of knowledge of illegality. The problem with this argument is twofold. First, the orthodox theory of mens rea is purely subjective. Secondly, knowledge of illegality is not relevant in the present law because of the ignorance of law rule. The thesis, therefore, has to challenge these fundamental criminal law doctrines that have been entrenched for over eight hundred years. It is accepted that the subjective doctrine of mens rea has much to commend. It insists on individual fault through an examination of the particular accused’s mental state and therefore respects the personal autonomy of individuals. Its weakness is that it does not explicitly require an evaluation of the moral blameworthiness of the defendant. Thus, in exceptional cases, the subjective doctrine has the potential to allow the conviction of an individual who is not deserving of criminal condemnation. Equally, it has the
potential of allowing the acquittal of an individual who is deserving of criminal condemnation.

The classic illustrations of these exceptional situations are found in the mistake cases. Under the present approach, an individual who has acted under a mistake of law is guilty, even if the mistake were reasonable. The current doctrine of mens rea does not permit an inquiry into the moral blameworthiness (or the moral innocence) of the accused, independently of the subjective mental state. As long as there is a relevant subjective mental state (which does not necessarily include knowledge of wrongfulness) the individual is guilty. Such a result is unfair. Courts have recognised this unfairness by refusing to impose any penalty in some cases where the accused has been reasonably mistaken or ignorant of the law. This is a recognition of the moral innocence of the individual. The converse situation, where the current doctrine allows a person who deserves condemnation to escape criminal liability, is illustrated by the subjective mistake of fact defence. The classic case is *DPP v Morgan*,2 where the House of Lords held that even an unreasonable mistake as to consent could theoretically negative the mens rea required for rape.

The theory underlying the present approach to mens rea is known as the descriptive theory of mens rea. Under this theory, mental states are described and each offence is assigned a particular mental state. As long as the accused has a mental state that fits the particular description, the mens rea requirement is satisfied. There is no further inquiry into whether or not the accused deserves to be blamed. Any excuse that the accused may have is dealt with as a separate defence. For example, a person who intentionally kills may plead self defence. A person who intentionally assaults another may plead duress. However, a person who intentionally engages in a particular activity, not knowing that that activity is illegal, has no defence. This is because knowledge of illegality is not an element of mens rea, nor is absence of knowledge of illegality, whether due to mistake of ignorance a recognised defence. It will be argued that this is unfair and indefensible in a civilised society.

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This thesis makes claims with respect to criminal fault:

- only the morally blameworthy are deserving of criminal condemnation
- morally blameworthy individuals are those who know, or ought reasonably to know, that the conduct is illegal. In other words, reasonable knowledge of illegality must be an element of criminal fault.

The descriptive theory of mens rea does not explicitly require an evaluation of moral blameworthiness. Even though the descriptive theory is concerned with subjective evaluation of the accused’s mental state, and thus the actual knowledge of the accused, it excludes knowledge of illegality. Any theory of criminal fault that is to be capable of giving effect to the two criteria identified above must be normative. German criminal lawyers have developed an alternative model of criminal fault based on the normative theory of mens rea. The fault element under the normative theory lies in the blameworthiness of the individual. Blameworthiness, under the normative theory is not a state of mind. Rather, it is an evaluation of the accused’s ability to refrain from committing the offence. Blameworthiness is based on four conditions:\(^3\)

- the defendant knew, or could have known, the circumstances which made the conduct correspond to the proscription and rendered it unlawful (awareness of unlawfulness)
- the defendant was capable of complying with the law (freedom of will and criminal capacity)
- the defendant voluntarily engaged in the conduct (intention)
- the defendant should not have engaged in the conduct (lack of excuse or justification)

From the above, it is immediately apparent that the German normative theory diverges from the orthodox theory in two fundamental respects. First, the fault element is a purely objective inquiry and hinges on knowledge of unlawfulness. Even if the accused did not actually know, as long as he or she could have known, that is

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\(^3\) See C R Snyman, Criminal Law (3\textsuperscript{rd} ed, 1995) 140. I have explained Snyman’s four criteria in slightly different terms to clarify the concepts.
sufficient. Secondly, intention is treated as part of the actus reus rather than the mens rea. While the German normative theory offers a theoretical solution to my endeavour, it is unlikely to successfully replace the common law doctrine of mens rea as it rejects the subjective foundation of the orthodox doctrine. The normative theory assesses fault on the basis of criteria external to the defendant. This threatens the liberal positivist foundation of individual responsibility. The orthodox mens rea theory insists on individual responsibility, but possibly at the expense of moral responsibility. The German normative mens rea theory, on the other hand, relies on objective standards, but possibly at the expense of individual fault.

This thesis attempts to discover the best of both worlds. From the descriptive theory, the subjective approach is borrowed, thus retaining the focus on the accused’s mental state. From the German normative theory, the objective evaluation of moral blameworthiness is borrowed. However, instead of relegating the defendant’s mental state purely to the actus reus and limiting the blameworthiness inquiry to whether or not a reasonable person would have known that the conduct was unlawful, the fault inquiry is centred on the accused’s mental state. The German normative theory asks whether there was a blameworthy state, regardless of the accused’s mental state. The descriptive theory, on the other hand, asks whether there was a prescribed mental state, regardless of blameworthiness.

This thesis argues that the question that should be asked is this: “Was the accused’s mental state a blameworthy one?” Instead of simply asking whether there was a mens rea, we instead ask whether the mens was “rea”. The mens, or mental state, is subjectively assessed, and the “rea”, or blameworthiness, is objectively assessed. This is a practical theoretical solution that can be implemented within the current framework of the criminal law. It retains the subjective character of mens rea, but includes an objective component to evaluate the moral blameworthiness of the accused’s mental state. Part I of the thesis thus reconceptualises fault and provides the theoretical basis for a revised doctrine of mens rea. This new doctrine of mens rea is primarily a subjective concept, but has grafted on to it an objective element of knowledge of illegality.
Introduction

Having reconstructed mens rea in this manner, Part II of the thesis addresses the law of mistake. Because the ignorance of law rule is so entrenched in the criminal law, it behoves any proponent of a new fault doctrine, which includes reasonable knowledge of wrongfulness, to provide convincing arguments against the ignorance of law rule. It is also argued that the present law of mistake has the potential to operate unfairly. In some cases, morally blameworthy individuals escape criminal liability, while in other cases it is shown that a particular mistake is denied as a defence for morally innocent individuals. Part II concludes with a comparative study of South African criminal law, where mistake of law operates as a defence.

OUTLINE OF CHAPTERS

Chapters I and II provide the historical and theoretical analysis of fault and mens rea in the criminal law. Chapters III and IV provide case studies of fault and mens rea in the criminal law. The purpose of Chapter I is to provide the theoretical basis for the argument that the doctrine of mens rea should include an explicit assessment of moral blameworthiness. The chapter begins by outlining the importance of sound theory to the development of legal doctrines. The lack of a sound theoretical foundation left the criminal law doctrines vulnerable to the changes in the eighteenth century, when liberal positivism and scientific development dominated over moral philosophy. The criminal law's moral foundation was weakened, yet branding a person a criminal is society's severest form of moral condemnation.\(^4\) Therefore, a moral theory of criminal culpability is required. It is argued that the philosophy underlying the retributive theory of punishment best accords with fundamental principles of fairness. Punishment must be morally justified, otherwise it is an unlawful infliction of harm by the state. Punishment is morally justified when it is deserved.

The just deserts theory of punishment is often criticised as unsophisticated and as being reliant on primitive notions of revenge. Its critics argue that it is not possible to accurately assess one's just deserts. While some of this criticism is valid it is argued that for punishment, or criminal liability, to be justified, the accused must be deserving of criminal condemnation. The thesis draws a distinction between the

“threshold” aspect of just deserts and the “taliones” aspect of just desert. The former is necessary to justify the branding of an individual as a criminal. The latter determines the degree of punishment or other sanction that is appropriate. It is the former that is critical to criminal liability.

The chapter then develops a normative theory of mens rea by relying on the theory developed in Germany. It should be borne in mind that while the criminal law may be described as normative, in that it has determined that only those individuals who commit proscribed conduct with a particular mental state ought to be punished, what is argued here is that the doctrine of mens rea itself should be normative. Therefore, it is not sufficient that a particular mental state existed, but it must further be shown that the mental state was a blameworthy one. It is argued that an objective test of knowledge of wrongfulness is necessary to determine the blameworthiness of a particular mental state. The normative theory of mens rea developed in Germany expressly states that blameworthiness is based on the accused’s knowledge of wrongfulness, objectively assessed.

Wrongfulness under a moral theory of fault includes moral wrong. This proposed model of mens rea potentially conflicts with two fundamental tenets of the criminal law. It may offend the positivist tradition of excluding moral consideration in favour of legal consideration, and it may offend the subjectivist foundation of mens rea by including an objective test of knowledge of wrongfulness. Because this thesis seeks to work within the general framework of the criminal law, both these concerns will be addressed and resolved so that the new theory of mens rea can be accommodated under the present framework.

Chapter II demonstrates the weakness of the orthodox, descriptive theory of mens rea. Because of the deficiency in the descriptive theory, courts sometimes rely on a latent normative approach. The chapter begins by tracing the history of the doctrine of mens rea from the twelfth century. It will be argued that mens rea was originally normative in nature, having its roots in Roman and Canon law. The shift from normative to descriptive mens rea was a relatively recent phenomenon, occurring in the eighteenth and nineteenth centuries. This period was dominated by the advent of liberal positivism in England and the growth of scientific knowledge. The separation of law
and morals, coupled with a greater scientific understanding of the mind and body led to a sharp distinction between actus reus and mens rea. It was held that the actus reus reflected the physical, external elements of a crime, while the mens rea reflected the psychological, internal elements of a crime. Thus, a purely subjective, descriptive concept of mens rea was entrenched.

Although the modern doctrine of mens rea is descriptive and purely subjective, its operation belies this. The analysis of intention and recklessness reveals how judges rely on opaque jury directions to invite the jury to consider the moral blameworthiness of the accused, in addition to the formal inquiry as to whether or not a particular mental state existed. Because this moral blameworthiness inquiry was not explicit, courts modified the traditional meaning of intention and recklessness. These mental states were broadened and narrowed, to include or exclude morally blameworthy individuals. Intention assumes a narrow meaning in the form of purpose but a broader meaning in terms of oblique intention in the form of foresight of virtual certainty. While motive is generally irrelevant, in exceptional cases, courts allow juries to rely on the motive behind the intention.

With regard to recklessness, again several varieties were created to give judges the flexibility of directing the jury in such a manner as to include consideration of moral blameworthiness. Recklessness can be in the form of foresight of probability or foresight of possibility. It can include inadvertence, which relies on a combination of subjective and objective tests. In some cases, it can even be purely objective. Chapter II thus argues that courts are surreptitiously “normatising” the present doctrine of mens rea. It will be argued that this normative dimension should be explicit, rather than hidden within the folds of the descriptive theory.

Chapter III examines strict liability offences. These offences dispensed with the need to prove mens rea. Because subjective mens rea was treated as the only form of fault in the criminal law, the strict liability regime was criticised as imposing criminal liability without fault. The strict liability regime is defended on two grounds. First, it will be argued that historically many of the strict liability offences were in fact not criminal offences, but merely civil offences. They were created to enforce minimum standards in trade and commerce and operated as an adjunct to the civil law of
remedies. Most of the offences concerned public health or public safety. The regulations imposed liability, often vicariously, on individuals and companies. This liability was generally compensatory in nature, and where the defendant was wholly blameless, the statutes provided an indemnity. Because breaches of these regulatory offences did not carry criminal sanctions in the traditional sense, moral blameworthiness was not necessary.

Secondly, it will be argued that some of the strict liability offences which were criminal in nature, in fact, did not impose liability without fault. While no subjective mental state was required to be proved, the morally innocent were generally excused. The fault element that operated was objective and in most cases consisted of an unreasonable absence of belief in the legality or otherwise of the activity engaged in. Strict liability thus provides an interesting case study of criminal fault and demonstrates that criminal fault is a much broader notion than subjective mens rea. It supports the argument that fault in the criminal law should include an objective evaluation of the accused's knowledge of wrongfulness. Judicial reactions to strict liability have resulted in defences that are based on honest and reasonable belief in lawfulness. Because of the ignorantia juris rule, the defence excluded mistake of law. Thus, the mistake had to relate to a matter of fact, which impinged on the lawfulness of the activity. It will, however, be argued that the crux of criminal fault identified in the strict liability cases hinges on absence of reasonable belief in the lawfulness of the conduct.

Chapter IV examines the law of intoxication and provides another case study to demonstrate the weakness of the descriptive theory of mens rea. The defence of intoxication arose as a result of the descriptive theory of mens rea. Historically, when criminal fault was normative, intoxication was not viewed as an exculpatory factor. Chapter IV traces the history of the intoxication cases and demonstrates that the defence coincided with the rise of the descriptive theory in the nineteenth century. By limiting mens rea to a subjective inquiry of technical mental states, it was inevitable that evidence of intoxication could raise doubts as to the existence of a particular mental state. Because the blameworthiness of the accused was not evaluated, the accused could escape criminal liability. This result offended the moral sense of judges and outraged the community, which was generally of the view that a person
who deliberately became intoxicated to the point of losing control should be morally responsible for the harm caused.

The case of *DPP v Majewski* is a perfect example of the tensions in the criminal law. In *Majewski*, the House of Lords refused to strictly apply the orthodox doctrine of mens rea. The judges instead relied on policy considerations. The judges also tried to reconcile their opinions within the orthodox mens rea theory. The attempt was futile. Arbitrary distinctions between types of intention and types of intoxication were relied upon. As with the strict liability cases, the intoxication cases forced the courts to consider moral blameworthiness and moral innocence. Unfortunately, these moral considerations of fault were not integrated into the law. Instead, they were used to justify the distinctions and the departure from existing legal principles. The fault dilemma in the intoxication cases has also divided the academic community and resulted in numerous inquiries into the law. Proposals for reform have all failed as none has grappled with the more fundamental issue of the nature of fault in the criminal law.

Part I of the thesis thus proposes a normative theory of mens rea which includes objective knowledge of illegality. This model of criminal fault is clearly at odds with the rule that ignorance of law is no defence. While the theoretical arguments presented in Part I may be sufficiently persuasive to reject the ignorance of law rule, it cannot be ignored that this rule has been a part of the criminal law for several centuries. Persuasive arguments are required to dislodge it. Part II provides some of these arguments.

Chapter V is aimed at challenging the validity of the ignorance of law rule by undermining its historical authority. Both the alleged Roman law and common law sources are critically examined and it is argued that neither source supports the maxim. Having challenged its historical authority, the chapter addresses the question as to whether or not the rule should nevertheless be supported. The various rationales supporting the maxim are critically evaluated. It will be argued that the traditional rationales for the rule are not based on principle, but are based on flawed

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considerations of pragmatism. Modern supporters of the rule are less categorical and indeed, many support a qualified version of the rule, ie only unreasonable ignorance of law should not be a defence. It is argued that this accords with fundamental principles of fairness and is compatible with the normative theory of mens rea proposed in Part I.

Chapter VI offers a critical analysis of the law of mistake. It will be argued that the emphasis placed on technical mental states by the descriptive theory of mens rea has resulted in a misguided approach to the law mistakes. Instead of determining the effect of the mistake on the culpability of the accused, courts focused on the nature of the mistake itself. Unrealistic distinctions are drawn between questions of fact and law as well as between mistake and ignorance. The chapter will argue that these distinctions should be avoided. An analysis of the mistake of fact defence demonstrates that the law sometimes fails to distinguish between blameworthy and innocent mistakes. For example, a morally culpable mistake that raises doubts as to the existence of a subjective mental state may be sufficient to deny criminal liability. On the other hand, there are cases where an accused has taken all reasonable care to avoid breaking the law, but because he or she cannot demonstrate a positive belief in particular circumstances, the accused’s reasonable ignorance of fact is not a defence.

The chapter also reviews cases in which mistake of law has been raised. It will be shown that courts have recognised several exceptions to the rule. It is argued that the strength of the rule is being diminished as the range of exceptions to the rule expand. It will be shown that the common aspect of the exceptions is that the mistake was reasonable. Indeed, one of the most significant exceptions is reasonable reliance on official advice. There is judicial and academic support for the view that where an accused reasonably relied on official advice and was mistaken as to the law, he or she should not be held criminally liable. The defence of reasonable reliance on official advice requires the citizens to have taken reasonable steps to ascertain the law. Limiting the defence to reasonable mistake thus addresses the traditional concern that a defence of mistake of law would encourage citizens to be irresponsible and deliberately avoid knowing the law.
Introduction

The final chapter provides a comparative study of the criminal law of South Africa where mistake of law operates as a defence. The mistake of law defence has successfully operated in South Africa for over twenty years. This chapter thus demonstrates that the concern that mistake of law would be practically impossible to administer and would open the floodgates of unmeritorious claims is unfounded. The South African defence of mistake of law, however, is not limited to reasonable mistake. Therefore, even an unreasonable mistake of law may operate as a defence. This chapter will argue that such a result is not desirable as there is a risk that morally blameworthy individuals could escape criminal liability. Thus, the chapter demonstrates the argument developed in this thesis that only reasonable mistake of law should operate as a defence.
CHAPTER I

RETHINKING MENS REA: A NEW THEORY OF FAULT IN THE CRIMINAL LAW

"Nothing is more practical than a good theory."\(^1\) Immanuel Kant.

INTRODUCTION

This chapter aims to develop a modified concept of fault in the criminal law by reconceptualising the current doctrine of mens rea. The present mens rea doctrine is characterised by the descriptive theory of mens rea. Mens rea is viewed as prescribed mental states, which if proved to exist at the time of the commission of the conduct that constitutes the offence, makes the accused guilty. For example, if the mens rea for an offence is recklessness, then as long as the accused foresaw the consequence, he or she is guilty. Because there is no explicit evaluation of the blameworthiness of the accused in addition to the determination of the descriptive mental state, it is argued that such an approach may, in some cases, result in the conviction of a person who is morally innocent. Instead of punishing a person simply because prohibited conduct was committed with a particular mental state, punishment should be reserved for persons who are morally blameworthy.

While it may be argued that the criminal law is normative, in the sense that it has determined that it is only individuals who engage in prohibited conduct with a prescribed mental state who ought to be punished, the doctrine of mens rea itself is not normative. It is argued that the doctrine of mens rea should be reconstructed in order to play a normative role. The importance of a normative theory, especially in the context of criminal culpability, cannot be understated. As Simester and Smith said, "No analysis of the law is really complete without [normative] argument, for it is not enough, in our view, that an explanation should lead to enhanced consistency; we

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\(^1\) Quoted in H H Jescheck, "The Doctrine of Mens Rea in German Criminal Law – Its Historical Background and Present State" (1975) 8 The Comparative and International Law Journal of Southern Africa 112.
also want to get the explanation right. The normative mens rea theory developed in Germany offers a valuable comparative model. The German approach requires a blameworthy state for criminal liability. A blameworthy mental state is when a person knows, or ought reasonably to know, that the conduct is wrong.

If mens rea is to be based on moral blameworthiness, it must first be demonstrated that moral blameworthiness is necessary. This is demonstrated by reviewing the theories justifying punishment. Modern commentators warn against the danger of linking theories of punishment to theories of criminalisation. While this is an important caution, it must be emphasised that the link that is drawn is between criminal fault and punishment, not criminalisation and punishment. Theories of criminal fault should be normative and should be viewed in a similar light to theories of punishment because criminal fault exposes individuals to state-sanctioned harm. Punishment involves causing some sort of harm to the accused, whether by way of deprivation of liberty or by imposing a penalty. In some jurisdictions (although not in the United Kingdom or Australia, which are the jurisdictions of prime concern to this thesis) punishment results in loss of life. Punishment must therefore be justified, otherwise it is an unlawful infliction of harm. Punishment is traditionally justified by recourse to either one, or both of the classical theories of punishment: retributivism and utilitarianism. It will be argued in this chapter that the retributive theory is more appropriate. Retributivism is based on the notion of desert, which in turn requires moral blameworthiness.

The early approach to fault in the criminal law was normative but that was gradually supplanted by a descriptive approach in the eighteenth century. This shift coincided with the rise of liberal positivism and the increasing interest in a scientific approach to the study of law, relying on reason and analysis, rather than on morals and

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philosophy. Apart from the influence of the scientific approach, the early scientific knowledge was also relied upon to develop the law and formulate theories of responsibility. Psychological and physiological assumptions of the mind and body were made, relying on mere hypotheses. Scientific claims about the workings of the human mind and body were applied to legal philosophy and the distinction between actus reus and mens rea was born. This sharp distinction resulted in mens rea being treated as a purely psychological concept, therefore lending itself to subjectivism. The moral foundation of mens rea was eroded. The scientific approach was viewed as a more enlightened approach and led to logic and reason replacing moral inquiry. Douglas Husak captures it well in this passage:

[T]he most influential legal philosophers on both sides of the Atlantic had officially banished ethical inquiry from criminal theory. These authorities were prepared to go to extraordinary lengths to construe their discipline as methodologically distinct from (and superior to that of moral and political philosophy. These theorists explored differences rather than similarities between their principles and those of moral and political philosophy. Jurisprudence was to be scientific, objective, factual and certain. Moral and political philosophy, by contrast, possessed none of these desiderata. In retrospect, it appears that these theorists suffered from what might be called “moral arguophobia,” that is, a fear that their discipline might require the production and evaluation of moral and political arguments. Orthodox criminal theory is almost unintelligible unless this fear is understood, for it explains the importance attached by these authorities to a number of concepts and principles. The content of the fundamental principles of liability reflects the fantasy that criminal theory embodies no moral or political presuppositions. The pretence that the issues of concern to criminal theorists are somehow unlike those investigated by moral and political philosophers has severely stunted the development of criminal theory. As a result, criminal theory has stagnated and lost its association with moral and political philosophy.6

It will be argued that moral blameworthiness depends on knowledge of illegality, which is satisfied by an objective test. This proposition raises two concerns that will be addressed. First, by relying on objective standards, there is an apparent conflict with the orthodox subjectivist approach to mens rea. To overcome this problem, the normative theory will be adapted so that it can be accommodated within the subjective model of mens rea that has reigned in the common law for centuries. The second problem is that because the normative theory relies on moral blameworthiness, there is a risk that it may be contrary to the positivist tradition of keeping separate law and

morals. It will be argued that the normative theory does not threaten the positivist foundation of modern criminal law. This is evident because the normative theory does not postulate a moral theory of law, it merely postulates a moral theory of punishment. This does not contradict positivism. The normative theory is not about the validity of rules, but about the justification of criminal liability.

CRIMINAL LAW – AN ART OR A SCIENCE?

In England the criminal law is uncodified and very defective. But the judges are excellent; and consequently the practical working of criminal justice is satisfactory. In Italy, on the other hand, we possess a Code on which twenty five years' labour has been lavished. But our judges are incompetent in point of learning and moreover are in subjection to the Executive - so the administration of our criminal justice is in disrepute, it is impotent against evil-doers and vexatious to honest men.

The above statement both damns and praises the English criminal justice system. The strength of the English criminal justice system lies in its common law tradition of reliance upon judges and jury. What underpins the criminal law is a sense of justice. As is often said, the law is about common sense and not just logic. The common law is clearly more an art than a science. The problem is that when judges disagreed, they had little by way of principles and theory to guide them. The casuistic system of common law, with inadequate theoretical foundations bequeathed a legacy of criminal laws that are internally inconsistent, and rules that are subject to constant exceptions. The English judges' disdain of theory is captured by Lord Wright's description of English judges who "go from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science."

Although common law judges prefer to rely on judicial reasoning and decide cases on the basis of precedent, the study of law as a science has had a considerable influence throughout history. The scientific approach to the study of law goes back to

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9 See for example, *DPP v Majewski* [1977] AC 443 at 482 per Lord Salmon.
10 Lord Wright, "The Study of Law" (1938) 54 Law Quarterly Review 185 at 186.
Justinian’s *Pandects*, where the law was systematically arranged. The seventeenth and eighteenth centuries saw the renaissance of legal science. The legal science of the eighteenth century was largely influenced by logic and reason which characterised the natural science approach. Legal science was initially a mixture of moral and natural science approaches, but the appeal of reason, logic and certainty of the natural sciences were gradually favoured. The aim of this modern legal science was certainty and predictability. This period also coincided with the decline of natural law and consequently the moral foundation of law was eroded. Not surprisingly, legal positivism, which insisted on the separation of law and morals became the dominant philosophy.

The seventeenth century development of legal science in England was principally due to the works of Francis Bacon and Edward Coke. Bacon was driven by the desire to develop the law to suit the needs of the public and to free it from abstract philosophies. He preferred the method of inductive reasoning, as opposed to deductive reasoning favoured by Aristotle. This inductive process was reflected in Coke’s legal science of historical jurisprudence, where first principles could be derived from a historical study of judicial decisions. This approach was further

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11 See S Jones, *An Introduction to Legal Science: being a Concise and Familiar Treatise on Such Legal Topics as are Earliest Read by the Law Student, Should be Generally Taught in the Higher Seminaries of Learning, and Understood by Every Citizen, as a Part of a General and Business Education* (1842).


16 Deductive reasoning is reasoning from general principles to a particular rule or law. Inductive reasoning is reasoning from a body of rules or law to a general principle.

developed by Hale and Blackstone. Blackstone, in particular, had great faith in the English common law. He believed that that the common law of England was the sole repository of rules that could protect the liberal values he cherished. Because of this conviction, he believed that lawyers should not look beyond the law for justification or interpretation. Hence, external norms and values were deliberately omitted from consideration in the development of the law. The law, in Blackstone's view justified itself.

The problem with this approach was that it did not provide for any external evaluation. Law was closeted from moral and political evaluation. This inductive approach was also methodologically flawed because there was no evidence that the judges were consciously stating general principles. Early case law was very compressed and much of the reasoning was not published. The lack of an appeal process and proper reporting further compromised this inductive exercise. To derive general principles from decisions that often were not supported by legal reasoning was perhaps an unrealistic goal. As Crawford and Quinn put it, "Reaching a coherent statement as to what were the dominant sets of legal principles in a growing legal system (as was early common law) is an inductive process, and fraught with the hazards of any inductive undertaking."

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Another factor that added to the exclusive nature of the criminal law was the advent of criminology in England. Leon Radzinowicz, the father of English criminology was heavily influenced by the eighteenth century Italian criminal scientists – Lombroso, Garofalo and Ferri.\(^{23}\) Radzinowicz introduced a tripartite integrated approach to criminal science to English lawyers and academics.\(^{24}\) The various branches of criminal science were divided into three categories – criminology, criminal policy and criminal law. This tripartite division is peculiar to English criminal law and resulted in the development of criminal law as a separate entity from criminology and criminal policy.\(^{25}\) As a consequence criminal law often failed to address the causes of crime and equally, failed to meet the policy objectives of criminalisation.

Criminology was based on criminal biology\(^{26}\) and criminal sociology.\(^{27}\) The function of criminology was to determine the origin of crime and causes of crime. The function of criminal policy was to devise methods of dealing with crime. Through criminal policy, various strategies to deal with crime could be developed by understanding and analysing criminological data; by investigating and testing the appropriate solutions; by enacting relevant legislation to prevent or punish; by shaping the common law to produce the goals of criminal policy. In a nutshell, criminal policy determined the criminal laws that were necessary to meet the objectives of criminal policy.

Criminal laws were rules that determined crime and punishment.\(^{28}\) These laws laid down substantive and procedural rules for dealing with crime and criminals. The


\(^{25}\) See N Lacey, C Wells & D Meure, Reconstructing Criminal Law (1990) 1-23. The authors prefer a holistic approach to criminal law.

\(^{26}\) Criminal biology included criminal psychology, criminal psychiatry, criminal psychopathology and some aspects of criminal anthropology in so far as these areas dealt with aspects of the human personality.

\(^{27}\) Criminal sociology involved studies of the social environment of the criminal, including factors such as climate, race, economic conditions, density of population, education, and employment opportunities.

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separation of criminology, criminal policy and criminal law into distinct branches meant that the integrated approach desired by Radzinowicz was compromised. Contemporary academics have recognised this failure and have adopted a more holistic approach of studying “criminalisation” as a process which relies on criminology, criminal policy and criminal law, to develop criminal law principles that better address the causes and effects of crimes, while preserving the balance between the individual and the state.  

Although this broad modern approach may redefine our thinking about criminal law and criminal justice, this thesis is concerned with the present model of criminal liability. The current doctrines on criminal fault are intrinsically tied to theories of punishment. Therefore, it is necessary to critically examine the existing theories of punishment and determine the most appropriate theory that will further the argument in this thesis.

Theories of punishment

The importance of a theory of punishment to any doctrine of mens rea is highlighted by Glanville Williams:

It may be said that any theory of criminal punishment leads to a requirement of some kind of mens rea. The deterrent theory is workable only if the culprit has knowledge of the legal sanction; and if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store for him if he does it. The retributive theory presupposes moral guilt; incapacitation supposes social danger; and the reformatory aim is out of place if the offender’s sense of values is not warped.

Punishment is either an infliction of pain or a deprivation of liberty, wealth or life, ie consequences that are unpleasant. It is a state-sanctioned harm that is inflicted on an individual. Because of its very nature, its very direct negative impact on individuals,

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there has been significant effort devoted to theories and philosophies of punishment.\textsuperscript{32} In comparison there is little work on justifying criminal liability where punishment is not inflicted. There may be a perception that as long as punishment is justified, criminal liability that does not result in punishment need not be justified.\textsuperscript{33} This ignores the fact that branding someone a criminal is society's severest form of criticism and therefore only those who deserve such condemnation should suffer it.\textsuperscript{34} Justifying criminal liability is as important as justifying punishment.

\textit{Prefatory remarks on theories}

Before examining theories of punishment several types of theories and the value of theoretical discourse will be introduced. Theories, broadly speaking, have two valuable functions. First of all, they provide a simple vehicle for understanding the law. Instead of having to discover and reconcile the law in thousands of cases a judge can rely on a theory to gain a broad overview of the law.\textsuperscript{35} Where a new case is at hand, the facts of which do not fit any previous case, a theory provides guidance as to how the law is to be applied. Such theories provide predictability and consistency by explaining and describing the law. As Moore put it, a descriptive theory "helps judges find those unobvious standards that bind them as judges."\textsuperscript{36} Secondly, they can be used to justify and shape the law. These theories go beyond merely explaining or describing a set of rules or doctrines. They prescribe what the rules ought to be and


\textsuperscript{33} Courts have the discretion not to impose punishment despite finding an accused guilty. See for example, \textit{Crimes Act} 1900 (NSW) s556A.

\textsuperscript{34} See H Gross, \textit{A Theory of Criminal Justice} (1979) 7

\textsuperscript{35} "Theories are nets to catch the world, to rationalise, to explain and to master it." K Popper, \textit{The Logic of Scientific Discovery} (1939) 59.

how the doctrines ought to be formulated and applied. These two functions divide theories into two types, descriptive and normative.

Some commentators prefer a third category of explanatory theories.\(^{37}\) An explanatory theory explains why laws are as they are. They take into account various factors that might have influenced the shaping of the law, such as historical developments, as well as environmental, political, economic and any other relevant factors. The problem with such theories is that is difficult to fairly take into account all factors, and the choice of factors often depends on the particular political or philosophical view of the writer.\(^{38}\) It is only recently that legal scholarship has given sufficient attention to historical analysis.\(^{39}\) While explanatory theories provide historical, analytical and contextual explanation to the existing set of rules, they are, at the end of the day, merely sophisticated descriptive theories. Since they do not justify the law nor prescribe what the law should be, explanatory theories can be subsumed within the broad category of descriptive theories.

Both descriptive and normative theories should be used in tandem, the former providing the framework and the latter providing the justification and guidance.\(^{40}\) The orthodox approach to criminal law theory and scholarship has largely been descriptive, with a commitment to organising and stating the law extracted from a

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\(^{39}\) M J Horwitz, “The Historical Contingency of the Role of History” (1981) 90 Yale Law Journal 1057 argued that the role history was often understated in legal scholarship.

systematic analysis of cases and legislation. This descriptive approach underlies the current mens rea doctrine. Because we use mens rea to determine the blameworthiness or innocence of an individual, a descriptive theory is not adequate. Merely describing the law fails to account for the fact that the law may be a result of an unsatisfactory or unjust process.

Most modern commentators prefer a normative approach. "As a social institution the criminal law seeks to guide and control individual conduct. This task obviously entails normation; the law is an essentially normative enterprise." Using a normative approach we can ask when a person ought to be blamed and punished. The present criminal law has determined that a person ought to be punished when he or she commits a prohibited act with a relevant mental state. In that sense the criminal law adopts a normative approach. But this normative approach needs to go further. Mens rea itself needs to be normative. The mere existence of a prescribed mental state is not sufficient to justify punishment.

It might be argued that according to the principle of legality and the positive theory of law, punishment can be justified as long as the state justifies it. Therefore, if the law states that a person shall be punished if he or she wears white shoes, such punishment is legitimised under the law. But is it just? A theory of punishment in a civilised, democratic society should be based on notions of justice. The classic conception of justice is the Rawlsian concept, based on fairness and equality. Every individual has

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a moral right to pursue his or her own liberties without the interference of the state. This right is not merely a legal right but a moral right. A sound theory of punishment therefore has to be a moral theory of punishment. Just because the state permits punishment, that does not automatically override an individual’s moral right to liberty and to be free of punishment. While the state can make laws prohibiting certain conduct, it should not violate individual rights without moral justification. As St Augustine put it, “What are States without justice but robber-bands enlarged?”

*Retributivism and utilitarianism*

The two classical theories of punishment are retributivism and utilitarianism. It will be argued that retributivism offers a valid and defensible theory of punishment. Retributivism is based on justice and moral rights while utilitarianism is based on efficiency. It is argued that where there is a conflict, justice must be given priority over efficiency. As Dworkin said, “the prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do.” Rawls’ thesis would place limits on utilitarianism when it does not respect individuals nor treat them equally. The only instance where an individual’s right may be constrained is when to do otherwise would impose an unbearable cost to society. It is not merely a utilitarian equation of outweighing the value of the right, but the cost to society must be so

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47 H L A Hart, *Punishment and Responsibility* (1968) 8, where Hart makes the point that criminalisation and punishment are two separate matters.
grossly disproportionate that the right is justifiably denied.\textsuperscript{52} Both these classical theories of punishment - retributivism and utilitarianism - can be traced to the English philosopher, Thomas Hobbes.\textsuperscript{53}

Hobbes’ theory of punishment is based on the social contract. Individuals consent to giving up their rights to the sovereign, including the right to punish. Thus, when a person is punished, it is the fruits of his or her own actions that are returned to him. This is characteristic of a retributivist view of punishment, i.e., a person receives his or her just deserts.\textsuperscript{54} Although Hobbes’ contractarian view of society provided the basis for a retributive theory of punishment, Hobbes himself claimed to be a utilitarian. As he put it, the aim of punishment is so that “the will of men may thereby be disposed to obedience.”\textsuperscript{55} On this view, the guilt or innocence is not relevant. If there is a threat that anyone committing conduct X will be killed, and ten people suspected of committing conduct X are executed as an example, that could have the effect of “disposing the will of men to obedience.” If conduct X were particularly harmful the utilitarian equation may well find that such summary execution is for the greater good.

While such an extreme example may be avoided under a moderate utilitarian approach,\textsuperscript{56} it does highlight the fact that innocent individuals may be at risk of punishment if moral blameworthiness were not required. Utilitarianism does not provide a justification for punishment, it provides a reason for it. Utilitarians argue that it is necessary because it deters or prevents harm. Recent empirical research, however, has shaken the very foundations of the utilitarian theory. Empirical evidence suggests that punishment is less of a deterrent than the belief of people that

\textsuperscript{52} R Dworkin, \textit{Taking Rights Seriously} (4\textsuperscript{th} ed, 1978) 199.


\textsuperscript{56} See J Rawls, “Two Concepts of Rules” (1955) 64 Philosophical Review 3 at 4-13.
crime is wrong.\(^{57}\) Respect for the criminal law is weakened when a person is punished even though he or she is not blameworthy. Individuals are more likely to follow laws that they believe are morally correct and less likely to obey laws that do not respect them as individuals.\(^{58}\) By respecting individual rights, retributivism encourages responsible citizenship. More importantly the retributive theory, by insisting on moral blame and desert, provides a moral justification and not merely a convenient reason for the infliction of harm on an individual. Hart urges that retributivists and utilitarians recognise that the two theories are equally valid in the punishment debate, although each has a slightly different role to play.\(^{59}\) Utilitarianism focuses on the aims and consequences of punishment, while retributivism focuses on the desert of the offender.

It is contended that utilitarianism should be concerned with theories of criminalisation, while retributivism should be concerned with theories of punishment. Many crimes do not automatically result in punishment. Conduct is criminalised, although not punished. Utilitarianism provides the reason and the justification for this. It justifies restricting the freedom of the individual to engage in certain conduct because of its potential harm to others. As long as no punishment is imposed, this is adequate. Where punishment is imposed, then it can only be justified if it is deserved by the individual, i.e., if the individual were morally blameworthy. A distinction may be drawn between justifying the institution of punishment, which is relevant to the process of criminalisation and the justification of punishment in an individual case, which raises more poignant questions of individual rights and liberties.\(^{60}\)

The German philosophers, Kant and Hegel developed the retributivist theory of punishment on the back of their broad moral philosophy of law and rights.\(^{61}\) Kant's theory was based on his ideal of justice; the right to individual freedom. Where that


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right is threatened by a person who breaches a law, then that breach needs to be reversed or corrected by an equal and opposite reaction. This reversal is punishment based on just deserts. Contemporaneously in England the liberal philosophy took hold not so much in terms of rights and reasons, but in terms of individual self-interest and economic rationalism.\textsuperscript{62} The emphasis was on the right of the rational person to be free to protect and pursue his or her interests. The “interest” in this case was mainly property interest.

One reason why the continental philosophers were more focused on rights and morals was because absolutism still reigned in many continental countries long after England recognised the moral and legal rights of individuals and offered protection against the sovereign.\textsuperscript{63} The birth of the common law during the reign of Henry II and the creation of the \textit{Magna Carta} contributed to the protection of individual rights.\textsuperscript{64} Because of this, and because of the class structure of early England, English philosophers focused on the protection of property rights, rather than basic human rights or moral rights.\textsuperscript{65} Hence the emphasis on the rational person and utilitarianism rather than the actual individual and justice. The utilitarian morality was “their economic sense put into the imperative.”\textsuperscript{66} Thompson stated this explicitly when he said, “The British state, all the eighteenth century legislatures agreed, existed to preserve the propertied and, incidentally, the lives and liberties, of the propertied.”\textsuperscript{67}

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\textsuperscript{61} I Kant, \textit{The Metaphysical Elements of Justice} (trans, J Ladd, 1965) 105; G Hegel, \textit{The Philosophy of Right} (trans, T Knox, 1952) 72.


\textsuperscript{63} See for example, M Foucault, \textit{Discipline and Punish: Birth of the Prison} (trans, Alan Sheridan, 1977).

\textsuperscript{64} The protection of individual rights through the common law was further strengthened by Sir Edward Coke. See D Little, \textit{Religion, Order and Law} (1969) 174; C Hill, \textit{Intellectual Origins of the English Revolution} (1965).


\textsuperscript{66} E Halevy, \textit{The Growth of Philosophic Radicalism} (1972) 478.

\textsuperscript{67} E P Thompson, \textit{Whiggs & Hunters: The Origin of the Black Act} (1975) 2.
The late twentieth century debates on punishment have clearly preferred retributivism over utilitarianism. Both theories have been slightly adapted to arrive at a more moderate position. The retributivists, while still focused on individual justice, tend to broaden this notion to include social justice. Modern utilitarians are embracing welfarism, which is based on a broad and inclusive concept of justice. Common to both theories now is the notion of justice, which as argued earlier is based on fairness. While utilitarians and retributivists conceive of justice in slightly different terms, both schools require that punishment be fairly imposed.

_Distinguishing between the threshold and taliones aspect of punishment_

Modern retributivism is based on the just deserts theory of punishment. There are two parts to just deserts. First, it looks at moral blame, i.e. whether punishment is warranted at all. Secondly, it looks at the degree of harm and hence the degree of punishment that is required. The problem with the just deserts theory is that the second element assumes such importance that the first element is often overlooked. This second aspect, or the _lex taliones_ principle is attacked as being unfair and in many cases unrealistic as it is impossible to match the punishment to the crime. It is important that the two elements be clearly distinguished. Each raises different questions. The question: “Is punishment justified?” is quite separate from the question: “How much punishment is justified?” It is the first question that is relevant to the imposition of punishment. It is submitted that, for the reasons already given, punishment or criminal liability is justified only when the individual is morally blameworthy. This is the “threshold question”.

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69 See for example, N Lacey, _State Punishment: Political Principles and community Values_ (1988).
72 H L A Hart, _Punishment and Responsibility_ (1968) 3 where he says: “What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?”
The second part belongs to the realm of sentencing, the amount of punishment. This is the “talion question”. Here, several other issues, quite apart from moral blame are relevant; matters such as the seriousness of the offence and the proximity of the causal connection with the harm. The “talion question” justifies imposing a higher penalty for an individual who shoots another and causes death than an individual who shoots another but does not cause death. In both cases, as long as the individuals were aware of their conduct and knew or ought to have known that it was wrong, they are blameworthy and deserving of punishment. Whilst they have crossed the threshold, the degree of punishment, still to be determined, depends on further inquiries.

It can be seen that the “threshold question” of punishment, which is essentially the equivalent of criminal liability, requires moral blame. Mens rea is the means by which criminal liability is determined. Therefore mens rea must demonstrate that the accused is morally blameworthy. The orthodox criminal law has shunned moral theories of criminal liability, due in part, to the eighteenth century legal science and the influence of liberal positivism. It should be recognised that a moral theory of criminal liability and punishment does not contradict the positivist concept of law. This moral theory of punishment is not concerned with the validity of legal rules. It is about the attribution of blame. Even positivists acknowledge that the separation of law and morals is not affected by a moral theory of punishment:

If a person whose action, judged ab extra, has offended against moral rules or principles, succeeds in establishing that he did this unintentionally and in spite of every precaution that it was possible for him to take, he is excused from moral responsibility, and to blame him in these circumstances would itself be considered morally objectionable. Moral blame is therefore excluded because he has done all that he could do. In any developed legal system the same is true up to a point; for the general requirement of mens rea is an element in criminal responsibility designed to secure that those who offend without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to the laws, should be excused. A legal system would be open to serious moral condemnation if this were not so, at any rate in cases of serious crimes carrying punishments.74

Hart says that moral blame can be modified or sidestepped by the law if it consciously decides to do so, e.g. in strict liability crimes. But where the crime requires mens rea, there must be moral blameworthiness. The question then is: "What is the "moral blameworthiness" that gives content to mens rea?" The answer lies in the normative theory of mens rea.

NORMATIVE AND DESCRIPTIVE MEN'S REA

The two major theories of mens rea are the descriptive theory and the normative theory. The former is the theory that dominates criminal law thinking in the common law world. The descriptive theory, as its name suggests, describes the mental states necessary for each crime. For example, for murder, the mens rea is intention to kill, intention to cause grievous bodily harm, reckless indifference to human life or reckless indifference to grievous bodily harm. As long as the prescribed mental state exists, the accused is guilty of committing the offence, subject to any available defence. For example, if the accused's intention is to commit conduct X, which is prohibited by the criminal law, the accused is guilty of committing that offence. There is no inquiry within the mens rea framework as to whether the accused ought to be blamed. Where it is manifestly unjust to convict, exceptions or special defences are recognised, e.g. insanity, infancy, intoxication, mistake, duress, necessity, self-defence and provocation.

The normative theory, on the other hand, goes beyond merely describing mens rea. Its function is to determine blameworthiness. The inquiry is not whether the accused intended offence X, rather it is whether the accused ought to be blamed for offence X. This theory necessarily relies on an objective evaluation of the accused's blameworthiness. Because of this objective approach the normative theory is viewed with great concern by common law lawyers trained in the subjectivist doctrine of

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75 It will be argued in Chapter III that the strict liability regime can be used to support the general thesis of moral blame for criminal liability.

76 Different jurisdictions adopt different approach to the mens rea for murder. In England, only intention is sufficient. Of the Australian common law jurisdictions New South Wales and the Australian Capital Territory include recklessness as to death while Victoria and South Australia extend the mens rea for murder to recklessness as to grievous bodily harm.
mens rea. The paradox seems to be missed. Under the orthodox descriptive theory, blameworthiness is assessed objectively, but separately from mens rea. It is assessed in the form of specific defences. All of the defences, with the exception of mistake and intoxication, are assessed objectively. If we can recognise under the orthodox theory, excuses which rely on objective standards, it is no great step to adopt a normative theory which is simply a more sophisticated theory of blame.

It is submitted that the descriptive theory of mens rea is a product of a misunderstanding of the fundamental notions of actus reus and mens rea. The scientific study of law in the eighteenth century relied on what we would now consider to be a primitive understanding of the human mind and the human body. A sharp distinction was drawn between the mind and the body with the actus reus being associated with the human body and the mens rea being associated with the human mind.77 Thus, mens rea was treated as a purely psychological concept and became a prisoner of subjectivism. Actus reus was treated as a purely physical concept when it was really a psychophysical concept.

Because blame was viewed as a psychological concept, commentators in the eighteenth and nineteenth centuries treated accidental conduct as unintentional conduct.78 A person who accidentally committed a particular act was therefore held to have acted unintentionally. This ignores the fact that intention may be relevant to the actus reus. To illustrate, if I trip over a log and fall on a person causing that person injury, that act of causing injury cannot be fairly attributed to me, because I did not intend to fall on the person. To put it another way, it was not a voluntary act.79 If I throw a stone at a person, mistakenly believing the target to be a statue, then I still voluntarily threw the stone, because I intended to do so, but because of my mistake I did not intend a wrongful act.80 In this simple illustration it is seen that intention can

77 See Chapter II for an elaboration on the actus reus and mens rea dichotomy.
80 See H L A Hart, Punishment and Responsibility (1968) 91, where Hart makes the error of treating accident and mistake in the same vein.
belong to the actus reus and it can belong to the mens rea. The former merely attributes the conduct to the individual, ie it makes the conduct voluntary, while the latter attributes moral blame to the individual.

The “intention” that the early writers talked about often belonged to the actus reus. Criminal law, several centuries ago did not require any fault or mens rea. Liability was absolute. The only condition was that the conduct had to be voluntary. The existence of a mental element of the actus reus was marginalised, if not rejected, in the nineteenth century, due to the pervasive influence of Cartesian dualism and its popularisation by Bentham and Austin. Mens rea had to be purely psychological and subjective while actus reus was purely physical and objective. The “intent” that made the actus reus voluntary became “intent” in mens rea. This error led to the descriptive theory of mens rea. The “intent” that is part of the actus reus has nothing to do with moral blameworthiness, yet it is used in the descriptive theory to attribute blame. Because of this dualistic notion of intent under the descriptive theory, it is seen that in some cases, where the intent truly belongs to the mens rea, the descriptive theory fairly attributes moral blameworthiness. In cases where the intent truly belongs to the actus reus, the descriptive theory runs into difficulties. This is demonstrated in the next chapter, where intention and recklessness are analysed.

The normative theory of mens rea – A German development

The modern normative theory of mens rea has its roots in the development of German criminal theory in the early 1900s. Reinhard Frank began this new thinking in criminal law in 1907 when he used blameworthiness as the essence of mens rea.
Frank repudiated the idea that mens rea consisted merely of subjective elements and insisted that a normative approach to mens rea would render the concept more comprehensible. The normative approach would also explain why there was no criminal culpability where the accused was insane or an infant, as well as in the cases where the accused acted under duress. Frank’s theory was developed further by Hans Welzel in 1930, and it is in his work that the modern normative theory of mens rea is found.\(^{85}\)

Welzel’s normative theory of mens rea began with a reconceptualisation of actus reus through his doctrine of “finalismus”.\(^ {86}\) The doctrine of finalismus or the finalistic theory of an act differed radically from the orthodox causal or ascriptive theory of an act. Under the causal theory of an act, as explained by Austin, the actus reus was construed simply as a willed muscular movement.\(^ {87}\) No consideration was given to the purpose or the reason for the act. Austin analysed an act in terms of will and volition.\(^ {88}\) The first stage was the desire or will for acting and the second stage was the volition which caused a muscular contraction and resulted in a desired bodily movement. Hart has criticised this Austinian view as being too artificial.\(^ {89}\) Hart

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\(^{87}\) J Austin, Lectures on Jurisprudence (R Campbell (ed) 5th ed, 1885, reprint 1972) vol 1, 414-5.


\(^{89}\) H L A Hart, Punishment and Responsibility (1968) 97.
argued that it was unrealistic to separate each component of an act as a muscular movement and to determine whether that muscular movement was voluntary.\textsuperscript{90} Hart took a broader view of an act, which accorded with common perception. For example, in the case of shooting a person, the actus reus, according to Hart was not the muscular contractions which caused the finger to squeeze the trigger, but the compendium of physiological activity that resulted in shooting. As he explained:

> What happens in normal action is that if we decide to do something we think of it in the ordinary terminology of action (as hitting someone, or writing something) and given that we have learnt to do these things and our faculties are unimpaired, our muscular movements normally follow smoothly on our decision. We do not have to launch our muscles into action by desiring that they contract as the Austinian terminology of ‘acts’ caused by ‘volitions’ suggests.\textsuperscript{91}

Under this view the actus reus was the whole act, not just the muscular contractions, which could be ascribed to the accused as a responsible agent. This ascriptive theory is not a normative one.\textsuperscript{92} It does not determine whether the person ought to be held responsible. It basically refers to a person who has the capacity to be criminally responsible. While Hart’s theory of action offers a better approach than Austin’s it still suffers from similar inadequacies as Austin’s theory. Hart described voluntary actions as those which the agent believed himself or herself to be doing. He distinguished between knowledge or foresight of consequence (which belong to mens rea) and belief in the state of affairs concerning the physical act. Therefore, a person who intentionally pulled the trigger of a gun was acting voluntarily, but may have unintentionally killed someone if they did not aim the gun at another person.

Hart’s criticism of Austin for artificially breaking down the components of an act into muscular contractions can be used against Hart himself. Why did Hart break down the act of shooting someone (the legally relevant act for murder) into the act of pulling the trigger, which was separated from the other components such as picking up the

\textsuperscript{90} Another criticism is that the Austinian theory does not explain omissions.

\textsuperscript{91} H L A Hart, \textit{Punishment and Responsibility} (1968) 103.

gun and extending the arm to take aim at the victim. Why should not the actus reus be the whole act that is wrongful? It seems that Hart only went halfway along the journey of redefining actus reus. He theorised when an act was voluntary, and recognised the relevance of intent within actus reus. He did not however distinguish between a mere act and an actus reus. The criminal law should be concerned with criminally relevant acts, not any and every act. It is the criminally relevant conduct that is the actus reus. Welzel takes the journey to its inevitable end in his finalismus theory.

Welzel’s finalistic theory of an act focuses on the purpose of the act. An act was not an actus reus until, and unless, the purpose of the act was examined. Finality, according to Welzel was a teleological concept. Welzel explained this by contrasting his finalistic theory with Austin’s causal theory. He described Austin’s theory of an act as a blind theory as it ignored the ability of the human will to select a goal in advance and to direct the conduct towards that goal. To continue with the above example, if the accused had caused the death of another by shooting that person, the actus reus was the squeezing of the trigger accompanied by the purpose of bringing about the death of the victim. If that purpose was non-existent, then that act could not be described as killing or causing death. It could only be described as an act of discharging a gun. The resulting death of the victim was merely incidental. This theory of action necessarily included consideration of the accompanying intent, without limiting it to the basic conduct, but by extending it to the consequences. This view also accorded with the philosophical view of Wittgenstein who argued that

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95 See G P Fletcher, Rethinking Criminal Law (1978) 434.


intending to do something was not a mental state dissociated from the act but rather a part and parcel of the act.\textsuperscript{98} As he put it, "Acting intentionally is a way of acting."\textsuperscript{99}

The finalistic theory removed intention from the sphere of mens rea and put it squarely in the sphere of actus reus. Having removed intention from mens rea, Welzel offered a radical reconceptualisation of mens rea. Instead of viewing mens rea as the accused’s mental state, mens rea was viewed as the blameworthiness of the accused. Snyman describes it thus:

[The normative theory of mens rea] amounts to a reproach of the wrongdoer for performing a certain act, despite the fact that he was aware of its wrongful character, and despite the fact that he was personally in a position to refrain from his unlawful conduct.\textsuperscript{100}

The two elements of mens rea under the normative theory are criminal capacity and knowledge of wrongfulness. Because mens rea under the normative theory does not include intention, it is not restricted by subjective constraints. The knowledge of wrongfulness element is not whether the accused knew that the conduct was wrong, but rather whether a reasonable person should have known that the conduct was wrong. As Snyman put it:

The state of mind or the intention [re actus reus] is 'in the head of the offender', but the mens rea, the reproach for the wrongful act, is 'in the head of the judge'. It is therefore confusing to describe mens rea as a 'blameworthy state of mind'. The intention, or the direction of the will, is the object of the reproach, but not the reproach itself.\textsuperscript{101}

This of course is fundamentally at odds with the orthodox theory, as blameworthiness under the normative theory is objective, while legal guilt under the descriptive theory is subjective. Knowledge of wrongfulness is assessed objectively, and therefore reasonable, or to use the expression favoured in German criminal law theory

\textsuperscript{98} L Wittgenstein, \textit{Philosophical Investigations} (trans, G E M Anscombe (3\textsuperscript{rd} ed, 1974)).


\textsuperscript{100} See C R Snyman, “The Normative Concept of Mens Rea – A New Development in Germany” (1979) 28 International and Comparative Law Quarterly 211 at 214, citing H Welzel, \textit{Das Deutsche Strafrecht}.

unavoidable, ignorance of law negatives mens rea.\textsuperscript{102} By recognising the existence of a mental element in the actus reus and treating that separately from mens rea, a model that better determines causal responsibility and moral responsibility has been constructed. The English common law has not done this because it has confused the mental element of actus reus with that of the mens rea. Any moral theory of blameworthiness is compromised because “the concept of mens rea is completely different from [the actus reus’] ethically indifferent and valueless mental process and this is commonly not recognized.”\textsuperscript{103}

**Fletcher’s normative model – borrowing from Germany**

The normative theory is not alien to criminal lawyers trained in the common law.\textsuperscript{104} Even as far back as 1954 there was an appreciation of the German criminal law principles of mens rea.\textsuperscript{105} However, it is George Fletcher who is widely credited with introducing German criminal law theory into the criminal law debates in the common law world.\textsuperscript{106} Fletcher adopted the German theory to develop his alternative model of criminal culpability.

That alternative model is expressed in the claim that the analysis of liability consists of both an objective and a subjective dimension. The objective dimension focuses on the act and, in some cases, on the harm that the actor causes. The subjective dimension focuses on the actor and the question whether the particular actor is accountable for the act of wrongdoing. The assessment of attribution and accountability obviously requires the application of standards to the particular situation of the actor. As worked out more elaborately in the theory of excuses, the standard has a variety of forms, but it always recurs to the same normative question: could the actor have been fairly expected to

\textsuperscript{102} *German Penal Code* ss16, 17.
avoid the act or wrongdoing? Did he or she have fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, or to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just.\textsuperscript{107}

Understanding Fletcher’s theory involves understanding these terms: wrongfulness, wrongdoing, attribution, justification and excuse. Fletcher defines wrongfulness as a technical, categorical concept. It simply means conduct that is prohibited by the law.\textsuperscript{108} However, the ordinary meaning of wrongful is broader than the specific meaning given to it by Fletcher. Wrongful includes conduct that is not necessarily illegal. For example, dishonesty has a specific legal meaning that is narrower than its ordinary meaning. In the law of theft these different meanings of dishonesty become particularly relevant. Under English law, dishonesty under the \textit{Theft Act} 1968 is given its ordinary meaning of being contrary to current standards of ordinary decent people.\textsuperscript{109} Australian jurisdictions have adopted a slightly narrower definition of dishonesty, particular in Victoria where dishonesty is restricted to a legal definition.\textsuperscript{110} This legal definition of dishonesty virtually restricts it to a belief in a legal entitlement. An example that illustrates the different application of the two forms of dishonesty is a person who knows of a tax loophole and decides to exploit it for personal gain. Under the English definition, such conduct could be viewed as dishonest because it would be contrary to current standards of decent people. Under the Victorian approach it would not be regarded as dishonest because the defendant could show a belief in a legal entitlement. While the conduct may be immoral, it is not dishonest according to the law. The same reasoning applies to the distinction between wrongful and illegal. Because of this ambiguity, and because this thesis favours a moral theory of fault within a positivist framework, the knowledge requirement is limited to illegality.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{107} G P Fletcher, \textit{Rethinking Criminal Law} (1978) 510.
\item \textsuperscript{108} G P Fletcher, \textit{Rethinking Criminal Law} (1978) 458.
\item \textsuperscript{109} \textit{R v Ghosh} [1982] QB 1053; \textit{R v Feely} [1973] QB 530.
\item \textsuperscript{110} \textit{Crimes Act} 1958 (Vic) s73(2).
\end{itemize}
\end{footnotesize}
Wrongdoing, according to Fletcher is the doing of something wrongful without justification.\textsuperscript{111} Attribution exists in cases of wrongdoing where there is causal responsibility (including intention) and where the accused has no excuse for his or her conduct, ie the accused can be fairly blamed for the conduct. Attribution is thus a normative concept. Where the defendant engages in conduct ordinarily unlawful, but under the particular circumstances becomes lawful, the accused is justified in so acting. For example, killing another in self-defence is a justification. Such killing in self-defence is not unlawful. This can be contrasted with excuses, which merely relieves the accused of blame. For example, mistake of fact is an excuse. If a person shoots another human dead, mistakenly believing that the target was a kangaroo, the person is not guilty of murder. The killing, however, is still unlawful. Therefore, justification negatives wrongdoing and excuse negatives attribution.

Under the current approach in English law, there is no clear distinction between justification and excuse, although there is a recognition of excusing conditions, eg insanity, duress, infancy, mistake and such.\textsuperscript{112} These excuses are treated as exceptions to what would otherwise amount to criminal liability. The normative theory integrates excuses within the theory of fault. Instead of treating excuses as secondary rules determining criminal capacity,\textsuperscript{113} excuses are treated as factors that judges can take into account in determining whether or not a person is criminally culpable. The insane cannot be fairly attributed with wrongdoing, not because he or she did not intend the deed, but because he or she cannot be fairly blamed for the deed. Under the orthodox theory, the excusing condition in insanity is not the individual blameworthiness of the accused for his or her acts, but rather a general exemption from criminal responsibility because of the accused’s pre-existing condition. This, according to Fletcher, suggests that insane people are outside the jurisdiction of the criminal law,\textsuperscript{114} which is patently incorrect. Yet, that is the conclusion that one must

\textsuperscript{111} G P Fletcher, \textit{Rethinking Criminal Law} (1978) 458.
\textsuperscript{114} G P Fletcher, \textit{Rethinking Criminal Law} (1978) 497.
reach under the orthodox theory. The better view is that the insane are subject to the criminal law. It may, however, be unfair to blame them.

Whether an individual can fairly be blamed under the view espoused by Fletcher depends on whether wrongdoing can be attributed to the individual. Since attribution depends on the existence or otherwise of an excuse, Fletcher's theory of criminal culpability is ultimately a sophisticated theory of excuse. An individual is criminally culpable if he or she engages in wrongdoing without any excuse. Excuses are generally assessed objectively, although the assessment is personalised to take into account many of the individual's characteristics. Thus, there is an element of subjective and objective assessment of criminal culpability in Fletcher's crucial question of whether "the actor (subjective) could fairly (objective) be expected to avoid the act or wrongdoing."

Adapting the normative theory: a separation of mens and rea

The normative theory of mens rea, as developed in Germany and modified by Fletcher both base culpability on the blameworthiness of the individual. This blameworthiness is determined by an objective appraisal of the accused's behaviour. Criminal culpability is determined not with reference to the accused's mens rea but with reference to the accused's conduct as a whole. While these models have theoretical appeal and perhaps provide a better conceptual framework for determining criminal liability, adopting either model would require an overhaul of the common law model of criminal liability. Whatever the weakness of the common law model of criminal culpability, it has operated quite successfully over centuries. To replace the current model with the German model could well result in throwing the baby out with the bath water. Because the normative theory subsumes intention wholly within the actus reus, it displaces the psychological aspect of mens rea. The model that is suggested in this thesis is one that marries both the psychological and normative dimensions of mens rea.

In order to achieve this, we have to reconceptualise mens rea as not one but rather as two elements. Mens rea has always been viewed as "the relevant mental state" or "the guilty mind" and is assessed wholly subjectively. The proposed model splits mens rea into its component elements, the "mens", which is the psychological element and
subjectively assessed; and the “rea”, which is the normative element and objectively assessed. This model is still loyal to the subjective principle of mens rea because the mental state of the accused is still central to criminal liability. The accused (not the reasonable person) must still intend or foresee the conduct or the consequence. The additional inquiry is whether that foresight or intention is blameworthy. This blameworthiness inquiry is objective. It is not a general inquiry into the accused’s conduct as a whole but an objective evaluation of the quality of the accused’s mental state. Instead of asking: “Did the accused act in a blameworthy manner?” (German model) or “Could the accused have fairly expected to avoid the act or wrongdoing?” (Fletcher’s model); the question should be: “Was the accused’s mental state a blameworthy one?”

A further concern with the normative theory is that it has the appearance of contradicting the positivist foundation of the common law. Assessment of moral blameworthiness may be criticised as a disguised return to a natural law approach. This concern can be dismissed once it is recognised that the normative theory offers a moral theory of punishment, not a moral theory of law. It does not challenge the validity of the law, it merely provides a just means of enforcing the law.\footnote{See generally, W J Waluchow, \textit{Inclusive Legal Positivism} (1994); H L A Hart, \textit{The Concept of Law} (1961).} Criminal culpability and theories of blame are intrinsically linked with moral evaluation. However, moral evaluation has to be conducted within the positivist framework of the law. Under the normative theory, criminal culpability hinges on reasonable knowledge of wrongfulness. As suggested above, this should be limited to knowledge of illegality. Therefore when a person engages in conduct X, which is prohibited by law, that individual is not morally blameworthy if he or she did not reasonably know that the conduct was illegal. It is not a question of the defendant arguing that he or she believed the conduct \textit{should not} be illegal. The moral status of the offence is not relevant and belief as to the moral wrongfulness or otherwise is similarly not relevant. It is only the belief of the legality of the conduct that is relevant. As Fletcher said, “These [normative] terms do not raise questions of the actor’s general moral worth or even of his moral wickedness in a particular situation. They pinpoint the specific
inquiry whether it is fair to hold the actor accountable for an act of legal wrongdoing.\textsuperscript{116} [emphasis added] Legal wrongdoing is still determined by the law and remains unchallenged by the belief of the defendant.

CONCLUSION

This chapter has provided a practical theoretical framework for a reconceptualisation of fault in the criminal law, and consequently a reconstruction of mens rea. The present theory of mens rea is the descriptive theory which merely describes particular mental states that need to be proved before criminal liability can be found. While this concept of mens rea will in most cases result in the punishment of morally blameworthy individuals, there is a risk that in some instances a morally innocent individual could be punished. This risk is present because the current theory of mens rea does not expressly require the evaluation of the moral quality of the particular mental state. While criminal law and punishment are inextricably linked with moral philosophy, this link was threatened in the eighteenth and nineteenth centuries.

During the eighteenth and nineteenth centuries tremendous advancement in scientific knowledge was gained and philosophers were attracted to the natural science methods of reason and logic. Judges and legal commentators, dissatisfied with the disarrayed state of the common law, found the precision, neatness and predicability offered by the scientific approach enticing. This period also coincided with the rise of liberal positivism as the dominant philosophy at the expense of natural law and moral philosophy. The combination of legal science and liberal positivism resulted in a criminal law that increasingly embraced descriptive theories over normative theories. Scientific knowledge in the fields of psychology and physiology was primitive and led to grand but premature hypotheses about the human mind and body. Based on this distinction between mind and body, philosophers created an artificial distinction between actus reus and mens rea. Legal commentators then formulated rigid principles of responsibility around these concepts.

\textsuperscript{116} G P Fletcher, \textit{Rethinking Criminal Law} (1978) 491.
The nineteenth century commentators continued this process and attempted to
describe mens rea in terms of particular psychological mental states rather than in
terms of moral blameworthiness. Thus mens rea was described as intention,
recklessness, knowledge and purpose. This approach was seen as more scientific and
introduced order and logic in the criminal law. The problem with this was that the
nineteenth century commentators were grappling with very complex scientific and
philosophical concepts while the available knowledge was simply inadequate. The
lack of appreciation of the mental element component of actus reus led to a corruption
of the notion of intention in mens rea. The intention that made the actus reus
voluntary was treated as the intention necessary for mens rea. This intention revealed
nothing about the moral blameworthiness of an individual. It merely made the actus
reus voluntary and ascribed causal responsibility to the accused. It did not ascribe
moral responsibility.

From a critical discussion of theories of punishments it was concluded that
punishment was only justified when it was deserved. While utilitarianism provided a
rationale for punishment, and perhaps justified the overall institution of criminal
punishment, a retributivist approach was necessary to justify punishment at an
individual level. An individual deserved punishment when he or she was morally
blameworthy. The doctrine of mens rea therefore had to be capable of showing that
the defendant was morally blameworthy. Because the descriptive theory did not
explicitly evaluate moral blameworthiness, an alternative theory was required. The
German normative theory offered a theoretical alternative. The difficulty with the
German model was that it was radically different from the common law model, in that
it had removed the psychological elements from mens rea. Mens rea under the
German model was simply acting in a state of blameworthiness, which was defined as
knowledge of wrongfulness and assessed objectively.

This model threatens the twin pillars of the common law mens rea doctrine –
positivism and subjectivism. It was argued that neither of these threats was fatal if the
German normative model was modified. A moral theory of blame was not the same
as a moral theory of law and therefore did not threaten the positivist foundations of
our legal system. The validity of the law was not challenged, it was only the validity
of the enforcement of the law that was challenged. The thesis is not about the
enforcement of morals,¹¹⁷ rather it is about the morals of enforcements. Under the positivist model, a moral theory of enforcement of the law was permissible. The model proposed also did not fall foul of the subjectivist doctrine. The psychological elements of mens rea were retained, but grafted on to it was a normative element. This was done by splitting mens rea into two components. The "mens" was the psychological component which was subjectively assessed while the "rea" was the normative component which was objectively assessed.

The normative component of mens rea is knowledge of illegality, which is objectively assessed. The test is whether or not the accused knew or should have known that the conduct was illegal. This normative assessment is contingent on the satisfaction of the subjective assessment, ie there must first be a relevant mental state, before the blameworthiness of that mental state can be assessed. Once a descriptive mental state is proved, it must then be shown that the accused had knowledge of illegality, or that the accused ought to have had such knowledge. It is not a question of whether the reasonable person would have had such knowledge. Only when the accused knew, or ought to have known, that the conduct was illegal, could it be shown that the mens was rea, and that the accused was morally blameworthy.

CHAPTER II

ANALYSING MENS REA: A HIDDEN DOCTRINE OF FAULT IN THE CRIMINAL LAW

INTRODUCTION

It was argued in Chapter I that mens rea should be a normative concept, the purpose of which should be to attribute moral blameworthiness. While retaining the subjective model, it was proposed that an objective assessment of moral blameworthiness be grafted onto the subjective test. In this chapter it will be argued that the doctrine of mens rea, although presently descriptive in nature, was originally a normative concept. It will be shown that even though the formal concept of mens rea is descriptive, the judicial approach in many cases reveals a normative basis. This "normatising" effect is achieved through jury directions that are couched in such terms as to permit the jury to engage in moral evaluation of the accused.

Mental states such as intention and recklessness are accordingly defined narrowly or broadly depending on the judges' intuitive view of the defendant's moral blameworthiness or moral innocence. This flexible judicial approach to directions on mens rea resulted in various meanings for mental states such as intention and recklessness. In some cases, intention was defined as including foresight whereas in others it was limited to purpose. In yet others, motive was implicitly made relevant. Inferential reasoning also allowed an objective test of intention to operate in some instances. Recklessness was similarly defined according to various degrees of foresight, depending on the nature of the offence. An objective species of recklessness was recognised where the defendant failed to advert to an obvious risk.

Thus, we may well have a doctrine of mens rea that is descriptive in theory but normative in practice. This normative dimension of mens rea, however, is latent. It lurks beneath the veneer of subjectivism and descriptivism. This approach of applying a hidden form of normative mens rea has resulted in a doctrine that is internally inconsistent and unnecessarily complex. Basic concepts like intention and
recklessness have acquired a variety of meanings that have unnecessarily complicated the law.

It is argued that, rather than being fixated with precise, technical definitions of mental states, it would be better to concentrate on the moral blameworthiness question. The legal approach to causation in law provides a useful comparator. Judges have accepted that causation is not a matter of determining cause and effect through scientific tests but is about determining causal responsibility. The modern approach to causation is unscientific but reflects the purpose of the doctrine. The test for causation is basically a common sense test, based on determining the substantial and material cause.\(^1\) As was so aptly put by Burt CJ, "it is enough if juries [are] told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry as to attribute legal responsibility in a criminal matter."\(^2\) [emphasis added]

The causation inquiry is essentially aimed at determining whether or not a person ought to be held causally responsible. It is a normative inquiry. Judges refrain from attempting to define causation too strictly and instead, expressly direct the jury to use their common sense. Mens rea, being a determinant of moral blameworthiness should be similarly treated. Judges should direct the jury that the issue is one of moral blameworthiness and that in addition to finding a subjective mental state they should also find a blameworthy mental state. The question should be whether or not the accused ought to be criminally liable. It is argued that the reconstructed doctrine of mens rea developed in Chapter I provides a better alternative to the current doctrine of mens rea. This alternative approach allows judges and juries to explicitly determine criminal culpability on the normative grounds of moral blameworthiness.

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\(^1\) See generally, H L A Hart & T Honore, _Causation in the Law_ (2\textsuperscript{nd} ed, 1985); _March v E & M H Stramare Pty Ltd_ (1991) 171 CLR 506.

\(^2\) _Campbell v The Queen_ [1981] WAR 286 at 290 per Burt CJ.
HISTORY AND DEVELOPMENT OF MENS REA

By and large, the dominant tradition in Anglo-American legal scholarship today is unhistorical. It attempts to find universal rationalising principles ... The underlying structure of the law class remains that of forcing the student to reconcile contradictions that cannot be reconciled. ... The ideological "ilt" of current legal scholarship derives from this attempt to suppress the real contradictions in the world, to make the existing world seem to be necessary, ... to be showing that the rationalising principles of the mainstream scholars are historically contingent. Consequently, analytic scholarship is anti-historical: it regards history as subversive because it exposes the rationalising enterprise.\(^3\)

The quote above highlights the importance of a historical understanding of the law. The history of mens rea provides some valuable insights into the purpose and original meaning of the doctrine. Mens rea as a necessary element of criminal culpability developed in the twelfth and thirteenth centuries. It was largely influenced by the expansion of the Church and the reception of Roman law. Both these influences demanded moral blameworthiness for punishment. The Church, in particular, was concerned with punishing sin. It viewed sin as something that existed in the heart and soul of the individual.

The twelfth century was a significant period in the development of the English common law.\(^4\) During this period, England was under the reign of Henry I and Henry II, both of whom devoted much effort to law and order. Henry I published the *Leges Henrui Primici* (circa 1118) which was a collection of all the laws existing in his time.\(^5\) The cardinal principle of criminal law – *actus non facit reum nisi mens rea* – can be traced to the *Leges Henrui Primici* \(^6\) This rule is more popularly known in its modern form as stated in the seventeenth century by Sir Edward Coke - *actus non

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\(^5\) Henry II's great contribution was the Magna Carta.

Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

facit reum nisi mens sit rea. There is evidence that the original source of this rule was St Augustine who said in the context of perjury, “ream linguam non facit, nisi mens rea.”

We therefore have a doctrine of mens rea that is at least 800 years old, and perhaps even older. Yet, even now there is debate as to what mens rea means. Francis Sayre, in an influential article, divided the study of mens rea into five stages:

- the mental requisites for criminality in the early law up to the thirteenth century
- the beginnings of the conception of mens rea
- the subsequent development of a general mens rea as a requisite for criminality
- the growing particularisation of this general mens rea with respect to specific felonies
- the growing particularisation of this general mens rea with respect to specific defences

This is a useful framework to study mens rea and will be adopted with some modification. There were two periods in history where there was radical development of the principles governing criminal liability. The first occurred in the twelfth and thirteenth centuries under the influence of Canon law and Roman law. The second was in the eighteenth and nineteenth centuries with the growth in scientific knowledge and the dominance of liberal positivism. Mens rea in the thirteenth century was a normative concept. The eighteenth and nineteenth centuries saw mens rea evolve into a descriptive notion. The particularisation of mens rea as described by Sayre occurred at this stage.

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7 This maxim was accepted and applied by judges in the eighteenth century. See R v Banks (1794) 1 Esp 145; Fowler v Padget (1798) 7 TR 509 at 514; R v Tolson (1889) 23 QBD 168 at 172.
9 Hall suggests St Augustine derived the maxim from Seneca, who originally said, “Actio recta non erit, nisi recta fuerit voluntas...” J Hall, General Principles of Criminal Law (2nd ed, 1960) 80. This would make the maxim nearly two thousand years old.
Law of wrongs

Prior to the twelfth century England did not have a separate system of criminal law. What operated in England was the law of wrongs, which included what is now known as torts and crimes. The emergence of the criminal law was due in part to the Crown's intervention in certain areas of conduct in the interest of maintaining an orderly community, as well as to collect fines and gain political control. The distinction between crimes and torts was that crimes affected public interests whereas torts affected private interests. More importantly criminal law was concerned with punishment while tort law was concerned with compensation. This critical difference in focus resulted in the development of mens rea, which became the hallmark of criminal liability. As stated in Bacon's Maxims:

In capital cases in favorem vitae, the law will not punish in so high a degree except the malice of the will and intention do appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was wrongdoer.

Prior to the Norman Conquest, there was no requirement of proof of mens rea. The law of wrongs consisted of four elements:

- outlawry
- the blood feud
- tariffs of wer and bot and wite
- punishment of life and limb

The general view was that in the early days, liability was absolute. For example it was not relevant that the killing of another was intentional or not. "The law thus set

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11 "The Penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of Torts." See H Potter, An Historical Introduction to English Law and its Institutions (1932) 295.


13 Quoted in H Potter, An Historical Introduction to English Law and its Institutions (1932) 309.

forth smack[ed] strongly of liability without fault and certainly without criminal intent.”¹⁷ Depending on the nature of the wrong, a person could be outlawed, ie cast out of society and left without its protection. Outlawry was reserved for the most serious of crimes. Blood feud was where the person was not completely outcast from society but permission was given to the victims to exact vengeance. Vengeance generally indicated a sense of being wronged and in most cases the wrong was intentional.¹⁸

This privatisation of “punishment” paved the way for the development of a system of compensation. The guilty person was spared physical harm if he or she was able and willing to pay the victim compensation. Thus developed the system of bot, wite and wer.¹⁹ Wer was the value of compensation, wite a penal fine payable to the King and bot a tariff, payment of which was an emendation of the crime, ie a representation of the person’s penance which deserved forgiveness. There were many offences which were regarded as too serious to be remedied by payment of bot and wite. These offences were unemendable and outlawry or punishment of life and limb were continued. Elements of the blood feud and the system of bot, wite and wer are seen in the retributive theory of punishment. There is an inherent sense of vengeance in

¹⁵ “Laws in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows.” F Pollock & F W Maitland, The History of English Law (2nd ed, 1923) vol 2 470. But see, P Winfield, “The Myth of Absolute Liability” (1926) 42 Law Quarterly Review 37 for a contrary view. As Winfield said, “No doubt it [Anglo-Saxon law] had no means for an elaborate investigation of intent, but all the Anglo-Saxon law with which we are acquainted shows that the system had at least the capacity for taking account of what passed in a man’s mind in facts of the commonest occurrence.”

¹⁶ “Whoever shall have killed a man,” runs the old Westgothic Law, “whether he committed the homicide intending to or not intending to (volens aut nolens), ... let him be handed over into the potestas of the parents of next of kin of the deceased.”: Walter, Corpus Juris Germanica, vol 1, 668, quoted in J H Wigmore, Responsibility for Tortious Acts (1894) 7 Harvard Law Review 315 at 321.


¹⁸ “Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted; even a dog distinguishes between being stumbled over and being kicked. ... The early English appeals for personal violence seem to have been confined to intentional wrongs.” O W Holmes, The Common Law (1881) 3.

¹⁹ H Potter, An Historical Introduction to English Law and its Institutions (1932) 298.
retribution. The *lex taliones* principle or just deserts was derived from this ancient compensation system of an eye for an eye.

The system of bot, wite and wer eventually resulted in the pleas of the Crown. Pleas of the Crown were wrongs personal to the King. Any breach of the King’s peace resulted in a fine to the King.20 The King’s peace, which was originally limited to certain times and place, was extended to include all of England all of the time.21 As the King’s peace was now all pervasive, Henry II put in place certain procedural mechanisms to ensure that the more serious offences were presented to a jury who determined whether or not the individual should be tried.22 This was the beginning of the separation of torts and crimes.

From the procedures adopted at the Assizes of Clarendon and Northampton (circa 1164),23 it is clear that the law of wrongs had two separate branches, one of crimes and one of torts. Criminal liability required guilt and resulted in punishment. Not long after the new procedures, English law came under the influence of two other legal systems, both of which placed emphasis on mental states and blameworthiness. One was Roman law with its emphasis on mental states such as dolus and culpa. The other was Canon law with its emphasis on sin and moral blame.

The thirteenth century influence of Roman civil law and Canon law

The twelfth century witnessed the revival of Roman law by Irnerius at Bologna.24 The method of study Roman law was to gloss the body of the law contained in the Corpus Juris. It was an exegetical exercise of interpreting the text from its source without putting it in the context of contemporary society. The aim was to interpret the pure

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20 Apart from the fines, outlawry was also a form of revenue raising as the property of the outlawed reverted to the King. See W Holdsworth, *The History of English Law* (4th ed, 1936) 48-9 for a description of the tariffs that were applied for different offences.


22 These procedure were introduced at the Assizes of Clarendon and Northampton and were the forerunners of the modern Grand Jury system. See, H Potter, *An Historical Introduction to English Law and its Institutions* (1932) 223.


Roman law and apply it to the society of the day. In the thirteenth century, the Post-Glossators or Commentators continued the work on Roman law. Their approach was different to the earlier approach in that the Commentators sought to develop a system form the multitude of rules that made up the Corpus Juris. The Commentators developed a system of principles and specific offences. The work of the Commentators transformed the pure Roman law into a new Roman-Italian law. The Commentators also insisted on proof of actual fault and elevated the significance of the mens rea notions of dolus and culpa.

This knowledge and tradition was passed into English law in the thirteenth century through Azo of Bologna who taught Bracton. Around the same time Canon law was also growing in stature. Between 1139 and 1142, Gratian of Bologna published a book on Canon law, called Concordia discordantium canonum. Roman and Canon law principles were slowly absorbed into the common law. The influence of both systems became pervasive when Roman and Canon law were extensively taught in Oxford during the early years of that institution. The common law at this stage was at its infancy, the system having its origins in the Constitutions of Clarendon, declared in 1164 by Henry II. Thus, three systems of law were competing for supremacy in the twelfth century. Roman and Canon law were favoured by the ruling elite and the

25 The study of Roman law in this manner spread from Italy to other parts of Europe as more law schools were established. In Italy, following Bologna, law schools studying Roman law were established in Padua (1222), Naples (1225), Rome (1303), Perugia (1308) and Pisa (1343); In France, schools were established in Paris (1202) Toulouse (1228), Orleans and Montpellier (1289); in England – Oxford (1167), Cambridge (1209); in Spain – Salamanca (1220) in Portugal – Coimbra (1290); in Germany – Vienna (1365), Heidelberg (1386) and Cologne (1388); in Bohemia – Prague (1348); in the Netherlands – Louvain (1425).


28 For Canon law Bracton relied on Bernard of Pavia.

29 This publication is better known as the Decretum. See, F Pollock & F W Maitland, The History of English Law (2nd ed, 1923) vol 1, 112-3.

Church. Common law, being the weakest, inevitably absorbed much from the other two systems.\textsuperscript{31}

The influence of these two schools of thought on mens rea was immeasurable. The Roman law notion of dolus and culpa laid emphasis on psychological responsibility. Thus knowledge or foresight was necessary for criminal liability. An investigation of the criminal mind was inevitable. Canon law, on the other hand, held to the view that only sin was punishable and therefore insisted on moral guilt for criminal liability. This moral guilt could only be determined by an examination of the mental state of the person.\textsuperscript{32} Humans sinned when they willed a wrongful act. To will a wrongful act was to intentionally bring about the result, knowing or desiring the wrongfulness of the result.\textsuperscript{33} Both schools of thought thus required blameworthiness and used the mind to determine this blameworthiness.

Bracton, who was responsible for introducing Roman and Canon law concepts into English law stated:

\begin{quote}
We must consider with what mind (animo) or with what intent (voluntate) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (nocendi voluntas) intervene, nor is a theft committed except with the intent to steal.\textsuperscript{34}
\end{quote}

During the thirteenth century, it was not quite accepted in English law that mens rea was required for criminal liability. Nevertheless, it was recognised that where a crime was committed without a relevant mental state, and the penalty was capital punishment, the King could pardon the condemned person.\textsuperscript{35} The liberal use of the King's pardon led Richard II, in 1389, to limit the use of pardons by denying it to

\begin{flushleft}
32 J C Ayer, \textit{A Source Book for Ancient Church History from the Apostolic Age to the Close of Conciliar Period} (first published 1913, reprint 1970) 626.
35 Statute of Gloucester, 1278.
\end{flushleft}
anyone who had killed another with malice aforethought. This was the first time that
the expression "malice aforethought" was recognised as the mental state for murder.
From the thirteenth century, the criminal law of England began to require a
blameworthy state of mind as an essential element of criminal liability. The early
mental states were generally described in highly normative terms. Thus "malic
aforethought", "maliciously", "wickedly", "wilfully", "knowingly" were the terms
generally used.

Bracton himself supported the view that the early mens rea was normative. In
discussing intention and homicide, he said:

But it is homicide if done out of malice or from pleasure in the shedding of human
blood [and] though the accused is lawfully slain, he who does the act commits a mortal
sin because of his evil purpose.

The "evil purpose" or intention was clearly a normative concept. In the original Latin
text Bracton described the mental state as "propter intentionem corruptam." It was
not just mere intention but a corrupt intention that was mens rea.

From the thirteenth to the seventeenth century

From the thirteenth to the seventeenth century there was little conceptual development
of the law for several reasons. There was a lack of distinguished writers to analyse or
state the law. The absence of comprehensive reporting of cases made it difficult to
collect and explain the judicial statements of the law. The Black Death which swept
through Europe also had terrible consequences on society and development generally.
From the available texts, however, it is clear that crimes in the middle of the
millennium did require mens rea. The absence of statutory definition meant the

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36 By the fifteenth century the importance of the mental element in crime was so embedded in
the law that statements were made that a person could be punished for their evil mental states
alone, even though they had not carried out their plans. See W Staunford, Pleas of the Crown,
(first published 1557, reprint 1979) 27

37 Quoted in J M B Crawford & J F Quinn, The Christian Foundations of Criminal

212-20 provide a few examples of works in the sixteenth century, which list the laws and
describe some of the cases.
judges had to interpret the mens rea terms. Given that the judges of that time were deeply imbued with the natural law philosophy, it was inevitable that they looked beyond technical notions of mental states and concentrated on whether the person was deserving of blame.\textsuperscript{39} Mens rea was a moral psychological concept and the human mind was treated as a moral, rather than as a neurological, director.

The influential writers in the seventeenth and eighteenth centuries were Sir Matthew Hale,\textsuperscript{40} Serjeant Hawkins,\textsuperscript{41} Sir William Blackstone\textsuperscript{42} and Sir Edward East.\textsuperscript{43} None of them contributed significantly to the development of the substantive criminal law. Each merely restated the law as it existed and recorded cases as they were decided. These writers did not identify a body of general principles separate from the specific offences.\textsuperscript{44} They wrote on the law of crimes, rather than on the criminal law. There was an uncritical acceptance of the goodness of the law. As Hawkins put it:

Those who have fully examined the Crown Law, agreed that it wants nothing to make it admired for Clemency and Equity, as well as Justice but to be understood. It is so agreeable to Reason, that even those who suffer by it, cannot charge it with Injustice; so adapted to the common good, as to suffer no Folly to go unpunished, which that requires to be restrained; and yet so tender of the Infirmities of Humane Nature, as to never refuse an Indulgence where the Safety of the Public will bear it; it gives the Prince no Power, but of doing Good and restrains the people from no liberty but of doing Evil.\textsuperscript{45}

Is the common law “so adapted to the common good” in its modern, rigid application? Is it really “tender to the Infirmities of Humane Nature, as to never refuse an


\textsuperscript{40} History of the Pleas of the Crown (1736).

\textsuperscript{41} Treatise of the Pleas of the Crown (1716)

\textsuperscript{42} Commentaries on the Laws of England (1765-69)

\textsuperscript{43} Treatise of the Pleas of the Crown (1803)


Indulgence where the Safety of the Public will bear it?” Is it fair to punish a person who takes all reasonable care to abide by the law but is given incorrect advice by a lawyer or a public official? The idea that the criminal law was inadequate in fairly or effectively dealing with crime and punishment was first protested by Cesare Beccaria who wrote in 1764, “Ignorance and uncertainty of punishments lend assistance to the eloquence of the passions. Every citizen ought to know when his acts are guilty or innocent.”

The eighteenth century writers emphasised the moral blameworthiness aspect of criminal liability. Hawkins, for example, opened his treatise with these words:

The Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience, can never justly be imputed to those, who are either incapable of understanding it, or of conforming themselves to it.

In his Pleas of the Crown, Hale stated that it was the human will that determined criminal responsibility:

Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will is that, which renders human actions either commendable or culpable; as where there is no will to commit an offence, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.

The exercise of the human will in choosing to engage in prohibited conduct determined the moral blameworthiness of the defendant. Where the will was freely exercised, the defendant was blameworthy if, knowing the wrongfulness of the conduct, he or she chose to act. Where there was a lack of free will, whether due to incapacity or lack of understanding, the individual could not be held blameworthy. The original conception of free will was in terms of moral reasoning capacity.

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46 C Beccaria, Of Crimes and Punishments (1764).
47 W Hawkins, Treatise of the Pleas of the Crown (1716) vol 1, 1.
48 M Hale, History of the Pleas of the Crown (1736) vol 1, 14-5.
Therefore, free will was not just limited to capacity and liberty to exercise the will, but also included understanding. Where the accused did not understand the consequences, for example due to ignorance, it could not be said that there was free will. Lack of free will resulted in moral involuntariness, not physical involuntariness.  

The modern conception of free will omits this moral element and is restricted to lack of capacity or liberty. Lack of free will is recognised in insanity, infancy, mistake, compulsion, necessity, duress and provocation. These categories did not relieve the person of civil responsibility; it only excused persons from criminal responsibility because of a lack of moral blameworthiness. These categories formed the basis of the theory of mens rea as excuses – leading to the emergence of specific defences. The corollary development was the particularised mens rea theory whereby each offence had a particular mental state that was required for that particular offence.

The defence of insanity provided a valuable insight into the concept of moral blameworthiness. Initially, the insane escaped criminal punishment, although not incarceration, because they were viewed as intellectually not human, but closer to animals. Later, a more refined test for insanity was developed and in 1843 the House of Lords stated the modern test in M’Naghten’s Case. The test was based on the accused’s ability to distinguish between right and wrong, ie it was based on the accused’s knowledge of the wrongfulness of the conduct. Moral blameworthiness meant engaging in conduct when the individual knew or could have known that it was

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52 *Beverley’s Case* (1603) 4 Co 124b. See also Fitzherbert, *Natura Brevium* (1534) 233b, where he says an insane is a person “who cannot account or number twenty pence, nor can tell who was his father or mother or how old he is.”

53 (1843) 10 Clark & Fin 200.

54 The authorities were ambiguous as to whether wrongfulness in this context meant moral or legal wrong. In *R v Offord* (1831) 5 Car & P 168n, 172 ER 925n wrongfulness meant moral wrong. In *R v Windle* [1952] 2 QB 826 (CCA) it was held to be limited to legal wrong. In Australia, there is authority that the insanity test includes moral and legal wrong – *R v Porter* (1933) 55 CLR 182.
wrong. Where the individual did not know, or could not reasonably have known, that the conduct was wrong, it could not be said the individual acted with free will. Hale’s view on mens rea affirmed this. He stated that a person deserved blame because he or she had a free choice and exercised his or her choice to do wrong. Similarly, Blackstone described mens rea as “a vicious will.”

Mens rea was a normative concept; as Bracton said, “propter intentionem corruptam” – a corrupt intention.

Kenny, the eminent criminal lawyer at the turn of the twentieth century, stated very simply, “In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed as consisting simply in ‘intending to do what you know to be illegal.’” In a footnote at the end of the above sentence Kenny qualified his statement by saying, “ie what you know to belong to a class of conduct that is (whether you know it or not) forbidden by law.” This rider makes his conception of mens rea meaningless. For Kenny, mens rea meant voluntarily doing what you knew to be illegal. His qualification, especially the words in parenthesis, effectively removes any mental element for he says that knowledge of illegality is not relevant. This dispenses with the very psychological element that he claimed was indispensable.

In light of the qualification, Kenny’s concept of mens rea was simply the voluntary commission of conduct, not known to be wrongful or illegal, which is prohibited by the criminal law. This, with respect, is the actus reus, not the mens rea of a crime. This statement by Kenny reveals the tension between the two models of mens rea – the descriptive and the normative. One of the causes of this tension is the ignorantia juris non excusat rule. If this rule were to be rejected, Kenny would not have been forced to make the nonsensical statement about mens rea, which in one breath says that mens rea is knowledge of illegality, but that knowledge of illegality is not relevant to mens rea!

Mens rea from the eighteenth century – subjectivism reigns

By the late eighteenth century, due to the industrial revolution, there was a massive increase in the number of crimes and a proliferation of statutes criminalising various forms of behaviour. These statutes were poorly drafted and it was left to the judges to interpret them. The tension between normative and descriptive approaches to mens rea resulted in judges arriving at inconsistent definitions of the various mental states that existed. As Turner described it:

[The English system, whereby changes in the law are made gradually by the accretion of judicial decision, has often created the situation in which old and new doctrines have been employed in the courts of the same period, according as the judges inclined one way or the other. Precedents can thus be found for conflicting principles, with puzzling results.]

It was at this stage that substantive reform of the criminal law was to occur. Instead of moral philosophy that drove the early criminal law in the thirteenth century, the dominant ideologies of the nineteenth century were utilitarianism and legal positivism. The principal contributors to the reform process were Jeremy Bentham, John Stuart Mill and John Austin. It was Bentham’s utilitarianism, Mill’s liberalism and Austin’s legal positivism that were largely responsible for the current state of the law. Bentham was dissatisfied with the uncertainty of the common law and had a deep seated mistrust of judges and lawyers. Bentham also viewed natural law, religion and moral codes as inferior to scientific reasoning and rationalisation of principles from a utilitarian perspective. Bentham’s aspiration was to make the law scientific, predictable and efficient. The philosophy underlying his approach was utilitarianism; the greatest happiness of the greatest number. In Bentham’s view codification would achieve this ambition.

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59 J W C Turner, Kenny’s Outlines of Criminal Law (1952) 25.
61 Bentham’s work, An Introduction to the The Principles of Morals and Legislation was aimed at clarifying the law and developing a comprehensive code for England. The first Criminal Law Commission, appointed in 1833 to work on a Criminal Code included John Austin, Bentham’s pupil. Austin later resigned from the Commission. Sir James Stephen later produced the Criminal Code (Indictable Offences) Bill 1878, which was endorsed by the Criminal Law Codification Commission of 1878.
Even though Bentham’s attempt at codification did not succeed in England, his efforts, and those of John Austin’s left a permanent impression on the development of the criminal law in nineteenth century England. The desire for clarity and the disdain for natural law or moral norms led to a scientific conception of mens rea. Mens rea was no longer a normative concept based on moral blameworthiness but a purely descriptive concept. Knowledge of wrongfulness was irrelevant. Even motive was held to be irrelevant to mens rea. A clear division was made between actus reus and mens rea, with the latter becoming a purely psychological concept to be assessed subjectively. Herein was a contradiction. Because it was impossible to determine the inner thoughts of a person, mens rea, although subjective, had to be objectively inferred from external facts and evidence.

Bentham would have accepted an objective approach to mens rea, if this made the enforcement of the law more efficient. However, the objective test was not to determine the moral blameworthiness of the accused, rather it was to simplify the determination of a descriptive mental state. Holmes, the American utilitarian and judge, advocated such an approach to mens rea. The objective test was used to determine the mental state of the accused by comparing it with the mental state of a hypothetical reasonable person. The English courts applied an objective test of intention even as late as the 1960s, and even today have a qualified objective test for recklessness.

As stated earlier, there were two schools of thought on the development of mens rea in the post-eighteenth century period. One view was that mens rea signified a

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62 Although Bentham was clearly a more sophisticated thinker, Austin has had a greater influence on the criminal law because he was a lawyer and also because his published works were available sooner than Bentham’s, whose works were not readily available until much later. See, M D A Freeman (ed) Llyod’s Introduction to Jurisprudence (6th ed, 1993) 208-9 and H L A Hart, Essays on Bentham (1982) ch 5.

63 As was stated by one medieval judge, Brian CI: “The thought of man shall not be tried for the devil himself knoweth not the thought of man.” YB 7 Edw IV p 1.


65 The classic case is DPP v Smith [1961] AC 290. Smith is no longer the law, having been overturned by the Criminal Justice Act 1967 (UK) s8.

collection of excusing states of mind, and the other was that mens rea was an indicator of blame. The view of mens rea as a collection of excuses arose from the difficulty of determining when mens rea was present. It was impossible to get into the mind of another person, but it was possible to identify situations of accident, or compulsion or insanity or infancy and say that in those cases there was no mens rea. The second view of mens rea could be further dissected into the particularised mens rea view and the general mens rea view. The former rejected the view that there was a universal concept of mens rea. Rather, it was argued that each offence had its own mental state. As Lord Hailsham put it, “The beginning of wisdom in all the ‘mens rea’ cases to which our attention was called is, as was pointed out by Stephen J in Reg v Tolson 23 QBD 168, 185 that ‘mens rea’ means a number of quite different things in relation to different crimes.” The general mens rea view was that there was a concept of mens rea that applied generally to all common law crimes.

The origin of the separation of actus reus and mens rea

The analysis of criminal liability through the separation of actus reus and mens rea goes back to the ancient philosophers, Plato and Aristotle. Both philosophers recognised the existence of the human soul, but each conceived of it differently. Plato’s conception of a human was a soul residing within a body. Aristotle, on the other hand, conceived of the soul as an element of the human. It was not separate from the body but merely an aspect of it. Although his conception was different to

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70 DPP v Morgan (1976) AC 182 at 213.


that of Plato, there were similarities in that both Aristotle and Plato had a tripartite definition of the soul. The three levels were the rational (Aristotle) or immortal (Plato) and the irrational/mortal which was divided into desire and sensation. The rational/immortal was "reason" which controlled the other two. The soul was responsible for human action.73

While neither philosopher disputed that the soul controlled human action and was therefore the responsible agent, Plato's dualism was favoured by later philosophers. The soul/body dichotomy became the mind/body dichotomy. St Augustine adopted this approach and as seen earlier, was the source of the maxim, actus non facit reum, nisi mens sit rea, which means, the act is not culpable unless the mind is guilty. This dualistic approach to human action and responsibility became an intrinsic part of philosophy and law in the seventeenth century. The person who is credited with entrenching this dualistic approach in modern philosophy is Rene Descartes.

Descartes was a philosopher born into the dawn of the scientific age. The human body was being studied in detail and human action was explained in scientific rather than in moral terms. Descartes himself was religious and believed in moral responsibility. He wanted to fit moral blameworthiness within the scientific model of responsibility. Borrowing the early body/soul dichotomy of Plato, Descartes adapted it by distinguishing between body and mind. It was the mind that directed the body and the mind that made human beings responsible for their actions. Two points need to be noted here. First, Descartes' concept of the mind was a broad one. It was not limited to rational thought, but included feeling, willing and desire. The Cartesian "mind" was analogous to the soul. The modern concept of the mind in criminal law is a much narrower one, limited only to rational thought. Secondly, Descartes' "mind" existed in a world separate from the body, which was exposed to examination. The mind could not be directly examined. It was secret. The only way one could attempt to determine what was going on in another's mind was by indirect inference. By observing the action of a person, the mental process behind it is inferred. It is mere speculation, at best an educated guess.

Descartes' philosophy of mind and body was introduced to English philosophy through the writings of John Locke. Bentham then injected Cartesian dualism into the law. This dualism provided a convenient vehicle for Bentham to advance his efforts in describing criminal responsibility in scientific terms rather than in moral terms. Descartes paradoxically, had conceived of the dualism for the opposite reason, ie to import moral criteria into a scientific system! Bentham used this dualism to argue that a person was responsible for his or her actions if the conduct was committed with a relevant mental state. Bentham then attempted to analyse and describe various mental states.\textsuperscript{74} Criminal responsibility took the appearance of a scientific equation:\textsuperscript{75} actus reus + mens rea = criminal responsibility. Bentham attributed his scientific approach to Beccaria. He said, "It was from Beccaria's little treatise on crimes and punishments that I drew as I well remember the first hint of the principle by which the precision and clearness and incontestableness of mathematical calculations are introduced for the first time into the field of morals."\textsuperscript{76}

Bentham's obsession with clarity and precision may have compromised his vision of the criminal law. The criminal law is not a cold science capable of such precision. It is about humans and the moral evaluation of human conduct in complex society. However, structure and form of liability were very important in the nineteenth century and Bentham's approach reflected this.\textsuperscript{77} The scientific approach of distinguishing between actus reus and mens rea was not without difficulty. Both Bentham and Austin had different approaches to the dualistic model of responsibility and both writers had very blurred lines that demarcated the mental and the physical. Bentham was of the view that an act had an internal and an external component. As he said, "By external are meant corporal acts; acts of the body: by internal, mental acts; acts of

\textsuperscript{74} J Bentham, \textit{Introduction to the Principles of Morals and Legislation} (Burns, J H & Hart, H L A (eds) 1996) chs VIII-XII.

\textsuperscript{75} Freeman describes Bentham's approach as a form of "moral arithmetic." See M D A, Freeman (ed), \textit{Lloyd's Introduction to Jurisprudence} (6th ed, 1994) 232, n 38.


the mind."\textsuperscript{78} Austin repudiated Bentham's views by distinguishing between will and intention. The will belonged to the actus reus; it made the act voluntary and identified the actor as the author of that act. Intention, according to Austin was the desiring or foreseeing an outcome as probable.\textsuperscript{79} Where an outcome was foreseen as possible, that was not intention but recklessness. A willed act in itself was not necessarily wrong; it was the intention or foresight that accompanied it that determined guilt. As Austin said, 'the guilt or innocence of a given actor, depends upon the state of his consciousness, with regard to those consequences, in the given instance or case.'\textsuperscript{80} [emphasis added]

This "state of his consciousness" was the subjective mind, which according to Austin comprised of intention and recklessness. Austin included negligence as a state of mind, although this has been controversial.\textsuperscript{81} The subjective approach to mens rea was entrenched in English law by modern writers of the twentieth century such as Kenny, Turner, Williams, Hogan and Smith. This subjective approach to mens rea did not include any inquiry as to moral blameworthiness. As Potter stated in his historical review of the doctrine of mens rea:

> From what has been said it is clear that when the notion of mens rea was perceived it was based upon moral wrong, but as it was elaborated in the different crimes it became a technical conception the exact content of which varied with the history of individual offences.\textsuperscript{82}

Mens rea was now a technical notion that had little in common with its origins. Moral blameworthiness and motive were not relevant. As long as the accused intended or foresaw the particular outcome, that was sufficient. The growing confidence in our

\textsuperscript{78} J Austin, \textit{Lectures on Jurisprudence}, (R Campbell (ed) 5th ed, 1885, reprint 1972) vol 1, 420.


\textsuperscript{80} J Austin, \textit{Lectures on Jurisprudence}, (R Campbell (ed) 5th ed, 1885, reprint 1972) vol 1, 427.

\textsuperscript{81} Negligence is generally treated as a blameworthy way of acting, rather than a blameworthy state of mind. However, some courts have treated negligence as a blameworthy mental state. See for example, \textit{R v Nydam} [1977] VR 430. Recent developments in the law of sexual offences have further blurred the line between recklessness and negligence.

\textsuperscript{82} H Potter, \textit{An Historical Introduction to English Law and its Institutions} (1932) 309.
understanding of the human mind led to bolder assertions that the accused's actual state of mind had to be examined. From the ancient despair that it was impossible to know the secrets thoughts of a person, modern judges insisted that the actual mental state could be proved. The strongest statement reflecting the changing attitude in the nineteenth century is captured in this statement by Lord Bowen:

A great deal of argument ... arises ... under cover of the fallacious use ... of the principle that you cannot look into a man's mind. ... It is said that you are to have fixed rules to tell you that he must have meant something, one way or the other, when certain exterior phenomena arise. The answer is that there is no such thing as an absolute criterion which gives you a certain index to a man's mind. ... So far from saying that you cannot look into a man's mind, you must look into it if are going to find fraud against him; and unless you think you see what must have been in his mind, you cannot find him guilty of fraud.\(^{83}\)

Despite this ambition, it remains that, short of an actual confession, it is virtually impossible to actually discover the exact state of a person's mind. Because it is so difficult to subjectively prove mens rea, the courts have been forced to modify the substantive law and evidentiary rules. Intention, which was traditionally purpose or desire has been extended to include foresight. Recklessness, traditionally limited to subjective foresight has been extended to include inadvertence. Knowledge has been extended to include wilful blindness. In some cases, these extensions were merely used to infer the existence of the narrower mental states. In other cases, these extensions were themselves the mental states, thus creating new species of mental states that had broader application than the original.

Subjective mens rea emphasised the psychological state of mind, rather than the normative state of the mind. An analysis of various mental states reveals the weakness in the orthodox descriptive approach. In many of the examples to be examined, it is evident that the court is trying to blame an accused who ought to have known or foreseen the illegality or wrongfulness of the conduct. Because this normative element is hidden in the descriptive approach many of the cases appear to be irreconcilable. Viewed in light of a normative approach the cases begin to make

\(^{83}\) *Angus v Clifford* [1891] 2 Ch 449 at 471.
sense. The leading decisions on the two classical forms of mens rea, intention and recklessness, will be reviewed and analysed.

INTENTION AND RECKLESSNESS

In order that an act should be punishable, it must be morally blameworthy. It must be a sin.\textsuperscript{84} Despite the above statement by Lord Denning, moral blame is no longer a general requirement of mens rea, except where expressly required.\textsuperscript{85} Mens rea is generally viewed as either intention or recklessness. Glanville Williams describes these mental states:

Intention is a state of mind consisting of knowledge of any requisite circumstance plus desire that any requisite result shall follow from one's conduct, or else of foresight that the result will certainly follow. Recklessness is a state of mind, essentially negligent, where there is foresight that a certain result will probably or may possibly follow. Inadvertent negligence does not necessarily contain any element of foresight, and it is not a mental state, but is the condition of one who fails to behave in accordance with a proper standard of care.\textsuperscript{86}

From this statement, and from the case law that will be examined, it becomes apparent that mens rea is for the most part a continuum of subjective foresight. "A risk may belong to any point in a scale ranging from virtual certainty to fantastic improbability."\textsuperscript{87} At either end of the spectrum is purpose and inadvertence. The varying degrees of foresight indicate different levels of culpability. Thus, the more serious the crime, the greater the degree of foresight required. In some cases only purpose will suffice. Intention, the ordinary meaning of which is purpose, would have had a limited role to play had it been narrowly interpreted. For example, where a

\textsuperscript{84} A T Denning, \textit{The Changing Law} (1953) 112.

\textsuperscript{85} The element of dishonesty in property offences is an example of an express requirement of moral blameworthiness. A person is not guilty unless he or she believed that the behaviour was dishonest. Although the mental state was still subjective an objective evaluation of dishonesty was permitted by reference to standards of ordinary decent people. Further, claim of right based on ignorance or mistake of law has been held to negative dishonesty. Another example where moral blameworthiness is expressly required is offences that can only be committed "corruptly".

\textsuperscript{86} G L Williams, \textit{The Mental Element in Crime} (1965) 20.

\textsuperscript{87} G L Williams, \textit{The Mental Element in Crime} (1965) 29.
crime required intention, and the accused was only reckless, there could be no criminal liability. Yet in many cases the judges were of the view that the accused was morally blameworthy. In England this was a particular problem with murder as only intention sufficed.

To facilitate conviction, judges extended the meaning of intention to include foresight of a consequence as a virtual certainty. Once this occurred it was not long before it was extended further to include foresight of probability, and even possibility. The extended notion of intention brought it into conflict with recklessness. So much so that Lord Denning once said that intention included recklessness.\textsuperscript{88} Glanville Williams strongly opposed Denning's view on the grounds that "there [was] a moral difference between intending a result and running a risk of the result."\textsuperscript{89} In some cases, perhaps there is. But it is very difficult to make moral judgments of different mental states when all normative criteria such as knowledge of wrongfulness, motive and indifference are ignored.

From the following analysis of the judicial treatment of intention and recklessness it will be seen that although motive, knowledge of wrongfulness and indifference, were formally treated as irrelevant, the courts, in fact, allowed these criteria to be considered by the jury. By giving "suggestive" directions, juries were encouraged to consider the hidden normative elements of criminal culpability. Because the courts did not formally acknowledge the normative considerations that guided their interpretation of mens rea, there was an appearance of inconsistency in the treatment of the basic mens rea concepts of intention and recklessness.

\textbf{Intention}

The following analysis is focused on the law of intention as developed in the murder cases in England. The mental state for murder in England was limited to intention,\textsuperscript{90}

\textsuperscript{88} A T Denning, \textit{Responsibility Before the Law} (1961) 27.

\textsuperscript{89} G L Williams, \textit{The Mental Element in Crime} (1965) 29.

\textsuperscript{90} \textit{Homicide Act 1957} (UK) s1.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

unlike Australia where recklessness sufficed.\textsuperscript{91} The English courts were therefore particularly concerned with the concept of intention, especially in the late 1970s and early 1980s when killings for political struggle became more common.\textsuperscript{92} The inadequacy of the orthodox approach to mens rea resulted in three distinct challenges to the orthodox law of intention. The first was the objectivisation of intention. The second was the extension of intention to include foresight. The third was the artificial creation of the concept of express or dominant intention, the purpose of which was to exclude mental states that would ordinarily qualify as intention. This apparently arbitrary broadening and narrowing of intention was due to the courts’ attempt to find an intent in cases where blameworthiness was evident, and to exclude intent where blameworthiness was absent. The law struggled as it attempted to carry out a normative task wearing a descriptive hat. As Norrie put it, “The cognitivism of the law of intention cannot reflect these broader moral issues, yet they remain central to the judgment of criminal culpability.”\textsuperscript{93}

*Inference of intention – creating an objective test of intention?*

In 1961 the House of Lords decided the case of *DPP v Smith*\textsuperscript{94} in which a man was accused of murder. Smith was caught driving a car with stolen goods. A police officer, who noticed the stolen goods in the car, ordered the accused to pull over. The accused, instead, drove off with the police officer holding on to the side of the car. The accused drove erratically at some speed and eventually the police officer was knocked off by an oncoming car and died. The question was whether the accused had intended to kill or cause grievous bodily harm to the police officer. The accused argued that he did not intend death or grievous bodily harm and was not thinking of any such consequence because he was in a state of panic. The trial judge directed the jury that if the facts supported an inference that a *reasonable* person must have foreseen death or grievous bodily harm, the jury could find that the accused intended

\textsuperscript{91} See for example, *Crimes Act 1900* (NSW) s18.

\textsuperscript{92} This was mainly due to the separatist movements in Northern Ireland.


\textsuperscript{94} [1961] AC 290.
death or grievous bodily harm. The House of Lords approved of this direction. Viscount Kilmuir held:

Once, however, the jury are satisfied as to [the actus reus] it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M’Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.\(^{95}\)

Viscount Kilmuir, in reaching the above conclusion relied on a number of earlier English authorities\(^{96}\) and the extra-judicial writings of Oliver Wendell Holmes.\(^{97}\) As far as Smith was concerned, as long as the conduct of the accused was voluntary, the mental state of the accused was found not to be relevant, except where there was an abnormality of the mind, eg insanity, diminished responsibility or infancy. The fault element, ostensibly subjective intention, was in effect a purely objective test. As Viscount Kilmuir stated, “it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all.” This decision has been reversed by statute\(^{98}\) and rejected by the House of Lords\(^{99}\) and the High Court of Australia\(^{100}\).

Although Smith is no longer the law, it was an important decision. It demonstrated the willingness of the House of Lords to abandon the subjective test of mens rea. Subjective intention was found to be too narrow a mental state for murder, and because recklessness was precluded, the House of Lords deemed an intention where

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\(^{95}\) DPP v Smith [1961] AC 290 at 327 per Viscount Kilmuir LC.

\(^{96}\) R v Faulkner (1877) 13 Cox CC 550 at 561-2; R v Lamley (1911) 22 Cox CC 635 at 636; R v Philpot (1912) 7 Cr App R 140 at 141; DPP v Beard [1920] AC 479 at 503-4; R v Ward [1956] 1 QB 351 at 356.

\(^{97}\) O W Holmes, The Common Law (1881, 42\(^{nd}\) reprint, 1948) 53-4.

\(^{98}\) Criminal Justice Act 1967 (UK) s8.


\(^{100}\) Parker v The Queen (1963) 111 CLR 610; Hawkins v The Queen (1994) 179 CLR 500.
there was in fact none. Glanville Williams has argued that the *Smith* presumption of
intention was originally used by the divorce courts in the civil law, in desertion
cases.101 Because of the difficulty of proving intention to desert, the court in *Lang v
Lang*102 took a broad view to intention and held that a man could be taken to intend to
desert his wife if he knew that his improper conduct would in all human probability
cause her to depart, even though he did not wish her to depart.

This presumption of intention was extended to matrimonial cruelty in *Windeatt v
Windeatt (No 2).*103 However, a few years later, in *Gollins v Gollins,*104 the House of
Lords abandoned the presumption of intention in divorce cases. Although *Lang v
Lang* would have provided the relevant authority, Viscount Kilmour in *Smith* relied
instead on a much older divorce case of *Hosegood v Hosegood.*105 In *Hosegood's*
case, Lord Denning actually rejected the presumptive intention approach, although in
*Smith,* he agreed with its use. Viscount Kilmuir relied on *Hosegood* by distinguishing
it on the facts. The divorce cases show an erratic swing between subjective and
objective constructions of intention. In 1950 (*Hosegood v Hosegood*) desertion in
marriage required subjective purpose or desire; in 1955 (*Lang v Lang*) objective
foresight was sufficient and in 1964 (*Gollins v Gollins*), the subjective test of purpose
was reinstated.

Even the Law Lords in *Smith* did not hold consistent views on intention. It was not
only Lord Denning who had conflicting views on intention. The other judges in *Smith*
had also previously supported a purely subjective view of intention. Lord Parker had
expressed such a view in *Loughlin*106 and Lord Goddard, in *R v Steane.*107 The
definition of intention seemed to hinge on the particular view of the judge. In *Smith,*

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101 G L Williams, *The Mental Element in Crime* (1965) 38
105 (1950) 66 TLR (Pt 1) 735 (CA).
107 [1947] 1 All ER 813.
the House was clearly of the view that Smith was deserving of punishment. Here was a rogue, in possession of stolen goods, killing a heroic police officer in the execution of his duty. How could the House not find Smith guilty of murder?\textsuperscript{108} The more important question is this: Why did the fault element of murder, namely intention, not accord with the judges’ concept of blameworthiness? The answer must be because the orthodox meaning of intention did not adequately reflect moral blameworthiness.

Lord Denning, in an attempt to defend the \textit{Smith} decision suggested that it did not lay down an objective test of intention, rather it laid down a rebuttable presumption.\textsuperscript{109} With respect, Lord Denning’s defence of \textit{Smith} is not persuasive. The risk of confusing objective inference of subjective intention with an objectivisation of intention was so great that Parliament and the House of Lords itself rejected \textit{Smith}.\textsuperscript{110}

\textbf{Intention and foresight}

In the 1970s and 1980s the English courts were once again grappling with the inadequacy of intention as a fault element for murder. By this time, the \textit{Smith} view of objective intention had been laid to rest. There were several homicide cases in England where an intent to kill could not be proved. Because objective intention had been rejected, the courts extended intention beyond purpose to include foresight. Two issues are of significance. First, was intention as foresight a separate species of intention or was foresight merely evidence from which an intention could be inferred? Secondly, what was the appropriate degree of foresight for intention that would distinguish it from recklessness?

The principal cases which discussed the issue of intention as foresight were \textit{R v Hyam}\textsuperscript{111} and \textit{Whitehouse v Lemon}\textsuperscript{112} in the 1970s; \textit{R v Moloney},\textsuperscript{113} \textit{R v Hancock} &

\begin{footnotesize}
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\item \textsuperscript{108} Glanville Williams also speculated whether the restriction of capital punishment by the \textit{Homicide Act 1957} (UK) may have encouraged the judges to take a more liberal view of intention in \textit{Smith}. See, G L Williams, \textit{The Mental Element in Crime} (1965) 100.
\item \textsuperscript{109} \textit{Hardy v Motor Insurers’ Bureau} [1964] 1 WLR 1155.
\item \textsuperscript{110} \textit{Criminal Justice Act} (UK) 1967 s8; \textit{R v Woollin} [1998] 4 All ER 103; \textit{Frankland & Moore v R} [1987] AC 576 (PC).
\item \textsuperscript{111} [1975] AC 55.
\end{itemize}
\end{footnotesize}
Shankland and R v Nedrick in the 1980s; and most recently R v Woollin. In Hyam the House extended the mens rea for murder to foresight of grievous bodily harm. It was held by a majority that a person who, although not intending to cause death or grievous bodily harm, engaged in conduct, with the knowledge that that conduct was likely to cause death or grievous bodily harm, had the mens rea for murder. The House did not say that this extended form of mens rea for murder was intention, but a later decision involving one of the judges in Hyam confirmed that the Hyam decision was an interpretation of intention.

This extension of intention was problematic because it risked becoming indistinguishable from recklessness which was also based on foresight. Section 1 of the Homicide Act 1957 (UK) clearly stated that only intention was a sufficient mental state for murder. The House of Lords in a trilogy of cases in 1985 and 1986 attempted to reign in the extended notion of intention. In R v Moloney, the trial judge adopted a textbook definition of intention, which in itself was derived from the Hyam decision. The trial judge’s direction was this:

When the law requires that something must be proved to have been done with a particular intent it means this: a man intends the consequences of his voluntary act (a) when he desires it to happen, whether or not he foresees that it will happen; and (b) when he foresees that it will probably happen, whether he desires it or not.

On appeal to the House of Lords, Lord Bridge was highly critical of this definition, holding that for intention, foresight of probability was not sufficient. To qualify as

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113 [1985] AC 905.
114 [1986] 1 All ER 641.
115 [1986] 3 All ER 1.
117 It should be noted that the dissenting judges did not disagree that intention included foresight. They merely disagreed that intention for murder included foresight of grievous bodily harm.
118 Whitehouse v Lemon [1979] AC 617 at 638 per Lord Diplock.
119 J F Archbold, Criminal Pleading, Evidence and Practice, (40th ed, 1979) para 1441a, p 948.
120 R v Moloney [1985] AC 905 at 906.
intention the foresight must be little short of overwhelming. Lord Bridge made it clear that foresight was not a species of intention, rather it belonged to the law of evidence. It allowed a jury to infer that the accused must have intended a consequence if he or she foresaw it as a natural consequence. The expression in *Moloney* of the test of intention as foresight as a "natural consequence" was criticised in *R v Hancock & Shankland*. Lord Scarman in that case was concerned that the expression might lead juries to a lower standard of foresight. But it would appear that this was merely a linguistic concern as Lord Scarman agreed in substance with Lord Bridge that the degree of foresight had to be very high. The next case that dealt with this issue was *R v Nedrick*, where the court used the term "virtual certainty" to describe the degree of foresight required before an intention could be inferred.

From these cases it was clear that intention meant purpose or desire, but intention could be inferred where the consequence was foreseen as a virtual certainty. This of course was patently incorrect. Merely because a consequence was foreseen as a virtual certainty is no reason to say that that consequence was desired or the purpose of the accused was to achieve that consequence. In the recent case of *Woollin*, the House of Lords reviewed the above cases and held that the foresight of virtual certainty test for intention was acceptable. However, it was pointed out that intention as foresight of virtual certainty was a type of intention in its own right, quite separate from intention as purpose or desire. It was not correct to say that foresight of virtual certainty gave rise to an inference of intention.\(^\text{121}\)

It is vital that this distinction be made because there have been a number of cases where courts have held that a relevant intention was absent notwithstanding the fact that the accused foresaw as a virtual certainty the criminal consequences. These cases will be analysed in the next section. First, some conclusions can be drawn from the above discussion. In the discussion of objective intention it was shown that the meaning of intention depended on the moral value of the judge. Can a similar conclusion be drawn here?

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\(^{121}\) *R v Woollin* [1998] 4 All ER 103.
Norrie in a recent article has done just this. The cases discussed above were divided into two categories. In one category were Moloney and Woollin. The facts in both cases were tragic. Both involved domestic killings with no prior animosity. In Woollin, a father killed his baby and in Moloney, a man killed his stepfather after both were drinking heavily together. In the second category were Hyam and Nedrick, both arsonists, who had burnt down houses and caused the death of another. In the first two cases, both defendants had their murder convictions quashed and substituted with manslaughter convictions. In the latter cases, Hyam was convicted of murder, while Nedrick was convicted of manslaughter. But as Norrie has pointed out, Nedrick was decided immediately after Hancock & Shankland, where the court was at the stage of retreating from the broad Hyam view. Thus, Nedrick benefited from the narrow interpretation. Even though Nedrick’s conviction for murder was reduced to manslaughter, his sentence was as severe as that which he would have received for murder.

It is instructive also to read Lord Bridge’s description of the facts in Moloney and compare it with his description of the facts in Hyam.

Moloney:

Behind this shocking event lies a tragic story. In November 1981 the appellant [Moloney] was aged 22. He was a serving soldier in the Gordon Highlanders and was at the material time on leave at the home of his mother and stepfather, having returned from duty in Belize in South America. He had been in the army since November 1978 and had served in Northern Ireland, in this country, and finally in South America.

There is no doubt that the appellant was one of a united, happy family. His mother had married the victim, Patrick Moloney, when the appellant was a very small boy. The appellant, at some stage, changed his name to Moloney. To all intents and purposes Patrick Moloney acted as a father to the appellant and was treated by the appellant as such. The undisputed evidence at the appellant’s trial was that the stepfather and stepson enjoyed a happy and loving relationship with each other.

Hyam:

Mrs Hyam was jealous of a Mrs Booth. Mrs Hyam feared that Mr Jones, her former lover, was about to marry Mrs Booth. Mrs Hyam went to Mrs Booth’s house at night

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123 R v Moloney [1985] AC 905 at 906 at 914.
(having first assured herself that Mr Jones would not be there) where Mrs Booth and her three children were sleeping. Taking care to disturb no one, Mrs Hyam set the house on fire with petrol. Mrs Booth and one of her children escaped, the other two children died in the fire.\footnote{R v Moloney [1985] AC 905 at 906 at 922.}

In the first case the accused shot dead the victim at point blank range with a twelve bore shotgun. He is referred to as a heroic soldier who loved his stepfather. In the second case a woman stuffed some newspapers into a letter box and set it alight. She is described as a vicious, crafty and jealous villain. Compare the degree of foresight of death in the two cases. In the former the accused shot dead the deceased at point blank range. In the latter the accused set fire to a house and two people perished. The court found an intention in the latter case but not in the former. Is intention based on purpose and foresight, or is it to do with the moral character of the accused? Under the descriptive theory, Moloney must have intended to kill his stepfather. Any matter relevant to the degree of blameworthiness should have been dealt with as a matter relevant to sentencing. The court instead dealt with the moral blameworthiness of Moloney as a matter relevant to the “threshold” question of punishment.\footnote{In Chapter I a distinction was drawn between “threshold” and “taliones” questions of deserts. It was argued that the “threshold” question was relevant to criminal liability, ie whether or not a defendant deserved to be blamed. The “taliones” question was relevant to sentencing and the degree of punishment.}

\textit{Intention as dominant purpose}

The third difficulty with the orthodox approach to intention surfaced in cases where courts wanted to restrict the meaning of intention. In \textit{The King v Ahlers},\footnote{[1915] 1 KB 616.} the accused was charged with assisting the King’s enemies at the commencement of World War I. Ahlers, a British subject, who was the German Consul, had assisted some German subjects to return to Germany on the first day that England was officially at war with Germany. He argued that he believed under international law principles that alien enemies were given a reasonable time to return to their country of origin after the declaration of war. Ahlers was convicted. On appeal it was held that the nature of Ahler’s intention was relevant. As Lord Reading put it, “Unless the jury
were satisfied that his *intention and purpose in acting as he did were evil,* ... and that he was intending to aid and comfort the King’s enemies and did these acts with that object, they could not find him guilty of the act charged.”¹²⁷ [emphasis added] Ahlers’ conviction was quashed.

It may be argued that the case can be explained on the basis of the particular words of the indictment which read, “contriving and with all his strength intending to aid and assist the enemies of our Lord the King against our said Lord the King and his subjects heretofore during the said war ... and with force of arms unlawfully maliciously and traitorously was adhering to aiding and comforting the German Emperor against our Lord the King.” It may be argued that the case does not stand for an interpretation of “intention,” rather it may have been an application of the specific mental states of “maliciously” and “traitorously,” which in the early days were synonymous with wickedness or evil.

A later case of assisting the enemy which arose out of the second World War did turn on the meaning of intent. In *R v Steane,*¹²⁸ the accused was tortured by the Germans and forced to broadcast for them. He did so, fearing for the safety of his family. Steane was charged with doing acts likely to assist the enemy, with intent to assist the enemy. He was convicted, and on appeal, Lord Goddard held that:

The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that, while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free, uncontrolled action of the accused, they would not be entitled to presume it if the circumstances showed that the act was done in subjection to the power of the enemy or was as equally consistent with an innocent intent as with a criminal intent, eg, a desire to save his wife and children from a concentration camp.¹²⁹ [emphasis added]

According to *Steane,* the natural consequence test of intention was too broad and it was necessary to look further. The difficulty with this case is that the court had confused intention with motive, even though Lord Goddard denied this. By emphasising the dominant intention, Lord Goddard was clearly saying that the motive

¹²⁷ [1915] 1 KB 616 at 625.
¹²⁸ [1947] 1 All ER 813.
of the accused was relevant. How does one distinguish an innocent aspect of an intent from a criminal aspect of an intent, without relying on the motive, or an evaluation of the accused’s knowledge of wrongfulness? The Steane approach to intention is extremely narrow. Not only did it exclude foresight of virtual certainty, it also excluded purpose. In fact, it actually focused on the wrongfulness of the intention. It cannot be denied that Steane’s purpose was to assist the enemy, although his motive may not have been to do so. Given the facts, he may well not have been blameworthy at all. The principal concern of the judges was to ensure that Steane, whom they thought was not blameworthy should not be convicted or punished.\footnote{130}

This dominant intention approach was applied by the Privy Council in 1951 in a criminal trespass case\footnote{131} and approved in \textit{R v Burke}.\footnote{132} In Burke’s case the accused was charged under s1(3) of the \textit{Protection from Eviction Act 1977} (UK), which made it an offence to do an act with an intent to cause a residential occupier to give up the occupation of premises. The court in Burke held that intention as foresight of virtual certainty did not necessarily apply to all specific intent offences, contrary to Lord Bridge’s view in \textit{Moloney}. In Burke’s case the phrase “with intent to” was interpreted as being limited to purpose in the strict sense. The same phrase in s18 of the \textit{Offences Against the Person Act 1861} (UK), however, was interpreted more broadly, i.e. it included foresight as a virtual certainty.\footnote{133}

This approach of separating a dominant intent from a subsidiary intention was simply a way for the courts to adjudge whether the intention was a wrongful one. The neutral approach to intention, exemplified by the orthodox subjective approach was not adequate. Resort to varying types of “intention” was necessary to indirectly permit

\footnote{129} [1947] 1 All ER 813 at 817.
\footnote{130} The court could have relied on the defence of duress instead of straining the meaning of intention.
\footnote{131} \textit{Sinnaamy Selvanayagam v The King} [1951] AC 83 at 87.
\footnote{132} [1988] Criminal Law Review 839. See also, the earlier case of \textit{Thorne v Motor Trade Association} [1937] AC 797.
evidence of motive to be considered by the jury in some instances.\textsuperscript{134} Norrie has described this approach to jury directions on intention as “moral shadow-boxing” where judges without expressly stating it, suggest to the jury that they are entitled, even obliged to take into account the motive of the defendant.\textsuperscript{135} Hidden in these directions is the normative dimension of mens rea.

The difficulty with the present approach to intention is the absence of an express acknowledgment of a normative element to the accused’s mental state. This normative element is necessary to evaluate the moral blameworthiness of the accused’s intention. Evidence of motive and the accused’s knowledge of the illegality of the conduct shed light on the question of whether or not the accused is deserving of blame. As Lord Devlin put it, “Mens rea consists of two elements. It consists first of all, of the intent to do an act, and secondly, of the knowledge of the circumstances that makes that act a criminal offence.”\textsuperscript{136} Lord Devlin’s explanation of mens rea is very close to the model proposed in this thesis. The mens is the subjective mental state and the rea is the objective knowledge of illegality.

**Recklessness**

Recklessness is a mental state that is characterised by a subjective foresight of a risk and an unjustifiable taking of that risk. This orthodox subjective test of recklessness was challenged in 1982 when the House of Lords created an objective species of recklessness. \textit{R v Caldwell}\textsuperscript{137} and \textit{R v Lawrence}\textsuperscript{138} were decided by the House of Lords within months of each other. In both cases the meaning of recklessness was at issue. Caldwell involved a prosecution under the \textit{Criminal Damage Act 1971} (UK) and Lawrence arose under the \textit{Road Traffic Act 1972} (UK). In both cases the House

\begin{itemize}
\item \textsuperscript{134} J W Salmond, \textit{Jurisprudence} (7\textsuperscript{th} ed,1924) 398 held the view that motive was really a species of ulterior intention.
\item \textsuperscript{135} A W Norrie, “After Woollin” [1999] Criminal Law Review 532 at 543.
\item \textsuperscript{136} P Devlin, “Statutory Offences” (1958) 4 Journal of the Society of Public Teachers of Law 206 at 213.
\item \textsuperscript{137} [1982] AC 341.
\item \textsuperscript{138} [1982] AC 510.
\end{itemize}
took an objective approach to recklessness, holding that inadvertence could qualify as a reckless mental state. Until 1982 there was no question that recklessness was a mental state that was assessed subjectively.\textsuperscript{139}

\textit{Caldwell/Lawrence} recklessness

The \textit{Caldwell} decision must be viewed in light of the background to the \textit{Criminal Damage Act} 1971 (UK). The predecessor to this Act was the \textit{Malicious Damage Act} 1861 (UK). Under the \textit{Malicious Damage Act} 1861 (UK), mens rea was referred to as "maliciously," which was interpreted subjectively.\textsuperscript{140} As Kenny stated:

In any statutory definition of a crime, malice must be taken ... as requiring either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).\textsuperscript{141}

The words in parenthesis indicated that the test was subjective and inadvertence was not sufficient for recklessness. This definition by Kenny was approved in \textit{R v Cunningham}.\textsuperscript{142} In \textit{R v Caldwell}, however, Lord Diplock took a different view. He rejected the subjective view of recklessness and held:

[A] person charged with an offence under section 1(1) of the \textit{Criminal Damage Act} 1971 is "reckless as to whether any such property would be destroyed or damaged" if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any risk or has recognised that there was some risk involved


\textsuperscript{140} "Maliciously" was generally interpreted as either intentionally or recklessly. See \textit{R v Pembilton} (1874) LR 2 CCR 119; \textit{R v Latimer} (1886) 17 QB 359; \textit{R v Faulkner} (1877) 13 Cox CC 550; \textit{R v Martin} (1881) 8 QB 54.

\textsuperscript{141} Cited in \textit{R v Stephenson} [1979] 1 QB 695 at 705.

\textsuperscript{142} See, \textit{R v Cunningham} [1957] 2 QB 396 at 399.
and has nonetheless gone on to do it. ... cases in the Court of Appeal which held otherwise should be regarded as overruled.\textsuperscript{143}

Lord Diplock was of the view that Kenny was using “recklessness” in the ordinary sense of its meaning which included a “range of states of mind from failing to give any thought at all to whether or not there is any risk of ... harmful consequences, to recognising the existence of [a] risk and nevertheless deciding to ignore it.”\textsuperscript{144} The parenthetical qualification, according to Lord Diplock was necessary to limit the range of states of mind encompassed by recklessness under its ordinary English meaning to give the adverb “maliciously” a contextual meaning. Therefore, the subjective definition of recklessly was based on the purpose of the Malicious Damage Act 1861 and had no relevance to the Criminal Damage Act 1971, which was in fact enacted to revise the law with respect to offences of damage to property.

There are two other areas where recklessness has acquired an objective meaning. One is in the Road Traffic Acts\textsuperscript{145} and the other in the Sexual Offences Acts.\textsuperscript{146} An attempt to extend the objective definition of recklessness to the Offences Against the Person Act 1861 (UK) failed. In \textit{R v Savage; R v Parmenter},\textsuperscript{147} the House of Lords rejected the argument that the \textit{Caldwell} definition of recklessness could apply to the Offences Against the Person Act 1861 (UK).\textsuperscript{148} Given that the Offences Against the Person Act and the Malicious Damage Act 1861 (UK) (the precursor to the Criminal Damage Act 1971 (UK)) were both enacted in 1861, it is strange that the term maliciously, has received such conflicting interpretation in each statute.

\begin{footnotesize}
\begin{enumerate}
\item [143] [1982] AC 341 at 354.
\item [144] [1982] AC 341 at 351.
\item [147] [1991] 4 All ER 698.
\end{enumerate}
\end{footnotesize}
Lord Diplock offered several arguments supporting his approach in *Caldwell*. First, Lord Diplock opined that the term "reckless" was an ordinary English word and should be applied as such. The ordinary definition of recklessness included "failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was." The problem with this argument, as Lord Edmund-Davies pointed out, was that it ignored the fact that certain words had particular meanings in law which might not entirely coincide with the ordinary English meaning. "Recklessness" was one such word. It was a term of art defining a particular mental state necessary for a person to be found guilty of a criminal offence. It should therefore be interpreted in light of the legal meaning of the word, which under the subjective mens rea doctrine required actual foresight by the defendant.

The second argument offered by Lord Diplock was that *Caldwell* was loyal to the subjectivist principle in that it was still the accused's mind that was being investigated. As he put it, "it cannot be the mental state of some non-existent, hypothetical person." However, Lord Diplock then contradicted himself by saying in the very next passage in his judgment, "Nevertheless, to decide whether someone has been "reckless" as to whether harmful consequences of a particular kind will result from his act, as distinguished from his actually intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation." [emphasis added] Several cases decided soon after *Caldwell*, including *R v Stephen Malcolm R*, *Elliot v C (A Minor)* and *R v Miller*, confirmed the objective nature of the

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_Caldwell_ test, although some of the judges expressed reservations about the objective approach to recklessness. As Lord Justice Ackner put it, “We respectively share the regrets voiced by Robert Goff LJ that in essence ‘recklessness’ has been construed synonymously with ‘carelessness.’” Professor Griew has argued that _Caldwell_ should not extend to situations where a person turned his or her mind to a risk and reasonably decided that the risk was negligible.

Lord Diplock’s third argument was that the person who failed to give thought to a risk and the person who consciously took a risk were morally equally culpable. Other cases where inadvertence was accepted as recklessness echoed the same theme: an ignorant person or one so insensitive to others is as, or even more, culpable than one who considers risks, albeit in a negligent or reckless manner. The objective recklessness test therefore generally applied in cases where there was already some blameworthiness. As Lord Diplock said of criminal damage cases, “the physical act of destroying or damaging property belonging to another, is in itself a tort. So there is something out of the ordinary to call the doer’s attention to what he is doing and its possible consequences, ...”. Antony Duff has suggested that the _Caldwell_ inadvertence approach is defensible only where the risk had been created by the

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156 (1983) 77 Cr App R 17.
161 See for example, _R v Kimber_ [1983] 1 WLR 1118 at 11221 per Lawton LJ: “…His own evidence showed that his attitude to her was one of indifference to her feelings and wishes. This state of mind is aptly described in the colloquial expression, ‘couldn’t care less’.”. See also _R v Reid_ [1992] 1 WLR 793 at 811 per Lord Goff: “Indeed it can be argued with force that, in many cases of failing to think, the degree of blameworthiness to be attached to the driver can be greater than to be attached in some cases to the driver who recognised the risk and decided to disregard it.”
accused.\(^{163}\) It has also been suggested that *Caldwell* should be read so that inadvertence may amount to recklessness only if it involved “moral wickedness” or “morally opprobrious factors”.\(^ {164}\) However, it is clear that *Caldwell/Lawrence* recklessness does not require indifference, let alone “moral wickedness”.\(^ {165}\)

**Reckless inadvertence in sexual offences**

Recklessness as inadvertence has been applied to offences under the *Sexual Offences* Acts. However, the inadvertence that qualifies as recklessness for the purpose of the *Sexual Offences* Acts is less “objective” than that under *Caldwell/Lawrence*. This is because an element of indifference, in addition to inadvertence is required. Further, the inadvertence test under the *Sexual Offences* Acts was not whether a reasonable person would have adverted to the risk, but whether a person with the defendant’s mental capacity would have adverted to the risk. In several cases decided around the same time as *Caldwell* and *Lawrence*, the courts consistently distinguished the *Criminal Damage* and *Road Traffic* Acts cases from the *Sexual Offences* Acts cases.\(^ {166}\) The reason a more subjective view prevailed in the sexual offence cases was due to the influential House of Lords decision of *DPP v Morgan*.\(^ {167}\) In that case Lord Hailsham said:

I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether victim consents or no.\(^ {168}\)

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That last phrase “the equivalent intention of having intercourse willy-nilly not caring” represents recklessness in sexual offences and imports the indifference element. Thus mere inadvertence was not sufficient for recklessness, it had to be indifferent. One reason for the different treatment was that a sexual act in and of itself was not wrongful. It was only when it was non-consensual that it became wrongful. A person was not blameworthy for having sex. He or she might be blameworthy only where the other party was not consenting. In the criminal damage cases, as Lord Diplock argued, there was generally some underlying degree of blameworthiness in that the act of criminal damage was itself socially unworthy.

A series of sexual assault cases in New South Wales has held that recklessness as to consent in sexual assault prosecutions included inadvertence, as developed in the English cases.\(^{169}\) As with the English sexual assault cases there appeared to be a requirement of indifference, before mere inadvertence qualified as recklessness. In the 1990 decision of \(R v\) Henning, the court held that indifferent inadvertence to consent could be treated as knowledge.\(^{170}\) This indicated an inferential approach, ie indifferent inadvertence was evidence of subjective knowledge. This is patently wrong, although Glanville Williams has given support to this in his earlier work. As he stated:

No man engaged on sexual congress (unless perhaps he is intoxicated) has a blank mind on the subject of the woman’s consent. Either he believes that she is consenting, or believes that she is not, or is aware of his ignorance on the subject (and in the last case he is reckless as to consent).\(^{171}\)

In \(R v\) Tolmie,\(^{172}\) Kirby J rejected the view that inadvertence gave rise to an inference of subjective knowledge. He held that inadvertent recklessness was a species of recklessness separate from advertent recklessness.\(^{173}\) Kirby’s judgment in Tolmie is

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\(^{170}\) Henning \(v\) R (NSW Court of Criminal Appeal, 11 May 1990, unreported) at 31.

\(^{171}\) G L. Williams, “The Unresolved Problem of Recklessness” (1988) 8 Legal Studies 74 at 83-4.

\(^{172}\) (1995) 37 NSWLR 660.

\(^{173}\) \(R v\) Tolmie (1995) 37 NSWLR 660 at 667.
ambiguous as to whether indifference is required as an additional element to inadvertence. While he referred to authority emphasising the need for indifference to qualify inadvertence, his position is unclear. He stated:

It follows from the decision in this jurisdiction of *R v Hensley, R v Kitchener, R v Henning*, and like decision in other jurisdictions such as *R v Reid, R v Caldwell and R v Lawrence* in the House of Lords, that, where the accused has not considered the question of consent and a risk that the complainant was not consenting to sexual intercourse would have been obvious to someone with the accused’s mental capacity if they had turned their mind to it, the accused is to be taken to have satisfied the requisite mens rea referred to by the word ‘reckless’ in s61R of the *Crimes Act 1900*. This passage equated *Caldwell/Lawrence* recklessness with *Kitchener/Tolmie* recklessness. This is incorrect since *Caldwell/Lawrence* recklessness is purely objective and completely disregards the defendant’s mental state, whereas Kirby J has held that *Kitchener/Tolmie* inadvertence is based on “someone with the accused’s mental capacity”. What the courts were trying to do was to arrive at some form of definition of recklessness that would convict the morally blameworthy, but not affect the morally innocent. Therefore in the sexual offence cases, because there was a possibility that a purely objective test could result in the conviction of a morally blameless person, since sexual intercourse per se may not be harmful, the inadvertence test was limited to the reasonable person with the defendant’s mental capacity. With criminal damage, because it was very unlikely that there could be criminal damage that was not harmful, a broader approach may have been justified.

In either case, the subjective mens rea doctrine has been shown to be inadequate. Both *Caldwell/Lawrence* and *Kitchener/Tolmie* have reasoned that recklessness was based on inadvertence, a *failure* to foresee, or an *absence* of a mental state. This is contradictory to the orthodox theory, but accords with common sense and does facilitate the determination of moral blameworthiness. As Kirby J put it, to reject

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inadvertence as recklessness, despite the contradictions with the orthodox theory, "would simply reaffirm the view that our criminal law, at crucial moment, fails to provide principled protection to ... victims."

**Blameworthy inadvertence – an illustration of when the mens was rea**

The concern with the development of inadvertence as recklessness was that it created an objective element of mens rea. In the *Caldwell/Lawrence* cases this is undoubtedly true. Lord Diplock tried to rationalise *Caldwell* on the grounds that a person who failed to consider a risk was as morally culpable as one who consciously took a risk. Therefore punishing the inadvertent was justified. This accords with the argument developed in Chapter I that moral blameworthiness justified punishment, despite the absence in some cases of a technical, subjective mental state. This justification does not, however, work for the criminal damage cases, unless one accepts that there is something morally opprobrious about damaging property. Therefore the *Caldwell* approach may be indefensible.

*Lawrence* can be justified on the grounds that recklessness in *Lawrence* did not belong to mens rea at all, but really belonged to the actus reus requirement. The offence was reckless driving, ie driving in a manner that was reckless. The history of the *Road Traffic Act 1972* (UK) suggests that this was Parliament’s intention. The original Act was the *Motor Car Act 1903* (UK), which was replaced by the *Road Traffic Act 1930* (UK) and the subsequent *Road Traffic Acts* until the 1972 Act. The *Road Traffic Act 1972* (UK) made it an offence to drive a motor vehicle on a road recklessly, or at a speed or in a manner that was dangerous to the public. By the *Road Traffic Act 1977* (UK), Parliament abolished the latter two offences and left reckless driving. The history shows that the offence was made out when the driving was in a reckless manner, rather than when the defendant was reckless with respect to his or

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178 As Lord Goff put it, "... the appropriate test to be applied was purely objective – a test which might in some circumstances be thought justifiable in relation to certain conduct (eg reckless driving), particularly where the word 'reckless' is used simply to characterise the relevant conduct." *Elliot v C* [1983] 1 WLR 939 at 949.
her driving. In 1991 Parliament abolished the reckless driving offence and replaced it with an offence of dangerous driving.\textsuperscript{179} The fault element for this was negligence.

The sexual offence cases can be interpreted to provide an illustration of this thesis. Instead of viewing the mens rea element as a reckless failure to advert to consent, the mens rea inquiry should instead be focused on the positive mental state of the accused. This is subjectively assessed. The question would be: Did Tolmie intend to have sexual intercourse? The answer has to be in the affirmative. The second question is whether or not this intention is morally blameworthy. This assessment of blameworthiness can be made objectively. It is the lack of consent that makes the conduct illegal. Reasonable knowledge of illegality should be an element of mens rea. This reasonable knowledge is assessed on the basis of the actual capacity of the accused, not by reference to a hypothetical reasonable person. Was Tolmie unreasonably ignorant of the victim’s lack of consent? Tolmie intended to have sexual intercourse with the victim, without reasonable belief in the legality of his conduct. His subjective intention was therefore blameworthy. Reconceptualising mens rea in this manner provides a rationalisation of reckless inadvertence within the subjective framework of mens rea.

CONCLUSION

It has been argued in this chapter that mens rea was originally a normative concept based on moral blameworthiness. This moral blameworthiness element was largely due to the influence of Roman and Canon law in the thirteenth century. The next major development occurred in the eighteenth and nineteenth centuries due to the influence of scientific knowledge and liberal positivism. The growth of science gave rise to the actus reus and mens rea dichotomy. Mens rea came to be treated as a purely psychological, technical concept, whereas it was originally a moral philosophical concept. The promise of precision and predictability offered by scientific methods led to the descriptive theory of mens rea. Various psychological mental states were categorised as intention, or recklessness, or knowledge. Particular mental states were assigned to particular offences. As long as the relevant mental

\textsuperscript{179} Road Traffic Act 1991 (UK).
state was present, there was no need for an inquiry into the moral blameworthiness of the accused.

This absence of inquiry into the moral blameworthiness of the accused was a severe shortcoming of the descriptive theory of mens rea. The legacy of the normative origin of mens rea had, however, survived in the conscience of the common law. Common law judges struggled with the tension between the latent normative dimension and the formally recognised descriptive approach. The analysis of intention and recklessness revealed a judicial approach that was at times bewildering in its lack of consistency, although in most cases the outcomes were justifiable. Courts sometimes allowed objective tests for mens rea and recognised different types of intention as well as different types of recklessness. Jury directions on mens rea varied according to the judges' intuitive perception of the moral blameworthiness of the accused. The mental states of intention and recklessness were alternately defined broadly and narrowly. The reason for this apparent inconsistency was that the judges were trying to incorporate a normative dimension into the mens rea directions, so that juries could convict or acquit on the basis of the moral blameworthiness of the accused. The English homicide cases revealed this highly normative approach, as judges manipulated the concept of intention.

Recklessness was held to include inadvertence, which was assessed objectively under Caldwell/Lawrence. The sexual assault cases (Kimber/Kitchener/Tolmie) applied this type of recklessness and held that an accused who failed to advert to the issue of consent had the necessary mens rea for sexual assault. Judges were of the view that an accused, charged with sexual assault, who completely failed to consider whether or not the victim was consenting, was clearly morally blameworthy. However, under the orthodox mens rea approach, such an accused could not be held criminally liable as there was no subjective belief in lack of consent. The courts therefore treated inadvertence as a species of recklessness. This created a conceptual problem because inadvertence was a failure to advert, ie a negative mental state. It was difficult to reconcile fault based on an absence of a mental state, with the orthodox subjective doctrine of mens rea.
Alternatively, it has been argued that the theoretical reconceptualisation of fault developed in Chapter I has provided a solution. Instead of viewing the fault element in the sexual assault cases as a mere failure to advert, the fault element should be viewed as an intention to have sexual intercourse without a reasonable belief in the lawfulness of that conduct. Under this approach, the mental state is still subjective but the knowledge of illegality, which provides the blameworthiness is objectively assessed. Consent is the issue that determines the legality of the conduct. Having determined that the defendant intended to have sexual intercourse, i.e., having determined the subjective mental state, the blameworthiness of that mental state is determined by this question: “Should this accused have reasonably contemplated the possibility of lack of consent?” Since consent determines the legality of the conduct, the question is effectively: “Should the defendant have been reasonably aware of the illegality of the conduct?”

The above question reverberates as the reasonable knowledge of illegality question that determines whether the subjective mental state was blameworthy, or to use this author’s fractured Latin, whether the mens rea was rea. Instead of cloaking this normative inquiry within descriptive terms, courts should openly acknowledge the normative element of criminal culpability. The reconceptualised model retains the subjective element by ensuring that it is the accused’s mental state that is evaluated.
CHAPTER III

STRICT LIABILITY:
A PARADOX OF FAULT IN THE CRIMINAL LAW

INTRODUCTION

The purpose of this chapter is to provide a case study of criminal fault by examining strict liability offences. The strict liability offences that are the subject of this chapter are mainly concerned with the nineteenth century statutory offences of England. It should be noted that whilst strict liability had existed under the common law these offences were very limited.\(^1\) The statutory strict liability regime provoked considerable academic and judicial criticism as the regime challenged the fundamental tenet of the criminal law; criminal liability was deserved only when the act was committed with a relevant mental state. The cardinal principle of the common law – actus non facit reum nisi mens sit rea was perceived to be under threat. The harshest of the criticism is captured by this comment by an American academic:

It is becoming increasingly recognised that strict liability has no place whatever in the criminal law; indeed, that it smacks of barbarism to punish people despite the fact that there is no reason for blaming them at all.\(^2\)

Much of the criticism was due to the fact that orthodox criminal law scholarship regarded mens rea as the only form of criminal fault. While orthodox mens rea, in many instances, adequately demonstrates criminal fault, it is by no means the sole form of criminal fault. By treating mens rea as synonymous with criminal fault, strict liability was criticised as imposing criminal liability without fault. In this chapter it will be argued that the strict liability regime is in fact not liability without fault. This

\(^1\) Common law strict liability offences included contempt of court (Evening Standard Co Ltd, ex p Attorney General [1954] a QB 578; R v Dolan [1907] 2 IR 260; Odhams Press, ex p Attorney General [1957] 1 QB 73. See generally, C J Miller, Contempt of Court (2nd ed, 1989) 280-5); criminal libel (R v Dodd (1736) 2 Sess Cas 33; R v Walter (1799) 3 Esp 21; R v Holbrook (1878) QBD 42) and public nuisance (R v Stephens (1866) QB 702; R v Shorrock [1993] 3 All ER 917. But see also, R v Vantandillo (1815) 4 M & S 73; R v Burnett (1815) 4 M & S 272, requiring mens rea).

argument is based on the thesis developed thus far - criminal fault should be normative and goes beyond descriptive mental states. It has been argued in Chapter I that mens rea should be reconstructed to include a normative element, which is essentially objective knowledge of illegality. In Chapter II, it has been demonstrated that judges had intuitively relied on this normative aspect of mens rea, although this has never been officially recognised. This latent normative dimension of mens rea becomes even more readily apparent in strict liability cases because subjective mens rea is removed from the equation.

It will be argued in this chapter that historically there were two types of strict liability offences. One category belonged to the civil jurisdiction and was concerned with regulation and compensation. The other properly belonged to the criminal jurisdiction, in that it concerned conduct that was patently immoral or wrongful. The first category of offences provided a regulatory framework to set minimum standards of safety. It created implied warranties in commercial transactions. As the state assumed greater responsibility, breaches of these regulations resulted not just in compensation to the victim, but in fines to the state. This penal element brought what was essentially a civil regulatory system into the criminal law. It has even been argued that the introduction of these regulatory offences into the criminal law was in fact a mistake, and that the criminal law should never have been used to administer this regime of offences. As Sayre argued:

The old cumbersome machinery of the criminal law, designed to try the subjective blameworthiness of individual offenders, is not adapted for exercising petty regulation on a wholesale scale; and consequently a considerable amount of this developing regulation has been placed under administrative control. But unfortunately the criminal law, which from early times had been used to punish those obstructing or endangering the King’s highway, threatening the public health or disturbing the peace by reason of intoxication, was seized upon as a convenient instrument for enforcing a substantial part of this petty regulation. As a result criminal courts are today swamped with great floods of cases which they were never designed to handle; the machinery creaks under the strain.

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A Paradox of Fault in the Criminal Law

If this argument is correct, ie that these offences are actually civil wrongs and not criminal wrongs, then dispensing with the need to prove mens rea does not offend fundamental principles.

The second category of offences properly belonged to the criminal law in that these offences were intrinsically wrongful. One justification for dispensing with the need for proof of fault in this area was that because of this intrinsic nature of the wrongfulness of the conduct, it was reasonable to presume that the accused must have known of the wrongfulness of the conduct. Indeed, this was precisely the justification given in 1875 in the important case of R v Prince. The court in Prince held that the substantive meaning of mens rea was knowledge of wrongfulness. Criminal fault went beyond subjective mental states and the strict liability cases reveal this. Strict liability, while ostensibly rejecting fault requirements, is in fact not a species of no-fault liability. Rather, it relies on a normative aspect of criminal culpability. Strict liability is a fault paradox in the criminal law.

It will be argued that there are, in fact, several varieties of strict liability. Recognising that strict liability is not restricted to liability without mens rea assists in a rethinking of the whole area. Strict liability can be seen not merely as dispensing with fault in the form of subjective mens rea, but rather as relying on alternative fault requirements. Because strict liability was viewed narrowly in terms of liability without proof of mens rea, the judicial reaction to it has been to import subjective mens rea requirements or to recognise special defences that suggest an absence of mens rea. Thus, Australia and Canada distinguish between strict and absolute

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liability, where the former attracts a special defence. In the Australian and Canadian contexts, the terms “strict liability” takes a slightly narrower meaning. In this chapter, the term “strict liability” is used generically, except where the context indicates otherwise. The American courts have also recognised special defences for strict liability crimes where it appears unfair to punish the accused. The common theme of these approaches is that the morally innocent should not be punished and that an objective fault standard is normally relied on. This objective fault is often unreasonable ignorance of the wrongfulness of the conduct.

HISTORY AND DEVELOPMENT OF STRICT LIABILITY

Criminal law theorists, particularly the liberal positivists of the nineteenth century viewed criminal law as being concerned with balancing the interest of the state in maintaining law and order, and the interest of the individual in being free to engage in his or her interests. The American Model Penal Code 1963 (US) reflected this balance in its statement of the purposes of the criminal law:

- to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests
- to subject to public control persons whose conduct indicates that they are disposed to commit crimes
- to safeguard conduct that is without fault from condemnation as criminal
- to give fair warning of the nature of the conduct declared to be an offence
- to differentiate on reasonable grounds between serious and minor offences.

In the late nineteenth century and early twentieth century, the role of the state in regulating society increased. The rapid growth of regulatory offences; the state’s increasing involvement in trade and commerce, both in terms of being a regulator and

7 In Australia the defence is honest and reasonable mistake of fact while in Canada it is due diligence.
a participant; the difficulty of proof of subjective knowledge of facts; and the rise of summary procedures were some of the factors that contributed to the greater intervention by the state.\(^9\) A parallel can almost be drawn between the twelfth century expansion of the King’s Peace and the consequent growth of the criminal jurisdiction,\(^11\) with the nineteenth century expansion of the state’s commercial/regulatory interest and the growth of the strict liability jurisdiction. Strict liability was embraced by the state as it gave greater power to law enforcers.

The purpose of the following historical analysis is to demonstrate that strict liability was accidentally introduced into the criminal law and that in most of the cases there was always some degree of fault. Where no fault was present, the accused invariably escaped liability, or received an indemnity. In the last century, and in recent years, the range of strict liability crimes has greatly expanded.\(^12\) Seventy years ago, a leading commentator asked, “Are we to see a day when criminality will be based upon external behaviour alone irrespective of intent?”\(^13\) Although there have been such assertions,\(^14\) this has clearly not happened. Indeed, courts now actively import fault

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11. See Chapter II.


14. “A crime does not consist of an act and an intent, but simply of an act. In the criminal law of England and the United States there is no place now for a doctrine of intent as a necessary ingredient of a crime. ... A crime is an act. It is *not* [emphasis in original] an act plus an intent.” A Levitt, “Extent and Function of the Doctrine of Mens Rea” (1923) 17 Illinois Law Review 578 at 588-589. “The mental state is wholly and solely a matter of inference from behaviour and that alone. The Court, suddenly realising its behaviouristic function, recognises this in telling the witnesses that, by the rules of evidence, they have merely to state ‘facts observed,’ that is, in this case, what they observed the external conduct of accused to have been.” D H T Malan, “The Behaviouristic Basis of the Science of Law” (1923) 9 American Bar Association Journal 43. “What the court is interested in, is whether the behaviour of the accused was of such and such a character.” J F Dashiell, “The Objective Character of Legal ‘Intent’” (1931) 38 Psychology Review 529 at 533. “Criminal intent, so important in the language of law, is imputed to persons who have conducted themselves after certain fashions. Where criminal intent has any psychological meaning, that meaning is derived from theorizing
elements which are absent in the statute. While the nineteenth century saw the expansion of strict liability, it was also the period when the common law was entrenching the requirement of mens rea as a cardinal element of criminal liability. The conflict between these two parallel developments was inevitable. On the one hand, the common law insisted on proof of subjective mens rea, and on the other, statutes were creating offences which resulted in liability without proof of mens rea.  

**Strict liability as civil wrong**

The early strict liability offences were actually instances of vicarious liability. Many of the early strict liability offences were related to health and public safety issues. These offences were not criminal, but were merely enacted to regulate trade and commerce, as well as to protect public welfare. The “penalty” was in most cases a payment to the victim. These offences created vicarious liability to ensure the victims received compensation by making the employers and principals liable. The statutes in effect created statutory warranties. The health and safety regulations generally contained provisions whereby a person found in breach could escape liability if he or she had obtained a warranty as to the safety of the product from the supplier. Because the fault of the employer or principal was irrelevant, vicarious liability was seen as creating strict liability. What is ignored is that in most of these cases, the offences required some sort of fault which was generally present in the employee or agent who actually breached the relevant provisions. The confusion between vicarious liability and strict liability was in part due to a failure to distinguish between strict liability offences and strict liability rules.  

The former referred to offences which dispensed with the need to prove mens rea, while the latter referred to the doctrine of liability without fault.

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Vicarious liability

Vicarious liability was seen as a viable means of directing responsibility to the persons who had control and who could afford to compensate anyone injured through their activity.\(^{17}\) The earliest vicarious liability cases concerned criminal libel and occurred in the late eighteenth century.\(^{18}\) It may be argued that this development was due to the influence of Lord Mansfield who took a particularly harsh view in libel cases.\(^{19}\) The late eighteenth century cases decided by Lord Mansfield, regularly held criminal libel to be an offence of strict liability,\(^{20}\) although later decisions adopted a softer approach. There was, in fact, only one case in the nineteenth century, *R v Walter*,\(^{21}\) which imposed liability without fault for criminal libel. *Walter’s* case can be argued to have been wrongly decided. The court relied on *R v Almond*,\(^{22}\) where it was held that there was a rebuttable presumption of mens rea in criminal libel cases. *R v Walter* treated this presumption as irrebuttable and thus created liability without fault for criminal libel. The court held that proof of publication was all that was needed for a conviction and that it was no defence that the defendant had no knowledge of the publication.\(^{23}\)

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\(^{17}\) See Redgate *v* Haynes (1876) 1 QBD 89; *Commissioner of Police v Cartman* (1896) 1 QB 855; *Emery v Nolloth* (1903) 2 KB 264; *Chisolm v Doulton* (1889) 22 QBD 736.

\(^{18}\) Two other categories of cases where vicarious liability played an important role were domestic misdemeanours and criminal nuisance. See G. O. W. Mueller, “On Common Law Mens Rea” 42 (1958) 1043 at 1080-97.

\(^{19}\) In one of his judgments he said, “I dare say they never read a thousandth part of what they publish. Are they, therefore, to justify their publications, be they what they will, because they publish they know not what?”. *R v Williams* (1774) ER 905 at 906.

\(^{20}\) *R v Almond* (1770) 5 Burr 2686, 98 ER 411 (KB); *R v Nutt* (1729) 47, 94 ER 647 (KB); *R v Williams* (1774) Loft 759, 98 ER 905 (KB); *R v Woodfall* (1774) Loft 776, 98 ER 914 (KB).

\(^{21}\) (1799) 3 Esp 21.

\(^{22}\) (1770) 5 Burr 2686, 98 ER 411 (KB).

\(^{23}\) Indeed because it was so harsh and unjust to convict newspaper proprietors who were innocent, the English Parliament changed the law by legislation in 1836. *Lord Campbell’s Act*, s7 allowed any newspaper proprietor in a libel suit to escape liability by proving that the publication was made “without his authority, consent or knowledge.”
This doctrine of vicarious liability in criminal law was entrenched in 1824 in the case of *R v Marsh*\(^{24}\) where it was held: "A master in some cases is answerable criminally for the act of his [or her] servant, when the act is done by the servant for the benefit of the master and in the course of his [or her] employment."\(^{25}\) Although vicarious liability imposed liability without fault on a third party, the breach itself was not one that could be committed without some sort of fault by the actual perpetrator. Therefore, finding an individual vicariously liable, without proof of fault, did not necessarily mean that the offence itself did not require fault. As a New South Wales judge once said:

> If the statute is one of the category of statutes regulating trade or business ... and if also, a liability is thrown on the principal by terms expressly imposing the penalty on him, then he becomes responsible for the knowledge or intent of the servant – his mens rea. It is reasonable in such cases that the master on whom responsibility is placed should not be able to avoid that responsibility by putting in his place an agent who will have the mens rea which otherwise would be possessed by the master.\(^{26}\) [emphasis added]

This passage shows the distinction between vicarious liability and liability without fault. The master is liable for the fault of the servant. Therefore, in the chain of criminal liability, there is a point at which fault is required. The offence itself is not one that can be committed without fault. For example, s16 of the *Liquor Licensing Act* 1872 (UK) has been interpreted as requiring proof of mens rea.\(^{27}\) Section 16 made it an offence to supply liquor to an officer who was on duty. In *Mullins v Collins*,\(^{28}\) a publican was convicted under s16 because his employee, without the knowledge or approval of the employer, had breached s16. The employer was held liable despite the absence of any relevant knowledge. This was not contrary to the view that s16 required mens rea because the employee, who served the liquor, knew that the constable was on duty. The employer was held vicariously liable for the employee’s fault. The offence itself was not a strict liability offence.

\(^{24}\) (1824) 2 B&C 717.

\(^{25}\) (1824) 2 B&C 717 at 723 per Littledale J.

\(^{26}\) *Alford v Riley Newman Ltd* (1934) 34 SR (NSW) 261 at 273.

\(^{27}\) *Sherras v de Rutzen* [1895] 1 QB 918.

\(^{28}\) (1874) 9 LR 292 (QB).
This case clearly illustrated the distinction between liability without fault and vicarious liability.\textsuperscript{29} Indeed, the court in \textit{Mullins v Collins} suggested that if the employee had not been aware that the constable was on duty, there would not have been a breach of the section, and the employer would not have been liable.\textsuperscript{30} In \textit{Brown v Foot},\textsuperscript{31} an adulteration case, although the defendant was convicted for the act of his employee, the judge, in commenting on the culpability of the defendant stated, "The magistrate does not put it that it is a criminal act on the part of the master, but the penalty is inflicted ... for the purpose of making people exercise care in selling articles which they have no right to adulterate."\textsuperscript{32} The confusion between vicarious liability and strict liability inevitably led to direct strict liability.

\textit{Origin of direct strict liability}

The case that is generally cited as the first instance of direct, as opposed to vicarious, strict liability is the 1846 case of \textit{R v Woodrow}.\textsuperscript{33} The defendant was charged with having possession of adulterated tobacco, contrary to the \textit{Tobacco Act} 1842 (UK). The defendant’s plea was that he lacked the necessary mens rea because he had no knowledge that the tobacco was adulterated. The Court of Exchequer held that knowledge of adulteration was unnecessary and convicted the defendant on a strict construction of the statute.\textsuperscript{34} Because the statute did not contain the word “knowingly” the court refused to read in a requirement of knowledge. While many

\textsuperscript{29} See for example, R M Perkins, “Alignment of Sanction with Culpable Conduct” (1964) 49 Iowa Law Review 325 at 356, nn 192-199. See \textit{Bosley v Davies} (1875) 1 QBD 84 and \textit{Somerset v Hart} [1894] 2 QB 360 where convictions were reversed where there was no proof of knowledge of adulteration on the part of both the employee and the employer. See also the distinction drawn between strict and vicarious liability in the American case of \textit{State v Beaudry} 365 NW 2d 593 at 597 (1985): “[U]nder strict liability the accused has engaged in the act or omission; the requirement of mental fault, mens rea, is eliminated. ... Vicarious liability, in contrast ... dispenses with the requirement of actus reus ...”

\textsuperscript{30} (1874) 9 LR 292 at 293.

\textsuperscript{31} (1892) 66 LTR 649.

\textsuperscript{32} \textit{Brown v Foot} (1892) 66 LTR 649 at 651 per Hawkins J.

\textsuperscript{33} (1846) 15 M&W 404, 153 ER 907.

\textsuperscript{34} It should be noted that both the justices of peace and the Court of Quarter Sessions found the accused not guilty because of an innocent mistake of fact.
commentators have cited *R v Woodrow* as the first case of strict criminal liability in English law, this has been disputed.

Richard Singer, for example, argued that *R v Woodrow* was not really a criminal case, rather it was a taxation case. The fine in *R v Woodrow* was essentially a replacement for an abolished excise tax. According to Singer, *R v Woodrow* was, apart from a tax case, also a regulation of commerce and implied warranty case. The strength of *R v Woodrow* as laying down the foundation for strict liability in criminal law was weakened in light of two cases decided not very long after *R v Woodrow*. In *Hearne v Garton & Stone* the defendants were charged with transporting prohibited goods. The defendants, who had no knowledge of the nature of the goods, which were sealed in boxes, were acquitted of the charges. The shipper had misled them as to the contents. Lord Campbell CJ, emphasising the common law requirement of moral blameworthiness, stated, “There was neither negligence nor moral guilt of any kind on their parts: and are they to be made the victims of Nicholas’s [the shipper] fraud?” *R v Sleep* is a clearer example of a court importing the requirement of mens rea in the absence of any words to that effect in the statute. Sleep was found in possession of certain contraband goods, possession of which had been made illegal. Sleep’s conviction was overturned on appeal. Cockburn J held, “It is true that the statute says nothing about knowledge, but this must be imported into the statute.”

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37 The 1842 Act in *Woodrow* was enacted to amend an earlier Act which was entitled *An Act to Discontinue the Excise Survey on Tobacco, and to Provide Regulations in Lieu Thereof.*

38 As Chief Baron Pollock put it, “[F]or reasons probably very sound, and not applicable to this case only but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.” *R v Woodrow* (1846) 153 ER 907 at 912.

39 (1859) 121 ER 26.

40 (1859) 121 ER 26 at 29.

41 (1861) 8 CCC 472.

42 (1861) 8 CCC 472 at 478.
Nevertheless, strict liability was creeping into the law, particularly in areas that were
classed as essentially regulatory.\footnote{R v Stephens (1866) LR 1 QB 702.}

In the early nineteenth century, principally between 1827 and 1841, capital
punishment as a punishment for most crimes was dropped and in 1840, transportation
as a form of punishment ceased.\footnote{See A C Castles, An Australian Legal History (1982) 32-3.}

Because the harshness of the penalties for criminal
liability had been ameliorated, courts adopted a firmer approach to interpreting
statutory offences. Where a statute purported to dispense with proof of mens rea, the
courts were more inclined to allow such an interpretation.\footnote{See C Manchester “The Origins of Strict Criminal Liability” (1977) 6 Anglo-American Law
Review 277 at 282.}

Another reason for this
narrower and more disciplined approach to interpretation was the criticism by the
Criminal Law Commissioners, in 1834, of the poor quality of reported judgments.\footnote{Criminal Law Commissioner’s First Report 1834.}

The general improvement in drafting also gave courts more confidence to read the
provisions narrowly. Thus, if a statute omitted reference to mens rea, the courts were
prepared to accept that Parliament intended to create a strict liability offence. The
second half of the nineteenth century witnessed a proliferation of strict liability
statutes. Offences which until then required mens rea, were transformed into strict
liability offences by these statutes.\footnote{See for example, R v Dixon (1814) 3 M&S 11 (KB); Treeve’s Case 2 East PC 821; R v Stevenson (1862) 3 Fost & F 106; R v Crawley (1862) 3 Fost & F 109; Core v James (1871) LR 7 QB 135.}

Cases based on statutes enacted in the 1870s
were often held to have dispensed with proof of mens rea.

The nineteenth century statutes that imposed direct strict liability were largely
concerned with public health and safety, as well as commercial efficiency. The
primary aim was to provide alternative means of compensation for individuals who
suffered as a result of commercial enterprise that did not meet minimum standards.

Most of these statutes supplemented the commercial law of obligations by imposing
statutory warranties and prescribing minimum standards of quality and safety. The
statutes often provided an indemnity for those who breached the provisions if it could
be shown that they took reasonable care or reasonably relied on manufacturers and suppliers.

_Sale of Food and Drugs Acts 1860-1875 (UK)_

In 1872 the _Adulteration of Food and Drugs Act (UK)_ was passed.48 Under this Act, knowledge of adulteration was required for selling adulterated food, but no knowledge of adulteration was required where the defendant sold adulterated food and claimed that it was unadulterated.49 This suggested that strict liability operated to give effect to a warranty by the seller rather than to punish the seller for criminal activity. Three years later parliament passed the _Sale of Food and Drugs Act 1875 (UK)_. This Act contained provisions which did not require mens rea for liability50 while at the same time, also provided for a “due diligence” defence.51 Most significantly, s25 provided that a seller could avoid criminal liability if it could be shown that he or she had bought the item subject to a warranty that it was not adulterated or admixed.

Section 28 provided that if a convicted seller successfully sued his or her supplier for breach of the supplier’s warranty, the seller could collect as damages not only the typical breach of contract amounts, but also any penalty and costs the seller might have incurred as a result of the conviction.52 Thus, there was an indemnity against the criminal sanctions. The reason for this indemnity provision was because the legislators were concerned about the risk of punishing innocent parties.53 Singer has argued that this legislation in reality covered the vacuum left by contract and tort law, as a result of the doctrine of privity, and provided a mechanism to make the

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48 This Act replaced the _Sale of Food and Drugs Act 1860 (UK)_.

49 _Fitzpatrick v Kelly_ (1873) LR 8 QB 337; _Roberts v Egerton_ (1874) LR 9 QB 494; _Blaker v Tillstone_ [1894] 1 QB 345.

50 _Sale of Food and Drugs Act 1875 (UK) ss3,4.

51 _Sale of Food and Drugs Act 1875 (UK) s5.

52 See for example, _Cointat v Myham_ [1913] 2 KB 220; _Crage v Fry_ (1903) 67 JP 240; _Burrows v Rhodes_ [1899] 1 QB 816.

53 See the Parliamentary Debates in Hansard, 19 February 1875 at 599-614; Hansard, 9 April 1875 at 1267; Hansard, 13 May 1875 at 598.
manufacturer liable to the consumer. There were other examples of criminal statutes that provided analogous indemnities or escape clauses.

_Pain v Boughtwood_ was the first significant case to consider the 1875 Act. The accused, a grocer, had sold milk from which, without his knowledge, a percentage of the fat had been skimmed. The accused was acquitted at trial but on appeal had the acquittal reversed. The court held that the Act did not require proof of mens rea and that the accused, instead of arguing lack of knowledge, should instead have sought to rely on s25. As the court put it:

> In the present case the respondent ought to have provided himself with a written warranty, and then he could have handed it over to the inspector, who could have thereupon proceeded against the person who had actually committed the fraud. [emphasis added]

Because of the availability of the s25 defence, the court was of the view that an accused who did not avail him or herself of that defence, could reasonably be found to have avoided seeking a warranty because he or she knew, or suspected the milk to be altered, and did not wish to inquire of the supplier. This could be taken as recklessness or a form of wilful blindness. Thus, while the case technically stands for a rejection of mens rea, it is arguable that there was, in fact, some sort of subjective fault. A conviction was reversed in a later case where the defendant had notified the purchaser that the milk might not be “full” and had obtained a warranty from their supplier.

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55 See for example, _Merchandise Marks Act 1887 (UK) s2(2); Food and Drugs Act 1955 (UK) s113; Offices Act 1960 (UK) s1(6)._ See C Howard, _Strict Responsibility_ (1963) 19, n 58 for further examples.

56 (1890) 24 QBD 353.

57 (1890) 24 QBD 353 at 356.

58 _Spiers & Pond v Bennett_ [1896] 2 QB 65.
**Public Health Act 1875**

The second Act during that period was the *Public Health Act 1875* (UK). *Hobbs v Winchester Corporation*\(^{59}\) is the leading case to the interpretation of this Act. It is generally ignored in the literature that the Court of Appeal decision was not concerned with the criminal liability of Hobbs. Rather, it focused on compensation for the penalties and costs that Hobbs incurred. Hobbs was a butcher who had a contract to supply beef to the British Army. He delivered some beef, which on inspection, proved to be unfit for human consumption. Hobbs was then charged under s117 of the *Public Health Act 1875* (UK). At trial before five justices, the charges were dismissed. Hobbs then claimed compensation for the costs of the wrongful prosecution and damages for injury to his reputation.

Hobbs' claim for compensation before Channell J was successful, with the judge holding that Hobbs was not at fault.\(^{60}\) The Court of Appeal reversed Channell J's decision and, strictly obiter, expressed the opinion that Hobbs should have been held criminally liable. The two principal reasons that the judges viewed s116 of the *Public Health Act 1875* (UK) as imposing strict liability are both questionable. The first reason was on the basis of risk analysis. In the judges' view parliament must have intended the seller, and not the consumer, to take the risk of meat being unsound.\(^{61}\) The risk analysis theory strengthens the argument that many of these statutes were designed to bridge the gap left by tort and contract due to the doctrine of privity. The second reason was the confidence that judges would wisely exercise their discretion not to punish, or at least not to severely punish, innocent persons who were convicted.\(^{62}\) This ignores the fact that regardless of the punishment that may or may not be inflicted, an innocent person should never be branded as a criminal.\(^{63}\)

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\(^{59}\) [1910] 2 KB 471.

\(^{60}\) *The Public Health Act 1875* (UK) s308 provides that a person who sustains loss as a result of the exercise of any of the powers of the Act in relation to any matter as to which he or she is not personally in default, is entitled to full compensation.

\(^{61}\) *Hobbs v Winchester Corporation* [1910] 2 KB 471 at 478 per Cozens-Hardy MR, at 481 per Farwel LJ, at 484 per Kennedy LJ.

\(^{62}\) *Hobbs v Winchester Corporation* [1910] 2 KB 471 at 481 per Cozens-Hardy MR, at 485 per Kennedy LJ.
Despite acknowledging that there was no direct authority, apart from dicta in a number of cases, Kennedy LJ held, “I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist.” It is probably this statement that has caused some commentators to regard *Hobbs v Winchester* as authority for strict liability. To say that the *Public Health Act 1875* (UK) imposed liability without fault is not entirely accurate. The Act did allow for the innocent defendant to effectively escape liability by having his or her fine refunded through an action for compensation.

**Liquor Licensing Act 1872 (UK)**

The third significant statute in the mid-nineteenth century, which purported to impose strict liability was the *Liquor Licensing Act 1872* (UK). Section 16 provided that any licensed person who (1) knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for such constable being on duty ... or (2) supplies any liquor ... to any constable on duty ..., is subject to a penalty. The absence of the word “knowingly” before the word “supplies” in subsection (2) may be contrasted with the presence of word “knowingly” before “harbours” and “suffers” in subsection (1). The deliberate omission of the mens rea word may be interpreted as parliament’s intention to make subsection (2) a strict liability offence.

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63 See J F Lawless Jr, *Prosecutorial Misconduct*, (1985) 26, who has shown that prosecutorial discretions sometimes result in the conviction of innocent parties.

64 *Mallinson v Carr* [1891] 1 QB 48 at 52 per Stephen J; *Blaker v Tillstone* [1894] 1 QB 345 at 348 per Lord Coleridge; *Firth v McPhail* [1905] 2 KB 300 at 305 per Lord Alverstone CJ; *Dickson v Linton* (1888) 15 R (IC) 76 at 80 per Lord M’Laren.

65 *Hobbs v Winchester Corporation* [1910] 2 KB 471 at 483.


67 *Public Health Act 1875* (UK) s308.
In the landmark decision of *Sherrass v de Rutzen*\(^{68}\) the court overturned the conviction of a publican who served liquor to a constable when the constable was on duty, although the publican did not know, and had no reason to know that the constable was on duty. The court was of the view that as a general rule mens rea had be be proved for any offence. In Day J’s opinion the deliberate omission of a mens rea word in a statute did not have the effect of making mens rea irrelevant. Instead, he was of the view that such deliberate omission merely reversed the onus of proof.\(^{69}\) In *Cundy v Le Cocq*,\(^{70}\) an earlier case dealing with a very similar provision under the same Act, the court took a different view. Section 13 of the *Liquor Licensing Act* 1872 prohibited the supply of liquor to an intoxicated person. The court in *Cundy v Le Cocq* contrasted s13 with s16(1) which had the word “knowingly” included and held that by omitting the word knowingly from s13, the legislature had intended to make it a strict liability offence. In *Sherrass v de Rutzen*, the court rejected this very line of reasoning.

**Summative remarks on strict liability as civil wrong**

The offences discussed above were mainly regulatory in nature. As Sayre has correctly argued, these offences did not belong to the criminal law but instead should have been treated as part of the jurisdiction of administrative law. The statutes examined were mainly concerned with providing effective means of compensation by creating vicarious liability. Alternatively, the statutes regulated commercial transactions by creating implied warranties. Liability was generally in terms of a fine, payable to the victim. Breach of these statutes was not viewed as criminal and did not carry with it the associated stigma of criminalisation. The absence of an express requirement of mens rea, or even fault was therefore not problematic. As Lord Alverstone CJ put it, “A breach of [such] regulation is not to be regarded as a criminal offence in the full sense of the word ... [t]he doctrine that there must be a criminal

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68 (1895) 1 QB 918.
69 *Sherrass v de Rutzen* (1895) 1 QB 918 at 921. See also *R v Prince* [1874-1880] All ER Rep 81 at 890-891 per Brett J (dissent); *R v Marsh* (1824) 2 B&C 717 at 722 per Bayley J, at 723-4 per Littledale J.
70 *Cundy v Le Cocq* (1884) 13 QBD 207.
intent does not apply to criminal offences of that particular class..."  

It is only when liability is criminal that moral blameworthiness should be present.

**Strict liability as moral wrong**

While the strict liability cases discussed above were essentially civil wrongs, there was a category of cases imposing strict liability for traditional crimes such as murder\(^72\) and certain sexual assaults.\(^73\) Bigamy,\(^74\) a strict liability crime created by statute, was another example that was outside the civil wrongs category of strict liability offences. Could strict liability be justified for these offences? Was the removal of any mens rea requirement contrary to the fundamental principle that there should be no criminal liability without criminal culpability? It is argued that these cases in fact did not impose criminal liability without criminal culpability. Although the requirement of the orthodox subjective mens rea was dispensed with, in all of these cases, an element of moral blameworthiness was present.

One of the most important cases on mens rea and strict liability is the 1875 case of *R v Prince.*\(^75\) The accused was charged under s55 of the *Offences Against the Person Act* 1861 (UK) with unlawfully taking an unmarried girl, under the age of sixteen out of the possession and against the will of her father. The accused’s conviction was affirmed on appeal even though the judges accepted that the accused honestly and reasonably believed that the girl was over sixteen years of age. Therefore there was no subjective mental state of knowledge or intention or recklessness. The majority in *Prince* acknowledged the fundamental principle that every crime required mens rea,

\(^71\) *Provincial Motor Cab Co v Dunning* [1909] 2 KB 599 AT 602.

\(^72\) Strict liability is seen in the felony murder rule, where a person is liable for murder that occurs in the course of the commission of a felony (or a serious crime). *R v Vickers* [1957] 2 QB 664. *Homicide Act 1957* (UK) s1; *Crimes Act 1900* (NSW) s18(1)(a). Although there is a mental state with respect to the foundation crime, there is no mental state with respect to the murder.

\(^73\) Sexual assault of a minor is a strict liability crime as knowledge of the victim’s age is not relevant. *B v Director of Public Prosecutions* [1998] 4 All ER 265; *Sexual Offences Act 1956* (UK) s6; *Crimes Act 1900* (NSW) ss66A, 66C.

\(^74\) See for example, *R v Tolson* (1889) 23 QBD 168; *R v Wheat & Stocks* [1921] 2 KB 119.

\(^75\) (1875) LR 2 CCR 154, [1874-1880] All ER rep 881.
but held that the absence of mens rea in this particular case was not relevant on the grounds that the accused was morally blameworthy. As Bramwell B said, "The act forbidden is wrong in itself, if without lawful cause. I do not say illegal, but wrong."

In Bramwell B’s view, the statute gave full scope for the application of the mens rea doctrine:

The legislature has enacted that if anyone does this wrong act he does it at the risk of the girl turning out to be under sixteen. This opinion gives full scope to the doctrine of mens rea. If the taker believed he had the father’s consent, though wrongly, he would have no mens rea.

Knowledge of the girl’s age was irrelevant because blame could already be attributed by knowledge of the father’s lack of consent. Bramwell B relied on a number of cases to illustrate this proposition that where an act was in itself wrong, then the conscious doing of that act provides mens rea. As Denman J put it, “[The accused] had wrongfully and knowingly violated the father’s rights against the father’s will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.”

The second and related view was that the accused ought to have known that there was a risk that he was breaking the law. By consciously taking that risk he was morally blameworthy because he ought reasonably to have known that the conduct was wrongful. Thus, while *R v Prince* is popularly regarded as a strict liability case, it is, in fact, a case where the court was satisfied that there was moral blameworthiness on the part of the accused. Even though the accused did not know of the precise fact

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76 *R v Prince* [1874-1880] All ER rep 881 at 884.

77 *R v Prince* [1874-1880] All ER rep 881 at 884.

78 Cases relied on by Bramwell B included *R v Forbes and Webb* (1865) 10 Cox CC 362 (defendant held liable for assaulting a police officer in the execution of his duty though the defendant did know the victim was a police officer because the act of assault was wrong in itself); *R v Sleep* (1861) 8 Cox CC 472 (CCR) (defendant acquitted of possession because there was nothing inherently wrong in being in possession of naval stores that were unmarked); *Heame v Garton & Stone* (1859) 121 ER 26 (KB).

79 *R v Prince* [1874-1880] All ER Rep 881 at 896.

that created the particular offence, he knew, or ought to have known, that his conduct was in general wrongful, and that provided the moral blameworthiness required for criminal punishment. This is a classic illustration of the normative theory of mens rea proposed in Chapter I.

Brett J, although dissenting, agreed with the majority which held that where the conduct itself was so tainted with moral wrong, the conscious doing of that act was sufficient to impute mens rea or fault to the accused.

There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent ... This and similar decisions go rather to show what is mens rea than to show whether there can or cannot be a conviction for crimes proper without mens rea.\textsuperscript{81} [emphasis added]

Here we find, in this “strict liability” case, a classic statement of the meaning of mens rea. It is a substantive, normative concept denoting culpability or blameworthiness. It is not merely a technical notion that must be present as a matter of form. \textit{Prince} is a perfect illustration of why “strict liability” in the criminal law is in fact a fault paradox.

\section*{Varieties of Strict Liability}

This part will highlight the different meanings of strict liability. This section is based on Douglas Husak’s article, the title of which has been adopted as the subheading.\textsuperscript{82} Husak’s thesis is that there is no single form of strict liability and even within each type of strict liability category, there are various degrees of “strictness”.\textsuperscript{83} The implication of Husak’s thesis is that by recognising degrees of “strictness”, there must always be some element of fault involved in any strict liability offence. Otherwise, there cannot be degrees of strictness. In the analysis of the nineteenth century cases, it

\textsuperscript{81} \textit{R v Prince} [1874-1880] All ER Rep 881 at 892.


\textsuperscript{83} See, S Perry, “The Impossibility of General Strict Liability” (1988) 1 Canadian Journal of Law and Jurisprudence 147, where it is argued that strict liability in a pure sense is conceptually impossible.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

was apparent that even though mens rea was not relevant, in most of the cases there was some form of fault, whether in terms of knowledge of wrongfulness, wilful blindness or negligence.

The crux of Husak’s strict liability thesis is this:. Strict liability exists in cases where the accused is convicted even though he or she is substantially less at fault than the paradigm perpetrator of that offence.\textsuperscript{84} The paradigm perpetrator embodies the degree of fault which represents the norm or baseline fault required for a particular offence. According to this, strict liability is always relative. Husak identifies seven varieties of strict liability:

- strict procedural liability
- liability without mens rea
- liability that is not fully defeasible by justifications
- liability that is not fully defeasible by excuses
- vicarious liability
- liability for nonvoluntary conduct that includes a voluntary act
- liability for relatively innocent activity.

A selection of these categories shall be briefly reviewed to illustrate Husak’s thesis and to draw from them the distinction between mens rea and moral blameworthiness, thus illustrating the fault paradox.

**Liability without mens rea**

The vast majority of offences require some sort of mens rea. The paradigm perpetrator therefore acts with some sort of mens rea. To convict an offender who acts without mens rea is to hold such a person liable notwithstanding the fact that such a person is substantially less at fault than the paradigm perpetrator. Therefore liability without mens rea qualifies as a variety of strict liability. Negligence would amount to strict liability in this category. This is clearly illustrated by comparing criminal law

and tort law. In the law of torts, negligence is the fault paradigm, therefore it cannot be said that negligence is strict liability, since the paradigm perpetrator can only be liable if negligent.\(^{85}\) For mens rea crimes, the negligent offender is less at fault than the paradigm offender, and therefore negligence liability can be classified as strict liability.

Husak argues that while liability without mens rea is one form of strict liability, it is not necessarily liability without fault. This is because fault is a broader concept than mens rea and fault is always relative. One can always find another who is more culpable, despite the existence of a similar mental state. Take the offence of possession of unlawful drugs. A and B are in possession of drugs, but neither is aware of this. A has taken some care but not reasonable care, while B has taken no care whatsoever, to avoid possession. Both have the same mental state, but clearly A is less at fault than B. But A is not without fault because compared to the reasonable person, A exemplifies some fault. Similarly the reasonable person, in comparison with the extraordinarily cautious person will also exemplify some quantum of fault.

The second reason why liability without mens rea is not always liability without fault is the existence of exculpatory defences. Such defences may serve to exculpate the person notwithstanding the fact that the offence has rejected the requirement of mens rea. While mens rea may have been rejected, the offence has not rejected the requirement of fault by allowing the accused means to demonstrate that he or she should not be blamed.

**Liability that is not fully defeasible by justification or excuse**

These two categories (justification and excuse) further illustrate the distinction between mens rea and fault. Husak argues that where a person may be held liable notwithstanding the existence of some form of justification or excuse, liability is strict. An example by way of illustration is the defence of duress for the crime of

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\(^{85}\) There are very few torts where negligence is not a sufficient indicator of fault. Even the traditional intentional torts of battery and assault generally accept negligence as a sufficient level of fault. *Hillier v Letch* [1936] SASR 490.
murder. At common law, duress is not a defence to murder although it may be a defence (excuse) to other crimes. According to Husak, a typical murderer displays a substantially greater degree of fault than the murderer who acts under duress. Therefore, it can be argued that a person who murders under duress is held strictly liable.

This argument of strict liability in the presence of a valid excuse applies to ignorance of law cases. Where a person is found guilty, despite being ignorant of the law, liability is strict. As Hall put it, "There is an element of what might be called strict liability throughout the criminal law, because of the doctrine that ignorance of the law is no excuse." Fletcher, in his treatise on criminal law, also stated:

The maxim that ignorance of the law is no excuse is so well entrenched in many legal systems that one is not likely to think of this form of mistake as a factor bearing on culpability ... [Yet there is no denying that in such a case] the court imposes liability regardless of the actor's culpability in violating the statute.

According to Husak two assumptions need to be made to defend the application of his model to ignorance of law. One is that the paradigm perpetrator of such an offence knows that his or her conduct is unlawful. The second is that the offender who does not know that his or her conduct is unlawful is substantially less at fault for the offence than is an offender who knows that the conduct is unlawful. It is submitted the second assumption need not be an assumption as it is simply a truism under Husak's own theory. It is the first assumption that is critical. Under orthodox criminal law, knowledge of unlawfulness is not required. Therefore it cannot be said that the paradigm perpetrator knows that his or her conduct is unlawful. This orthodoxy has to be challenged.

89 G P Fletcher, Rethinking Criminal Law (1978) 716.
Liability for nonvoluntary conduct that includes a voluntary act

The classic example of this category is the sleeping driver cases. Husak’s example is the case of *State v Baker.* Baker was convicted of driving in excess of the speed limit notwithstanding his argument that his cruise control had stuck in the “on” position and he was unable to deactivate the device by pushing the “off” button. Baker argued that his action was nonvoluntary. The conviction was affirmed on the ground that his act of speeding, although nonvoluntary was included in the voluntary act he had previously performed, ie the prior activation of the defective cruise control device.

The problem with this category is that Husak is not dealing with a question of fault and blameworthiness, rather he is dealing with a question of causal responsibility. There is no issue of fault when the act is nonvoluntary. That is a separate question. Nonvoluntariness is relevant only to determining whether or not the act, not moral blame, can properly be attributed to the actor. Prior fault may provide the culpability for a later included act, but a prior voluntary act cannot make a later nonvoluntary act, voluntary. Because of the lack of distinction between fault, which attributes blame, and voluntariness, which attributes causal responsibility, Husak’s theory fails to explain this category. Indeed he himself admits this:

Thus I conclude that it is impossible to provide a general answer to the question of whether liability that is merely based on conduct that includes a voluntary act, and is not imposed directly for a voluntary act, is a variety of strict liability.

It is not surprising that this confusion occurs, as courts sometimes resort to denying the actus reus in certain strict liability crimes where the accused is held to be not morally blameworthy. Since moral blame is not formally acknowledged as a

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91 See for example *Jiminez v The Queen* (1992) 173 CLR 572.
93 See Chapters I and II.
necessary element of criminal liability, courts have to rely on alternative means of negating liability. One way is to hold that the conduct was not voluntary.⁹⁶

**Liability for innocent activity**

Typically, the criminal law concerns itself only with conduct that is harmful⁹⁷ or in some cases where it outrages public morals, even though it is not harmful.⁹⁸ There are, however, some offences which are neither harmful nor immoral, such as offences of possession.⁹⁹ The paradigm perpetrator of such possession offences is one who intends to use the possessed items for an unlawful purpose. However, due to the nature of these possessory offences, a person who may have such an item but never intends to use it for an unlawful purpose may also be guilty of an offence.¹⁰⁰ Such a person is clearly substantially less at fault than the paradigm perpetrator and therefore is held strictly liable.

Under the orthodox view, liability in such circumstances is not regarded as strict because it does not satisfy the popular conception of strict liability, which is liability without mens rea. Such defendants obviously have mens rea if they act knowingly, i.e., with knowledge of the possession. But that still does not mean that the defendant is at fault. The fault turns on the nature of the knowledge.¹⁰¹ If the defendant is aware that he or she is in possession of certain drugs but is not aware of the nature of the drugs

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⁹⁸ *Shaw v DPP* [1962] AC 220. It may be argued that these public morals offences are also indirectly harmful as they may lead to dangerous or detrimental conduct or results.

⁹⁹ Typical examples are possession of firearms or possession of drugs. See G L Williams, *The General Part* (1953) 7. He argues that possession was never an offence at common law and was only criminalised by statute.

¹⁰⁰ For example, someone who possesses a banned firearm merely for the purpose of maintaining a historical collection of firearms, or a person who collects bongs as artefacts, although bongs are also used for inhaling illegal drugs.

¹⁰¹ See the cases on intention in Chapter II, where the courts sometimes looked at the ultimate purpose of the accused and in others refused to look beyond the basic intent.
and whether or not the drugs are prohibited, this should not be sufficient to constitute culpable knowledge.\textsuperscript{102}

Understanding that there are a varieties of strict liability sheds light on this area as it was traditionally viewed as a unitary concept of liability without mens rea. By demonstrating that strict liability is liability without fault - a broader notion than mens rea - strict liability can be justified on the basis that there is some degree of moral blameworthiness, despite the absence of subjective mens rea.

\textbf{REVERSING THE STRICTNESS OF STRICT LIABILITY}

The concern that strict liability had the potential of holding criminally liable a person who was morally innocent resulted in concerted judicial efforts to restrict the extent of strict liability. Because the generally accepted view was that strict liability meant liability without proof of mens rea, the efforts to prevent the criminal liability of morally innocent individuals was, to an extent, misplaced. The courts focused on narrower issue of mens rea rather than on the broader issue of moral blameworthiness. Thus, the courts created a rebuttable presumption of mens rea for statutory offences that omitted any mens rea requirement. Further, the courts in some jurisdictions created a "halfway house" between mens rea offences and offences that completely dispensed with the need to prove mens rea. Different jurisdictions have adopted slightly different approaches. For example, the Australian courts have allowed a defence of honest and reasonable mistake of fact and the Canadian courts have allowed a due diligence defence. Recent developments in the United States suggest a reasonable care defence is being recognised in many cases.

\textbf{The presumption of mens rea}

Where a statute created an offence without including a mens rea element, courts held that there was a rebuttable presumption of mens rea. In \textit{Sherras v de Rutzen},\textsuperscript{103} Lord Wright enunciated a threefold classification of categories where the presumption of

\textsuperscript{102} See for example, \textit{He Kah Teh v The Queen} (1985) 157 CLR 523.

\textsuperscript{103} [1895] 1 QB 918.
mens rea could successfully be rebutted.\(^{104}\) The three categories were all essentially civil wrongs:

- acts which were not criminal in any real sense, but were acts which in the public interest were prohibited under penalty
- public nuisances
- proceedings which were criminal in form but were really a summary mode of enforcing a civil right.

In *Sweet v Parsley*,\(^ {105}\) it was held that strict liability could attach to activities which involved a potential danger to public health, safety or morals. The American and Canadian view was to limit strict liability offences to public welfare offences only.\(^ {106}\) The Australian courts did not restrict strict liability to particular types of offences. Rather, the Australian courts strengthened the presumption of mens rea.\(^ {107}\) While allowing the possibility of strict liability for serious crimes, the strengthening of the presumption was relied on as a sufficient safeguard. In 1985, both the High Court of Australia, in *He Kaw Teh v The Queen*,\(^ {108}\) and the Privy Council, in *Gammon (Hong Kong) Ltd v Attorney General for Hong Kong*,\(^ {109}\) considered the presumption of mens rea in statutory offences and attempted to outline the principles that were to apply. Lord Scarman in *Gammon (Hong Kong) Ltd v Attorney General for Hong Kong* listed five propositions:\(^ {110}\)

- there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence

\(^{104}\) *Sherras v de Rutzen* [1895] 1 QB 918 at 922.

\(^{105}\) [1970] AC 132


\(^{107}\) See for example, *He Kaw Teh v The Queen* (1985) 157 CLR 523.


\(^{109}\) [1985] 1 AC 1.

\(^{110}\) [1985] 1 AC 1 at 14.
the presumption is particularly strong where the offence is “truly criminal” in character

- the presumption applies to statutory offences and can be displaced only if this is clearly or by necessary implication the effect of the statute

- the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue

- even where a statute is concerned with an issue of social concern, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promoted the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

The *He Kow Teh* court substantially agreed with these principle although the fourth proposition was not accepted.111 While the courts were reluctant to abandon the common law requirement of mens rea, they did not formulate clear principles on when mens rea was presumed and when liability remained “strict”. The courts intuitively wished to avoid liability without moral blame. Because the orthodox criminal law relied on descriptive mens rea to determine blame, courts were forced into a very narrow analysis of strict liability and fault. As shown earlier, strict liability went beyond liability without proof of mens rea and existed in a variety of forms with varying degrees of culpability. Liability without proof of subjective mens rea was not necessarily contrary to the fundamental principle of criminal culpability. It was liability without moral blameworthiness that raised concerns. Instead of focusing on moral blameworthiness, the courts adopted a very technical approach to statutory interpretation, to determine whether or not the legislature intended to exclude proof of mens rea.

*Statutory interpretation*

The language of the statute was the starting point. Words such as “intentionally”, “knowingly”, “recklessly”, “wilfully”, “maliciously”, “purposely” and “falsely” were interpreted as creating offences that required proof of mens rea. Certain words which

111 *He Kow Teh v The Queen* (1985) 157 CLR 523 at 567 per Brennan J.
did not directly indicate a mental element were interpreted as requiring a mental element, for example, "permitting"\textsuperscript{112} and "possessing"\textsuperscript{113}. Words such as "use"\textsuperscript{114} and "cause"\textsuperscript{115} were generally held not to include a mental element. Without any express underlying criterion of moral blame, these interpretations were often inconsistent. For example, the word "false" was held to require mens rea in a South Australian case\textsuperscript{116} but not in a Queensland case.\textsuperscript{117}

Further complications arose when an offence consisted of several elements and it had to be determined whether the mens rea "word" applied to one, some, or all the elements. For example, in \textit{Proudman v Dayman},\textsuperscript{118} the defendant was charged under s30 of the \textit{Road Traffic Act} 1934-1939 (SA) for permitting a person, not being the holder of a licence for the time being in force, to drive a motor vehicle on a road. It was held that while the word "permits" in the statute required a mental element, it only went to the elements of the act of driving on a road and not to the absence of a licence. Thus, the defendant was convicted of knowingly allowing an unlicensed person to drive on a road although the defendant did not know that the person was unlicensed.\textsuperscript{119}

Where the statute did not contain any word that expressly indicated a mental element, the presumption of mens rea was held to be rebuttable. In such cases the courts looked at the provision in the context of the statute or in comparison with other provisions in the statute to determine whether mens rea should be implied, or whether

\textsuperscript{112} \textit{Proudman v Dayman} (1941) 67 CLR 536; \textit{Reynolds v GH Austin & Sons Ltd} [1951] 2 KB 135; \textit{James v Son Ltd v Smee} [1955] I QB 78.


\textsuperscript{114} \textit{Green v Burnett} [1955] I QB 78.

\textsuperscript{115} \textit{Alphacell Ltd v Woodward} [1972] AC 824.

\textsuperscript{116} \textit{Cameron v Holt} (1980) 142 CLR 342.

\textsuperscript{117} \textit{R v White} (1979) 23 ALR 432.

\textsuperscript{118} (1941) 67 CLR 536.

\textsuperscript{119} See also, \textit{Wings Lts v Ellis} [1985] AC 272.
the presumption of mens rea should be rebutted. Another consideration was the presence of any statutory defence. Where the legislature had provided some form of defence, that indicated that mens rea was not required, as the limited defence should exculpate the blameless. Although the courts ostensibly relied on statutory interpretation solely on the basis of the contents of the statutes, the reality was that the courts did consider whether or not a particular interpretation could result in the conviction of a morally innocent individual. As Wills J held:

If identical language may thus be legitimately construed in two opposite senses, and is sometimes held to imply that there is and sometimes that there is not an offence when the guilty mind is absent, it is obvious that assistance must be sought aliunde, and that all circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences.

The construction of a statute was dependent on whether or not the consequences on the accused were desirable, ie whether or not it was fair that the accused be found guilty. This type of consequentialist reasoning has been criticised as being detrimental to the law by increasing uncertainty. However, if the courts openly

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120 See for example, Alphacell Ltd v Woodward [1972] AC 824 concerning the interpretation of s2(1)(a) of the English Rivers (Prevention of Pollution) Act 1951 (UK). That provision provided for the punishment of one who “causes or knowingly permits” pollutants to enter a river. It was held that the word “knowingly” modified “permits” only and did not modify “causes”. The House of Lords held that had parliament intended to include a mens rea requirement for “causes” the provision would have read “knowingly causes or permit”; see also, Pharmaceutical Society of Great Britain v Storkswain Ltd ([1986] 2 All ER 635.


122 R v Tolson (1889) 23 QBD 168 at 174.

123 “In the present connection the courts have manifested an increasing readiness to assume the role of legislators, and to fill imagined lacunae in penal statutes by the conjectural emendations of judges. The result has been lamentable. Penal statutes have acquired appendages of judge-made law based upon the conjectures of judges as to what the Legislature would have provided if it had addressed its mind to a matter, where there is nothing to suggest that the Legislature ever thought about it at all or that the appendage would have survived if it had been included as part of the bill. A fertile field of litigation has been created; multitudes of reported cases have come into existence, many of them irreconcilable, in which the common law rule has been treated as excluded or not excluded upon judge-made indicia derived from cases in which there has often been a difference of opinion as to so-called necessary implications; and no one can now be reasonably sure of the effect of a penal statute until it has been tested by prosecutions.” R v Turnbull (1943) 44 SR (NSW) 108 at 110 per Jordan CJ.
identified the normative dimension of the interpretive task, this could in fact provide a guiding principle for later courts. Rather than creating uncertainty it would create greater predicableability as courts would be able to openly rationalise their decisions on criminal culpability. Some of the factors that have been identified as relevant to the process of interpretation included the subject matter of the offence, the history of the statutory provision, the enforcement of the statute if mens rea were required, whether the offence was one of omission and the consequences of conviction. Two of these factors will be briefly examined to illustrate the argument that an underlying consideration was an objective evaluation of the defendant’s moral blameworthiness.

Subject matter of the offence and history

Historically, there were certain categories of offences which attracted strict liability. This category mainly consisted of “public welfare” offences. These offences were basically regulatory in nature and were not truly criminal, rather they were quasi-criminal offences.124 These regulatory offences were designed to protect the public and included statutes regulating consumables, road safety, industrial safety, consumer protection and environmental protection. Because these offences were not regarded as criminal, in the classical sense, it was accepted that proof of mens rea was not necessarily required.125 Another category which consisted of offences which were regarded as criminal, in the classical sense, has also been treated as attracting strict liability. These crimes generally had the common feature of offending public morals and causing or having the potential of causing harm. These included the common law strict liability offences such as contempt of court and criminal libel, as well as certain statutory offences such as sexual offences with regards to minors,126 bigamy127 and possession of certain prohibited items or substances such as drugs128 or firearms.129


125 Provincial Motor Cab Co v Dunning [1909] 2 KB 599 at 602.

126 See for example, R v Prince (1875) LR 2 CCR 154.

127 R v Tolson (1889) 23 QBD 168; R v Wheat & Stocks [1921] 2 KB 119.

128 See for example, R v Bush (1975) 1 NSWLR 298; Warner v Metropolitan Police Commissioner [1969] 2 AC 256; United States v Balint 258 US 250 (1922). But there is a
This category of offences was viewed as intrinsically wrongful, such that it was reasonable to presume knowledge of wrongfulness.

Duties and omissions

Where a statute purported to impose strict liability for a pure omission, the presumption of mens rea generally survived. The reason was that for a pure omission, there was unlikely to be any reason for the accused to have known about his or her duty under the law. For example, in Harding v Price, the accused was charged under the Road Traffic Act 1930 (UK) with failing to report an accident. Lord Goddard held that a distinction had to be drawn between a statute that prohibited the doing of an act and a statute that required the doing of an act in certain circumstances. For the latter, the accused could not be convicted in the absence of knowledge of the circumstances that gave rise to the duty to act. Where there was a positive duty on the defendant, an omission could give rise to criminal liability without proof of knowledge, because the pre-existing duty demanded that the defendant should have taken steps to know. In Atkinson v McAlpine Ltd, the accused were charged with failing to give notice of undertaking work with a particular substance, ie crocidolite, contrary to local asbestos regulations. The defendants argued that they were not aware nor had any reason to be aware that their work involved crocidolite. The defendants were convicted on the ground that they should have ascertained that the work involved crocidolite. These omissions cases demonstrate that a latent objective fault criteria was being applied by the courts. The question was whether or not the defendants ought reasonably to have known a material fact and whether they could fairly be held accountable.

move towards requiring mens rea for drug possession offences. See, He Kaw Teh v The Queen (1985) 157 CLR 523.

129 See for example, US v Flum 518 F 2d 39 (1975) (boarding an aircraft with a concealed weapon contrary to Federal Aviation Act 1958 (US)).

130 [1948] 1 KB 695.

Thus, although strict liability offences may dispense with the need to prove fault in the form of orthodox mens rea, in most cases there was some degree of fault. Strict liability was not necessarily incompatible with a criminal law system based on fault. Jerome Hall may have overstated the case against strict liability when he said, “It is becoming increasingly recognised that strict liability has no place whatever in the criminal law; indeed, that it smacks of barbarism to punish people despite the fact that there is no reason for blaming them at all.”\textsuperscript{132} In most strict liability cases, there were reasons to blame the defendant. It was just that there was no mens rea in the orthodox form. In the next section, it will be seen how courts have tried to limit the application of strict liability even after the presumption of mens rea was rebutted.

**Resurgence of moral blameworthiness**

Where the presumption of mens rea was satisfactorily rebutted, courts in many jurisdiction did not permit criminal liability unless there was some degree of objective fault. This objective fault requirement was recognised in different forms in various jurisdictions. In Australia, the courts recognised a defence of honest and reasonable mistake of fact; in Canada, the courts recognised a defence of due diligence; and in the United States, the courts adopted a reasonable care standard. Common to these approaches was the absence of subjective mens rea, but an insistence on objective culpability. In all of the jurisdictions, the courts referred to the need for moral blameworthiness and the risk of punishing the morally innocent. The underlying question was whether or not the defendant could reasonably have avoided the harm and whether or not the defendant could fairly be blamed for his or her conduct.

**Australia – honest and reasonable mistake of fact**

The Australian High Court has a strong record for denying criminal liability without proof of fault, whether in terms of subjective mens rea or objective blameworthiness. Indeed, in its one hundred year history, the High Court has only recognised three

cases where liability without proof of mens rea was permitted. In all other cases, the High Court has insisted on proof of mens rea or allowed the defence of honest and reasonable mistake of fact. The leading authority on strict liability and the extent of its operation is the 1985 decision of He Kaw Teh v The Queen. In that case, the High Court recognised a tri-partite division of criminal offences according to the nature of the fault element. Gibbs CJ identified the three categories as full mens rea, strict liability and absolute liability. The three categories were adopted from a Supreme Court of Canada decision:

• offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

• offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...

• offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

The second category was held to attract a defence of honest and reasonable mistake of fact. Dixon J is widely credited with introducing the defence of honest and reasonable mistake of fact into Australian law when he stated in Maher v Mussons that it was

133 Spooner v Alexander (1912) 13 CLR 704; Duncan v Ellis (1916) 21 CLR 379; Brown v Green (1951) 84 CLR 285.


135 He Kaw Teh v The Queen (1985) 157 CLR 523 at 533.


137 (1934) 52 CLR 100.
“a good defence that the accused held an honest and reasonable belief in the existence of circumstances, which, if true, would [have made] innocent the act for which he [was] charged.” 138 The crystallisation of the Australian approach to mens rea and the reasonable mistake defence occurred in 1941 in the case of Proudman v Dayman.139 Dixon CJ expressed it thus:

There may no longer be any presumption that mens rea, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no prima facie presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also.140

This statement clearly separated mens rea and honest and reasonable mistake of fact. In earlier cases, courts treated an honest and reasonable mistake of fact as an absence of mens rea. This was incorrect as mens rea was subjective and therefore a mistake did not have to be reasonable to negative mens rea.141 The confusion between mens rea and honest and reasonable mistake of fact was caused by the nineteenth century case of Bank of New South Wales v Piper,142 where it was held: “The absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent.”143 This error in equating absence of mens rea with honest and reasonable mistake of fact crept into Australian law in Wilson v Chambers,144 where Isaacs J held that for the purpose of mens rea, the law accepted in cases of mistaken belief “the standard of reasonableness as a test of culpability.”145

138 (1934) 52 CLR 100 at 104.
139 (1941) 67 CLR 536.
140 (1941) 67 CLR 536 at 540-541. It is a tribute to Dixon J that his obiter comments in a minority concurring judgment have become the leading statement on the law in this area.
141 DPP v Morgan [1976] AC 82.
142 (1897) AC 383.
143 (1897) AC 383 at 389-390.
144 (1926) 38 CLR 131.
Blameworthiness is an objective concept. However, orthodox mens rea is a subjective concept and unless the distinction between subjective mental states (the mens) and objective blameworthiness (the rea) is made, this meshing of subjective and objective standards contradicts the orthodox theory. In the context of strict liability offences, the honest and reasonable mistake does not negative the mental state – which the statute has made irrelevant anyway – but negatives moral blameworthiness, which is objectively assessed.

In *He Kaw Teh v The Queen*, Brennan J relied on *Piper* and held that an honest and reasonable mistake of fact was the equivalent of the absence of mens rea.¹⁴⁶ Where mens rea was absent, an accused could not be guilty. Reasoning from this, Brennan J held that the absence of an honest and reasonable mistake of fact was a form of mens rea which was sufficient to make the accused guilty. Brennan J drew a distinction between mens rea in the form of knowledge, which belongs to Category 1 and a lesser form of mens rea, satisfied by an absence of an honest and reasonable belief in a mistaken state of facts, which belongs to Category 2. This lesser form of mens rea as an absence of exculpatory belief is reminiscent of the development of inadvertence as a form of recklessness.¹⁴⁷ It has already been argued that treating an absence of mental state as a relevant mental state for criminal liability is problematic. The better approach is to treat the absence of mental state, when a particular mental state ought reasonably have been present, as an alternative form of culpability.

What Brennan J was really trying to say was that an honest and reasonable mistake may negative moral blameworthiness, not mens rea. The mental state was the intention to commit the act. What made that intention blameworthy was an unreasonable ignorance of the wrongfulness of the act. Brennan’s view really was that for Category 2 crimes, there was a duty on the accused to be reasonably acquainted with the circumstances that made the conduct illegal. This unreasonable ignorance of one’s duties, or of the wrongfulness of the conduct, was the test for

¹⁴⁶ (1985) 157 CLR 523 at 572-3 citing *Bank of NSW v Piper* [1897] AC 383; *R v Tolson* (1889) 23 QBD 168; *Criminal Code* (Qld) s24; *Hardgrave v The King* (1906) 4 CLR 232; *Thorne v Motor Trade Association* [1937] AC 797.

¹⁴⁷ See Chapter II.
moral blameworthiness. Some of the earlier High Court cases on strict liability illustrate this very point.

One of the earliest strict liability cases before the High Court was Lyons v Smart,\(^{148}\) decided in 1908. The defendant was charged with the unlawful possession of certain contraband contrary to s233 of the Customs Act 1901 (Cth). The Court adopted a restrictive approach to statutory interpretation and held that the word "unlawful" had to be read as including knowledge. It is evident from the judgments that the "knowledge" required was not mere knowledge but guilty knowledge, ie the accused had to have knowledge of the unlawful nature of the possession, not just knowledge of possession.\(^{149}\) Three years later, in the case of Hill v Donohoe,\(^{150}\) the High Court expressly stated that for a prosecution under s233 of the Customs Act 1901 (Cth) to be successful, the prosecution had to prove that the defendant had knowledge at the time of importation that the substance at issue was a prohibited import.\(^{151}\)

Wilson v Chambers,\(^{152}\) a 1926 decision, supports many of the central arguments made in this thesis. The defendant was accused, inter alia, of evading payment of import duty contrary to s234 of the Customs Act 1901-1920 (Cth). The High Court had to decide the meaning of the word "evade" in s234. Two possible meanings for the word were (1) underhand dealing, and (2) intentional avoidance of something disagreeable.\(^{153}\) Under either definition, the word "evade" required knowledge of the wrongfulness of the conduct. The facts were that a quantity of paint was shipped from England to Sydney. That paint was dutiable if imported into the Australia. The

\(^{148}\) (1908) 6 CLR 143.

\(^{149}\) Lyons v Smart (1908) 6 CLR 143 at 151 per Griffith CJ, at 158 per Barton J.

\(^{150}\) (1911) 13 CLR 224.

\(^{151}\) The Customs Act 1901 (Cth) was later amended to include section s233(2) which defined the word "unlawful" in this manner. "It shall not be lawful for any person to ... have in his possession without reasonable excuse (proof whereof shall lie upon him) any ... prohibited imports." This expressly removed the requirement of knowledge and substituted instead a requirement of lack of reasonable excuse, proof of which was on the defendant. See, Poole v Wah Min Chan (1947) 75 CLR 218.

\(^{152}\) (1926) 38 CLR 131.

\(^{153}\) Wilson v Chambers (1926) 38 CLR 131 at 141 per Isaacs J, citing Lord Hobhouse in Simms v Registrar of Probates (1900) AC 323 at 334.
ship entered Port Kembla where Chambers, acting on behalf of the consignee entered into the following arrangement with the ship’s captain. Chambers bought the paint, but the paint was to remain on the ship and declared in Melbourne, the ship’s next port of call. Chambers sought and obtained the permission of the Custom’s Officer at Port Kembla and believed that the duty was not payable since the paint had not been imported into Australia at that point.

Under the law, however, the paint had in fact been imported and was therefore dutiable. Chambers’ plea of lack of mens rea was based on a mistake of law as to his legal obligation. It was argued that that mistake was reasonable given that he had sought the permission of the Custom’s Officer. Isaacs J said:

If, legally owing the duty, the importer has not merely omitted to pay, but has omitted without any reasonable grounds for withholding payment, he has “evaded” payment. If, however, he can show any reasonable excuse for omitting to pay, he does not evade payment. He may genuinely and without negligence be unaware of the facts constituting liability; he may have misunderstood a regulation or a law; he may, though perfectly cognizant of all necessary facts, be strongly advised that either on construction or constitutionally the law does not reach him. [emphasis added] Such a man does not, in my opinion, “evade” payment. On the other hand, if his ignorance of facts arises through his own unbusinesslike conduct, so as to be unreasonable in his case want of knowledge is no reasonable excuse. That, as already shown, is not because of the absence of mens rea as ordinarily understood. It is simply because what he ought to know [emphasis in original] in his situation when his public obligations are in question, he is taken to know. But the only test of what he ought to know is what a man in his position acting reasonably [emphasis in original] would know.\footnote{154}

This passage is a clear statement that criminal culpability is not necessarily contingent on mens rea, and that moral blameworthiness is not necessarily equated with the absence of mens rea. Criminal liability is deserved when a person engaged in conduct that he or she knows, or ought to know, is illegal.

\textit{Canada – due diligence}

Prior to 1978, Canada lacked a principled approach to strict liability.\footnote{155} The Canadian courts took a similar approach to the English courts and interpreted statutory offences

\footnote{154} (1926) 38 CLR 131 at 144.
which did not expressly include a mens rea requirement as either full mens rea or absolute liability. For example in *R v Beaver*,\(^{156}\) the accused was charged with selling and possessing drugs, contrary to the *Opium and Narcotic Drug Act*.\(^{157}\) The Act did not specify a mental state but the court imported a mental state of knowledge, in the same way as the *He Kaw Teh* court subsequently did with respect to a similar possession offence. The Canadian courts interpreted knowledge broadly and extended it to recklessness and wilful blindness.\(^{158}\) The court in *Beaver* required proof of mens rea because the majority viewed drug offences as "truly criminal" rather than merely regulatory in nature.\(^{159}\) In the court's view, conviction of such an offence carried with it a moral stigma and it was unfair that the morally innocent suffer such criminal condemnation. This aversion to punishing the "morally innocent" was the driving force behind the development of the due diligence defence in Canada. Where an offence did not carry moral stigma,\(^{160}\) or was merely a provincial,\(^{161}\) as opposed to a Code offence, courts were less troubled by the presumption of mens rea being rebutted.

In 1978 the seminal case of *R v City of Sault Ste Marie*\(^{162}\) was decided. The Supreme Court of Canada relied on the Australian development of the honest and reasonable mistake defence for strict liability crimes, and extended that defence to include due diligence. Rather than restricting the defence to a reasonable belief in particular circumstances, the defence was based on the exercise of due diligence, or an absence of negligence. *Sault Ste Marie* involved a prosecution for environmental pollution.\(^{163}\)

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\(^{156}\) [1957] SCR 531.

\(^{157}\) RSC 1952 c 201. This Act has been repealed and the new legislation requires knowledge for "possession". *Food and Drugs Act* RSC 1985 c F-27 ss38, 46; *Narcotic Control Act* RSC 1985 c N-1, s2.

\(^{158}\) *R v Blondin* (1972) 4 CCC (2d) 566n (SCC).

\(^{159}\) [1957] SCR 531 at 539 per Cartwright J.

\(^{160}\) See for example, *R v Pierce Fisheries Ltd* [1970] 5 CCC 193 (SCC).

\(^{161}\) *R v Hill* (1973) 24 CRNS 297 (SCC).

\(^{162}\) [1978] 2 SCR 1299.

\(^{163}\) *Ontario Water Resources Act* RSO 1970 c332 s32(1).
A Paradox of Fault in the Criminal Law

The offence was treated as a regulatory one and the Canadian Supreme Court formulated the tripartite classification of offences – which was later adopted in *He Kaw Teh* – and held that the defence of due diligence was available for all Category 2 offences. The main catalyst for this decision was the Canadian Law Reform Commission report on strict liability, which recommended negligence as a fault element for crimes without mens rea. The Canadian developments were also influenced by the *Canadian Charter of Rights and Freedoms*, particularly s7 of the Charter. There were four aspects of *Sault Ste Marie* that were significant:

- the distinction between “true crimes” and “public welfare” or “regulatory crimes”
- the recognition of due diligence as a defence
- the reversal of the onus of proof with respect to due diligence
- the strong statement that the “morally innocent” should not be convicted or punished.

At this stage of the discussion, the second and fourth propositions are particularly relevant. The recognition of due diligence as a defence was a significant development. Although Dickson J referred to the honest and reasonable mistake defence in *Proudman v Dayman*, he viewed due diligence as a much broader defence, of which honest and reasonable mistake of fact was simply one aspect. This was significant as it did not restrict the defence to a positive state of mind. Whether the accused turned his or her mind to a particular issue was not as important as whether the accused was deserving of blame. It therefore avoided the confusion between an absence of belief and mens rea.

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165 Section 7 provides that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

166 [1978] 2 SCR 1299 at 1310.

167 [1978] 2 SCR 1299 at 1315.

168 The *Proudman* honest and reasonable belief defence was limited to mistake and excluded reasonable ignorance. See Chapter VI.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

The due diligence defence was elevated from a common law defence to a constitutional requirement in 1985. The Supreme Court of Canada held that any offence which carried a sentence of imprisonment, or even a threat of imprisonment (as an alternative to non-payment of a penalty) had to permit a defence of due diligence. Otherwise, the offence violated s7 of the Canadian Charter of Rights and Freedoms. While proof of mens rea was not constitutionally required, offences which could result in a term of imprisonment had to have a minimum fault requirement of lack of due diligence. Because of this constitutional imperative, even certain speeding offences now require some minimum fault and allow the defence of due diligence.

The elevation of a minimum fault standard to a constitutional requirement, coupled with the repeated statements decrying the punishment of the morally innocent, demonstrate the Canadian view that moral blameworthiness is a prerequisite to criminal liability. The strict liability experience in Canada illustrates the need for a fault doctrine which includes knowledge of wrongfulness, objectively assessed.

United States – Constitutionalism and reasonable care

Strict liability offences in the early twentieth century in the United States were regularly upheld, particularly for public welfare offences. US v Balint decided in

174 258 US 250 (1922).
1920, was the clearest example of this. That case was criticised and the United States courts adopted a more restrictive approach to strict liability statutes in the years after *Balint*. Limitations to strict liability were generally imposed when a constitutionally protected right was threatened. The constitutional approach was based on procedural fairness, rather than moral blameworthiness. Cases such as *Smith v California* and *US v X-Citement Video* were examples of the court voiding strict liability on the basis that it interfered with the constitutionally protected freedom of speech. While not declaring no fault liability unconstitutional, most of the cases were adjudged as requiring some form of fault, whether in terms of orthodox mens rea, or negligence.

For example, in *US v Morissette* and *Lambert v California*, the Supreme Court required proof of mens rea for what was essentially a regulatory offence. In *US v Dotterweich* and *US v Park*, while upholding strict liability, the Supreme Court began to develop the notion of reasonable care as a defence. As stated in *US v Park*:

> *Dotterweich* and the cases which have followed reveal that... the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and

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177 (1959) 361 US 147 (possession of obscene material)

178 513 US 64 (1994) (distribution of child pornography)


180 The *Model Penal Code* 1963 (US) s205 required negligence as a minimum fault requirement for all Code offences.

181 342 US 246 (1952).


183 320 US 277 (1943).

primarily, a duty to implement measures that will insure that violations will not occur.\textsuperscript{185} [emphasis added]

This halfway approach of allowing a reasonable care defence was applied in the 1988 case of \textit{US v US District Court for the Central District of California (Kantor’s case)}.\textsuperscript{186} \textit{Kantor} was a child pornography case and it was held by the Ninth Circuit that although knowledge of the child actor’s age need not be proven by the prosecution, it was open to the accused to prove that they had acted in good faith and had no reason to believe that the child actor was below the legal age. Although the principal reason for recognising the good faith defence in this case was to protect the individual’s First Amendment right, the court also recognised the injustice in punishing the morally innocent.\textsuperscript{187}

Several cases decided in 1994 have emphasised the role of moral blameworthiness in determining criminal culpability.\textsuperscript{188} An American commentator recently concluded that the trend in the US cases showed that the Supreme Court was increasingly relying on moral blameworthiness as the fault element for criminal liability:

A rule of mandatory culpability unites these decisions: The Court will demand that the government prove moral culpability when statutory language might reach conduct that is “not inevitably nefarious”, that is, conduct that is not inevitably blameworthy. ... this method analyzes the fairness of these extreme applications according to an unwritten moral code. Judges thus must render moral judgments by standards that come neither from Congress nor the Constitution. \textit{The practical but unstated effect is to identify an independent moral foundation to which the Court has begun to moor the interpretation of federal criminal law}.\textsuperscript{189} [emphasis added]

Recent cases support the thesis that moral blameworthiness lies in reasonable knowledge of wrongfulness. In \textit{Staples v US},\textsuperscript{190} the accused was charged with the

\begin{itemize}
\item \textit{US v Park} 421 US 658 at 672 (1975).
\item 858 F 2d 534 (9th Cir 1988).
\item 858 F 2d 534 at 542-3 (9th Cir 1988).
\item 511 US 600 (1994).
\end{itemize}
A Paradox of Fault in the Criminal Law

possession of unregistered automatic guns, which was prohibited under the *National Firearms Act* (1934). The relevant provision omitted any mens rea requirement. The accused argued that he did not know that the gun in question was an automatic one, believing it to be semi-automatic. The Supreme Court held that, because possession of a gun that was not prohibited under the Act was lawful, there was a risk that innocent persons could be found guilty under the Act without a relevant knowledge requirement, ie knowledge that the gun was an automatic one. It was knowledge of the nature of the gun that gave rise to blameworthiness. Just as in the Australian drug possession case, it was knowledge of the illicit nature of the drugs, and not just merely knowledge of possession of drugs that was required.\(^191\)

Similarly in a case involving child pornography,\(^192\) it was held that knowledge of the child’s age was relevant, as it was this knowledge that made an otherwise lawful activity unlawful. Without such knowledge there was a risk of punishing a person who was not morally blameworthy. This approach has been applied in other situations such as the sale of items to be used for illegal drugs.\(^193\) The Supreme Court held that knowledge that the item was likely to be used for illegal purposes was required. In some instances, the courts went further and actually required knowledge of the law itself. This was an express exception to the ignorance of law rule.\(^194\)

This recent trend of moving away from no fault liability and embracing a moral blameworthiness approach has been described by various American writers as the courts recognising “mandatory culpability”,\(^195\) “constitutional innocence”\(^196\) and “good faith defences”.\(^197\) According to the principle of constitutional innocence, strict liability was justified under the constitution only “when the intentional conduct

\(^{191}\) *He Kaw Teh v The Queen* (1985) 157 CLR 523.

\(^{192}\) *US v X-Clement Video* 513 US 64 (1994).


covered by the statute could be made criminal by the legislature.”\textsuperscript{198} For example, if a statute made it unlawful to sell milk which was adulterated and the statute did not require any fault with respect to the adulteration requirement, under the constitutional innocence principle, this strict liability offence would not violate the constitution if the state could make the sale of milk itself unlawful. This principle is a disguised form of imputed blameworthiness. If a person engaged in conduct that carried with it a risk of criminality, then the person may fairly be punished if that risk eventuated, even if the person did not know of the particular risk. In such circumstances, the person ought to have known of the wrongfulness of the conduct, and failure to know in such circumstances could be blameworthy.

CONCLUSION

As seen in this chapter, the history of strict liability offences shows that this regime was not originally part of the criminal law. The early cases concerned vicarious liability, and the purpose of this liability was to facilitate compensation. These statutory offences were civil, rather than criminal in nature. Even so, the statutes normally included indemnity provisions to avoid the risk that a defendant might be unfairly penalised. Thus, the morally innocent accused could avoid penalty. There was also a category of strict liability offences that consisted of crimes in the traditional sense, ie they were not merely civil breaches. These cases were rationalised on the grounds that the intrinsic wrongfulness of the crime meant that it was unreasonable for an accused to argue that he or she did not know of that wrongfulness. Moral blameworthiness should be based on unreasonable ignorance of wrongfulness, and the strict liability cases support this thesis. Because strict liability offences dispensed with the subjective element of mens rea, the normative dimension of mens rea came to the fore. As was stated in \textit{R v Prince}:

\textit{This and similar decisions go rather to show what is mens rea than to show whether there can or cannot be a conviction for crimes proper without mens rea.}\textsuperscript{199} [emphasis added]


\textsuperscript{199} \textit{R v Prince} [1874-1880] All ER Rep 881 at 892.
The fact that there were varieties of strict liability was also ignored. Recognising that strict liability was relative provides further support for the argument that this regime of offences did not dispense with criminal culpability. Rather it was based on different forms of criminal culpability. Because criminal fault was traditionally based on descriptive mens rea, the reaction of the courts to this statutory strict liability regime was severely curtailed. The courts operated within the framework of descriptive mens rea and therefore the only method of reintroducing fault was to create a presumption of mens rea. Where the presumption was rebutted, a halfway position was recognised, where the accused was permitted to raise a defence of honest and reasonable belief or due diligence/reasonable care. This minimum fault requirement, in the absence of subjective mens rea, paradoxically reflected the normative dimension of mens rea. The moral blameworthiness of the accused was based on whether he or she knew or ought to have known that the conduct was proscribed.

This fault element, applied in various forms in Australia, Canada and the United States revealed that in many of the cases the accused escaped criminal liability because of reasonable lack of knowledge of the wrongfulness of the conduct. As has been argued in Chapters I and II, the reconceptualised concept of mens rea should consist of two elements – the descriptive element or the mens (which is the subjective mental state) and the normative element or the rea (which is knowledge of illegality, objectively assessed) The strict liability regime, by rejecting proof of orthodox descriptive mental states, revealed the latent, normative aspect of mens rea. Strict liability therefore, paradoxically, apart from being no-fault liability, also provides cogent support for the thesis that criminal fault should be based on the normative theory of mens rea.
CHAPTER IV
INTOXICATION: A DILEMMA OF FAULT IN
THE CRIMINAL LAW

INTRODUCTION

This chapter examines the criminal liability of intoxicated offenders to highlight the deficiency of the orthodox mens rea theory. In Chapter II, it was shown that the orthodox mens rea theory worked in practice because it was supplemented by a latent normative approach. The jury directions on intention and recklessness were such that juries were permitted to rely on broader notions of moral blameworthiness. In Chapter III, it was shown that where the law expressly removed consideration of subjective mens rea, courts created special rules to exculpate those who were reasonably mistaken as to the wrongfulness of the conduct. Again, a normative approach to mens rea was implicitly relied on. The criminal liability of intoxicated offenders raises difficult questions because under the descriptive theory self-induced intoxication could operate as a “defence”.\footnote{1} It was held that gross intoxication could raise a doubt as to the existence of a relevant subjective mental state. The defence of intoxication was generally viewed as unmeritorious by courts and the community. Cases where an accused was acquitted on the grounds of intoxication often attracted harsh criticism.\footnote{2} The intoxicated cases thus reveal with an acute clarity the tension between orthodox descriptive mens rea and the intuitive requirement of moral blameworthiness. The intoxication offender therefore provides a perfect case study of the themes and arguments developed in this thesis.

\footnote{1}{Intoxication is not a defence in the classical sense of the word. It merely raises a doubt as to the existence of one of the elements of criminality and therefore has the practical effect of operating as a defence as it may exculpate an accused.}

\footnote{2}{A recent example involved a member of a local football team who was acquitted on assault charges because he was too drunk to have formed a relevant intention. SC Small v Noa Kurimalawai, ACT Magistrate’s Court, No CC97/01904, 22 October 1997. The acquittal resulted in extreme outrage by the local community as well as the broader Australian community.}
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

The chapter starts with a historical analysis of the intoxication defence. This analysis reveals the historical tension between normative and descriptive approaches to criminal fault. The ascendancy of the descriptive approach in the nineteenth century, emphasising subjective, psychological mental states, resulted in the inevitable conclusion by the courts that any factor that could negative the existence of a prescribed mental state had to be relevant. Whether or not this negating factor was in itself blameworthy was held to be irrelevant under the descriptive mens rea approach. In the early twentieth century, judges began to limit the application of the defence as they were of the view that self-induced intoxicated offenders were morally blameworthy individuals. These limitation were contrary to the strict application of the descriptive theory. The frustration with the law led Lord Edmund-Davis to declare in DPP v Majewski⁢³:

If such be the inescapable result of the strict application of logic in this branch of the law, it is indeed not surprising that illogicality has long reigned, and the prospect of its dethronement must be regarded as alarming.⁴

In Majewski, the House of Lords preferred to apply policy considerations and broader community standards to strict legal doctrine. Thus, intoxication was denied as a defence.⁵ Less than one year earlier, the House of Lords had reached the opposite conclusion on the question of whether broad policy considerations should ever constrain strict legal doctrine. In DPP v Morgan,⁶ Lord Hailsham said:

I cannot myself reconcile it with my conscience to sanction as part of English law what I regard as logical impossibility, and, if there were any authority which, if accepted, would compel me to do so, I would feel constrained to declare that it was not to be followed.⁷

In Morgan, the House adhered to the subjective, descriptive theory of mens rea, insisting that, despite community outrage, even a morally blameworthy mistake could

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⁵ Majewski only rejected intoxication as a defence to basic intent offences. Intoxication was permitted for specific intent offences. The crimes Majewski was alleged to have committed were basic intent offences.
theoretically negative the subjective mental state for rape. In Majewski, the court held that because the community would not condone the acquittal of a defendant on the grounds of intoxication, the strict, subjective doctrine of mens rea should, in some cases, give way to broader concerns of justice. The conviction of an accused, despite the absence of any relevant mental state was held to be justified in some cases. Even though both Majewski and Morgan were convicted on the facts, the legal reasoning on mens rea was inconsistent.

This chapter will suggest a reconciliation of principle and policy by modifying the underlying principle. The focus of this chapter will be on English law because of the seminal case of Majewski, which recognised the failure of the orthodox mens rea theory in its application to the intoxication cases. The Australian approach was to adhere to the logic of the law and to hold that evidence of intoxication was relevant to all crimes of mens rea. However, it is clear that Australian jurisdictions are reintroducing Majewski by legislation. Hence, Majewski is of utmost importance. The problem with Majewski is that the court, having recognised the problems with the descriptive mens rea theory, failed to rectify the doctrine of mens rea. The Majewski decision is an illustration of a normative approach to criminal fault. Instead of explicitly recognising that and expounding it as an alternative doctrine of mens rea, the court chose to reconcile the intoxication rule within the general orthodox doctrine of descriptive mens rea by creating abstract distinctions and relying on legal fiction. Recent intoxication cases in Canada reveal a more explicit normative approach and a renewed emphasis on notions of moral blameworthiness and moral innocence.

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9. The Code States (Queensland, Western Australia, Northern Territory and Tasmania) had always adopted the approach later adopted by Majewski. Of the common law jurisdictions, New South Wales has already abolished the Australian common law rule on intoxication and reintroduced the Majewski rule. Crimes Act 1900 (NSW) s428. The Criminal Code Act 1995 (Cth) has also abolished the common law and reintroduced Majewski. It is expected that the other common law jurisdictions, South Australia, Victoria and the Australian Capital Territory will follow suit.
HISTORY OF THE INTOXICATION DEFENCE

The available evidence suggests that English law initially took a harsh approach to intoxication, treating it as evil and therefore punishing individuals who committed crimes while intoxicated. In the eighteenth and nineteenth centuries, the commercialisation of alcohol resulted in it being more readily accessible.\(^{10}\) The correlation between alcohol and violence further enhanced the view that alcohol was a social evil and should be condemned. Further factors were the imperative of capitalism and the class distinction that operated in nineteenth century England. Most of the individuals who consumed alcohol in public belonged to the lower working class. By making intoxication blameworthy, the ruling class gained more control over the working class.\(^{11}\) The eighteenth century physicians and psychiatrists further legitimised the evils of intoxication by medicalising the negative effects of alcohol.\(^{12}\) One of the earliest and most influential medical scientists was a teetotaller who actively encouraged the notion that alcohol caused people to lose control and become a menace to society.\(^{13}\) In some cases, intoxication was equated with insanity.\(^{14}\)

The criminal law of intoxication developed in an era when the descriptive theory of mens rea was displacing the normative. The descriptive theory, as explained previously, focused on prescribed, subjective mental states. As long as the relevant mental state was shown, the moral blameworthiness of the accused was not independently relevant. Similarly, where the relevant mental state was absent, the reasons for that absence were not relevant, and the accused would be acquitted. The normative theory took a broader approach to criminal culpability and relied on an evaluation of the moral blameworthiness of the accused. The normative approach was


\(^{11}\) See, J Helmer, Drugs and Minority Oppression (1975) 126-144.


\(^{13}\) W B Carpenter, the Registrar of London University in the mid-1800s was a prohibitionist who denigrated alcoholism. See C N Mitchell, "The Intoxicated Offender – Refuting the Legal and Medical Myths" (1988) 11 International Journal of Law and Psychiatry 77 at 81.
historically part of the common law of crimes, but the rise of scientific knowledge and liberal positivism in the nineteenth century displaced the normative concept of fault and replaced it with a scientific approach that relied on subjective, descriptive mental states.

Although the scientific liberal attitude prevailed, this was also the Victorian era of conservatism and moral values. The aristocratic class, which included the legal and medical professions, was brought up with these conservative values. As far as public consumption of alcohol was concerned, temperance and prohibition were the order of the day. The rise of descriptive mens rea and scientific knowledge clashed with the conservative moral values of judges and doctors. Under the descriptive mens rea approach, intoxication was relevant to the determination of the existence of a relevant mental state. Instead of determining the moral blameworthiness of the accused, courts were engaged in determining the pathological effects of intoxication on the accused’s subjective mental state.\textsuperscript{15} This sometimes led to the acquittal of an accused. Judges who strongly believed in the inherent evil of intoxication refused to permit intoxication to operate as a defence. However, the harshness of punishment caused some of these courts to try and reduce the criminal liability of intoxicated offenders.\textsuperscript{16} The cases were therefore inconsistent. The legal reasoning in the intoxication cases was based on medical theories about intoxication that were at best “educational guesswork and circular thinking.”\textsuperscript{17}

There were three possible effects of intoxication on criminal culpability. Intoxication could (1) increase culpability, (2) be immaterial to culpability or (3) decrease culpability. Several stages, reflecting the dominance of each of the above views of


\textsuperscript{17} P McCandless, “‘Curses of Civilization’: Insanity and Drunkenness in Victorian Britain” (1984) 79 British Journal of Addiction 49 at 50.
Reconceptualising Fault in the Criminal Law: A Defence of Reasonable Mistake of Law

intoxication can be identified. The first stage was the period up to the end of the eighteenth century, during which period the general view was that intoxication increased culpability. The second stage was the period from the end of the eighteenth century to the middle of the twentieth century. During this time, the view that intoxication increased culpability was no longer held, and courts vacillated between the view that intoxication was immaterial to criminal culpability and the view that intoxication decreased or negated criminal culpability. This struggle resulted in a compromise whereby intoxication could negative criminal liability for certain offences, categorised as specific intent offences, but not others, which were categorised as basic intent offences.

The third stage began in the latter half of the last century. The descriptive theory had achieved almost complete ascendancy over the normative theory and courts accepted that intoxication could negative criminal liability for offences that required proof of a subjective mental state. This conclusion, forced on the courts by the orthodox mens rea doctrine, was resisted in England on the ground that it provided an unjustified “defence” for morally blameworthy offenders.

The first stage – to the end of the eighteenth century

Even over a thousand years ago, there was not a consistent approach to the effect of intoxication on criminal culpability. The Archbishop of Canterbury stated (circa 668 to 690AD) that “whosoever shall have killed a man while drunk shall be guilty of

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20 The offences were distinguished on the basis of the nature of the intention.

21 For Australia see, R v O’Connor (1980) 146 CLR 64; for Canada see, R v Daviault [1994] 3 SCR 63; for New Zealand see, R v Kampele [1975] NZLR 610; for South Africa see, R v Chretien 1981 (1) SA 1097 (A). England did not accept the orthodox approach for intoxicated offenders and instead expressly preferred “policy arguments” over “the logic of the law”. See DPP v Majewski [1977] AC 443. The United States also adopted a conservative approach, allowing intoxication to be relevant to offences where purpose or knowledge was the mental state, and excluding evidence of intoxication for offences of recklessness or negligence. See Model Penal Code 1963 (US) s308.
homicide because he commits one fault by self-indulgence and another by killing a Christian." The view was that intoxication increased the culpability of an offender. Half a century later, the Archbishop of York (circa 735 to 766 AD) stated that the killing of another in an intoxicated state subjected the offender to the same penance as killing another in anger. Thus, intoxication could reduce criminal culpability. While the two texts appear to be inconsistent, it is clear that English law, until the early nineteenth century did not permit intoxication to be a defence. In some circumstances, however, it might have influenced some judges to reduce the punishment.

The earliest reported case dealing with the effect of intoxication on criminal culpability was the 1551 case of Reniger v Feogossa. It was held:

As if a person that is drunk kills another this shall be a felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby. And as Aristotle says, that man deserves double punishment, because he has double offended, viz in being drunk to the evil example of others, and in committing the crime of homicide.

While the court in Reniger was cognisant of the fact that intoxication could negative the mental element of a crime, it was not prepared to allow intoxication to exculpate. The reference to Aristotle echoed the sentiments found in the Penitential of Theodore. Similar judicial views were found in 1603 in Beverley's Case. The views of the

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24 R U Singh, "History of the Defence of Drunkenness in English Criminal Law" [1933] 49 Law Quarterly Review 528 at 530: "It seems that the canonist idea of indulgence for offences committed by person while in a state of drunkenness did not have any effect on the English law of drunkenness in its relation to criminal responsibility."

25 Reniger v Feogossa (1551) 1 Plowd 1; 75 ER 1.

26 (1603) 4 Coke 125: "[A]tho he who is drunk is for the time non compos mentis, yet his drunkenness does not extenuate his act or offence nor turn to his avail, but it is a great offence in itself, and, therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him."
leading commentators from the sixteenth century to the early nineteenth century were not uniform. Those who supported the view that intoxication increased culpability included Coke,\textsuperscript{27} Blackstone,\textsuperscript{28} Chitty\textsuperscript{29} and Russell.\textsuperscript{30} Those who did not subscribe to the view that intoxication increased culpability included Hooker,\textsuperscript{31} Dalton,\textsuperscript{32} Bacon,\textsuperscript{33} Hale\textsuperscript{34} and Hawkins.\textsuperscript{35} Hale went further and suggested that if the intoxication were such that it had a permanent and continuing effect on the accused, it could decrease the culpability of the accused.\textsuperscript{36} This was the first attempt to treat intoxication on the same footing as insanity.\textsuperscript{37}

It is difficult to explain how intoxication could increase the culpability of a defendant. Singh concluded that while courts asserted that intoxication increased the culpability of the offender, there was no evidence to demonstrate how the courts dealt with the “increased culpability” of the particular offenders.\textsuperscript{38} If an intoxicated accused and a

\begin{itemize}
  \item E Coke, \textit{On Littleton} 247a: “As for a drunkard who is voluntarius daemon, he hath no privilege thereby, but what hurt or ills soever he doth, his drunkenness doth aggravate it. \textit{Omne crimen ebrietatis et incendit et detegit.”}
  
  
  \item J Chitty, \textit{A Practical Treatise on the Criminal Law} (first published 1816, reprint 1978) vol 3 725
  
  \item W O Russell, \textit{Crimes and Misdemeanours} (1819) vol 1, p 11.
  
  \item R Hooker, \textit{Laws of Ecclesiastical Polity} (1594) vol 1, s 9: “[I]t is no excuse unto him, who being Drunk, committeth incest, and allegeth, that his wits were not his own; inasmuch as himself might have chosen, whether his wits should by that means have been taken away from him.”
  
  \item Dalton, \textit{Country Justice} (1643) 299: “[I]f a man that is drunk killeth another, that is felony of deth for it is a voluntary ignorance in him, inasmuch as such ignorance commeth to him by his own act and folly.”
  
  \item F Bacon, \textit{Elements of the Common Laws of England} (1636) 29.
  
  \item M Hale, \textit{History of the Pleas of the Crown} (1736) vol 1, 32.
  
  \item W Hawkins, \textit{Pleas of the Crown} (1716) vol 1, c 1, s 6.
  
  \item M Hale, \textit{History of the Pleas of the Crown} (1736) vol 1, 32.
  
  \item Some cases in the early nineteenth century adopted this view. See for example, \textit{R v Burrow} (1823) 1 Lew 75; \textit{R v Rennie} (1825) 1 Lew 76
  
\end{itemize}
sober accused each independently murdered a victim, how did the intoxication increase the culpability of the intoxicated accused compared to the sober accused? The only explanation is that intoxication itself was viewed as a sin and attributed blameworthiness to the accused in addition to the blameworthiness arising out of the offence committed. The view that intoxication was in itself blameworthy has contemporary support as seen in the recommendations for a separate offence of culpable intoxication.\textsuperscript{39} As Singh put it:

\begin{quote}
It may, therefore, be said that omne crimen ebrietas et incendit et detegit was little more than rhetorical flourish inspired by the spirit of the times that was responsible, in the early part of the seventeenth century, \ldots{} for suppression of \ldots{} the odious and loathsome Sin of Drunkenness.\textsuperscript{40}
\end{quote}

Because intoxication was viewed as a sin, an intoxicated offender was morally blameworthy, regardless of the actual mental state at the time of the offence. Moral blame was attributable through the conduct of the accused in becoming so intoxicated that he or she was unable to control his or her actions. As Douglas Stroud put it in 1920:

\begin{quote}
By allowing himself to get drunk and thereby putting himself in such a condition as to be no longer amenable to the law’s commands, a man shows such regardlessness as amounts to mens rea for the purpose of all ordinary crimes.\textsuperscript{41}
\end{quote}

Stroud’s concept of mens rea, as will be demonstrated later, was not compatible with the descriptive theory of mens rea, where particular mental states were required for particular crimes.\textsuperscript{42} Stroud’s concept of mens rea in the above comment was much broader and encompassed a general state of moral blameworthiness.

\begin{footnotes}
\item[41] D A Stroud, “Constructive Murder and Drunkenness” (1920) 36 Law Quarterly Review 270 at 273.
\item[42] See text at nn 74-92.
\end{footnotes}
The second stage - nineteenth century to late twentieth century

The early cases

In the nineteenth century, the view that intoxication could increase culpability was rejected by the courts:

We are aware that the text writers frequently say that drunkenness is no excuse for crime, but rather an aggravation of the offence. That it is no excuse is certainly true, but that it should be held in law to aggravate crime is not, we conceive, a correct proposition. In ethics it is no doubt true, but how it can aggravate a wilful, deliberate murder, perpetrated with malice preconceived, and deliberately perpetrated, we are unable to comprehend. Or that it will aggravate what in law is only manslaughter if perpetrated by a sober man, into murder if committed by a drunken man, is not, we conceive, true. Or that it increases a minor offence to one of a higher degree, is not true.\(^{43}\)

This second stage saw the gradual acceptance of the view that intoxication could have the effect of decreasing an accused’s culpability and that it could operate as a partial defence to certain crimes.\(^{44}\) Despite this acceptance, the nineteenth century cases were not consistent.\(^{45}\) In the 1836 case of \textit{R v Meakin},\(^{46}\) the accused, allegedly in a state of intoxication murdered the victim by stabbing him with a fork. Alderson B directed the jury that intoxication could be relevant to denying the existence of the malicious intent required for murder.\(^{47}\)

A significant case in the development of the defence of intoxication was the 1849 case of \textit{R v Monkhouse}.\(^{48}\) The significance of this case was that it was the first case that

\(^{43}\) \textit{McIntyre v People} 38 Ill 514 at 520 (1865).

\(^{44}\) \textit{Pennsylvania v M‘Fall Add} 255 (Pa) (1794); \textit{R v Grindley} (Worcestershire Summer Assizes) (unreported), referred to in \textit{Rex v Carroll} (1835) 7 C & P 145, 173 ER 64.

\(^{45}\) See the different results in \textit{R v Thomas} (1837) 7 C & P 817; \textit{R v Pearson} (1835) 2 Lewin 144; \textit{R v Marshall} (1830) 1 Lewin 76; \textit{R v Carroll} (1835) 7 C & P 145, (1835) 173 ER 64; \textit{People v Willey} 2 Parker 19 (NY) (1823); \textit{US v Drew} 25 Fed Cas No 14 993 (CCD Mass) (1828); \textit{Cornwell v State} 7 Tenn Rep 496 (1827).

\(^{46}\) (1836) 7 C & P 297.

\(^{47}\) On the facts of the case, it was held that evidence of intoxication did not negative the presence of an intention to cause grievous bodily harm. The \textit{Meakin} approach of permitting evidence of intoxication was followed two year later in \textit{R v Cruse} (1838) 8 C & P 546.

\(^{48}\) (1849) 4 Cox CC 55.
apparently distinguished between basic and specific intention, although that dubious honour was given to *DPP v Beard*.\(^{49}\) Coleridge J in *Monkhouse* said:

If the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged. ... Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention.\(^{50}\) [emphasis added]

The *Monkhouse* decision was characteristic of the nineteenth century move towards a descriptive theory of mens rea. The issue was not whether the accused was blameworthy, but whether the accused had a particular mental state at the time of commission of the offence. In *R v Doherty*, a murder case decided in 1887, the effect of intoxication on the psychological state of mind was further emphasised. Stephen J, whose views were the most influential in the development of the descriptive theory of mens rea, said in his direction to the jury:

... although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to commit the crime. If a sober man takes a pistol, or a knife, and shoots or strikes at someone else, the inference is that he intended to strike or shoot him with the object of doing him grievous bodily harm. If, however, a man acting in that way was drunk, you have to consider the effect of his drunkenness upon his intention.\(^{51}\)

In the late nineteenth century, the courts treated intoxication on the same footing as insanity. Echoing Hale's views, which found favour in the 1830s,\(^{52}\) Manisty J in the 1878 case of *R v M'Gowan*,\(^{53}\) said that if the accused were permanently and habitually intoxicated then the accused may have a defence, but not so where the insanity was temporary and from the accused's own excesses. This case was overruled a few years

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\(^{49}\) [1920] AC 479.

\(^{50}\) (1849) 4 Cox CC 55 at 56.

\(^{51}\) (1887) 16 Cox CC 306 at 308.

\(^{52}\) *R v Burrow* (1823) 1 Lew 75; *R v Rennie* (1825) 1 Lew 76.

later.\textsuperscript{54} This distinction between permanent and temporary intoxication was another arbitrary means of limiting the exculpatory effects of intoxication. The descriptive theory of mens rea demanded that intoxication be relevant to criminal culpability, but from a moral blameworthiness perspective, such a defence was unwelcome. Thus, courts engaged in contrived distinctions, the most notorious being that between basic and specific intent offences, with intoxication being relevant only to the latter.

\textit{R v Meade}\textsuperscript{55} is the final case in the line of authority prior to the seminal case of \textit{DPP v Beard}.\textsuperscript{56} This decision further expanded the relevance of intoxication to criminal liability by declaring that evidence of intoxication was relevant to the question of whether the accused was so intoxicated “that he was incapable of knowing that what he was doing was dangerous, ie likely to inflict injury.”\textsuperscript{57} No distinction was made between permanent or temporary incapacity, nor any distinction between basic and specific intent offences.

The analysis of the above cases shows that, by the late nineteenth century, the courts were moving from a normative fault approach, based on the wrongfulness of intoxication to an allegedly scientific, or descriptive fault approach, based on the physiological and psychological effects of intoxication on human mental functions. The nineteenth century criminal law, influenced by liberal positivism, distinguished sharply between law and morals. The alleged immorality of intoxication could no longer be used to impute culpability to the defendant and greater emphasis was laid on a technical approach to mens rea.\textsuperscript{58} As a consequence, intoxicated offenders were

\textsuperscript{54} \textit{R v Baines, The Times}, 25 January 1886. See also, \textit{R v Davis} (1881) 14 Cox CC 563.

\textsuperscript{55} [1909] 1 KB 895.

\textsuperscript{56} [1920] AC 479.

\textsuperscript{57} [1909] 1 KB 895 at 899.

\textsuperscript{58} F B Sayre, “Mens Rea” (1932) 45 Harvard Law Review 974 at 1014-15 makes this point: “The act of getting drunk may of itself be considered morally blameworthy. It was for this reason that, in a day when criminal liability strongly connoted moral delinquency, the absence of an evil intent caused by intoxication was not allowed as a defence against criminal liability. It is only within fairly modern times, with the growing realisation that criminal liability is to be sharply differentiated from moral delinquency, that intoxication has been allowed as an indirect defence in so far as it negatives the existence of a specific intent required for certain crimes.”
permitted to raise intoxication as a “defence”. Yet, many judges were of the view that intoxicated offenders were morally blameworthy. Because the law required intoxication to be taken into account as an exculpatory factor, judges tried to limit the application of this “defence” by drawing arbitrary distinctions between permanent and temporary intoxication, between voluntary and involuntary intoxication and between basic and specific intent crimes.

*From Beard (1920) to Majewski (1977)*

The modern English law of intoxication has its roots in the 1920 decision of *DPP v Beard*.59 Beard was charged with murder. He had sexually assaulted the victim and then strangled her during a struggle. With respect to the relevance of intoxication, Lord Birkenhead stated:

> Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.60

As a result of this passage and Lord Birkenhead’s use of the term “specific intent”, later courts made a distinction between offences of specific intent and offences of basic intent, accepting that intoxication was relevant only to the former. The better view is that Lord Birkenhead did not use the term “specific intent” as a term of art, rather that he simply used that term to describe the relevant intent for the particular offence. This was made explicit by Lord Birkenhead himself in a later passage:

> I do not think the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime - eg wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with

59 [1920] AC 479.

60 *DPP v Beard* [1920] AC 479 at 499.
the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens rea was rea.\textsuperscript{61}

Even in \textit{Beard} itself, Lord Birkenhead was of the view that intoxication could be relevant to the offence of rape, which was classified as a basic intent offence.\textsuperscript{62} The evidence of intoxication, however, was not sufficient to raise a doubt about the accused’s mental state with respect to the rape.\textsuperscript{63} The conviction of murder in \textit{Beard} was upheld under the felony murder rule, where there was no need to prove an intention to kill. Academic writers\textsuperscript{64} and even as late as 1975, the House of Lords,\textsuperscript{65} supported the view that \textit{Beard} did not distinguish between crimes of basic and specific intent.

In 1977, the House of Lords had to reconsider the criminal law relating to intoxication in \textit{DPP v Majewski}.\textsuperscript{66} The facts of the case were that the accused had been involved in a brawl at a public house in which he assaulted the public and some police officers who were called to the scene. He was charged with three counts of assault occasioning actual bodily harm and three counts of assaulting a police officer in the execution of his or her duty, contrary to s51(1) of the \textit{Police Act 1964} (UK). The accused argued that he had committed the offences while suffering from the

\textsuperscript{61} \textit{DPP v Beard} [1920] AC 479 at 504.

\textsuperscript{62} \textit{DPP v Beard} [1920] AC 479 at 504-5.

\textsuperscript{63} \textit{DPP v Beard} [1920] AC 479 at 507 per Lord Birkenhead: “In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant, sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.”


\textsuperscript{65} \textit{R v Sheehan} [1975] 1 WLR 739.

\textsuperscript{66} [1977] AC 443.
effects of alcohol and drugs. The trial judge directed the jury that since the offences charged against the defendant were basic intent offences and did not require any specific intent, intoxication was not relevant and was to be ignored in reaching their verdict. The accused was convicted on all counts.

Before dealing with the House of Lords’ decision it is interesting to note that the prosecuting counsel, Mr Brian Higgs, when called upon by the Court of Appeal to submit the prosecution’s argument in reply to that of the accused’s, told the court that he could not support the conviction. He was convinced by counsel for the accused that Beard did not intend to exclude evidence of intoxication in basic intent crimes, ie intoxication was relevant to all crimes of mens rea. The Court of Appeal was thus left with no argument from the prosecution and had to adjourn the appeal and invite the Director of Public Prosecutions to take over the Crown’s role.

**THE MAJEWSKI DECISION: REVEALING THE UNNECESSARY COMPLICATIONS AND THE WEAKNESS OF THE DESCRIPTIVE THEORY**

The House of Lords unanimously held that evidence of intoxication could not be used to negative the mental state for basic intent offences. The Majewski decision was justified on policy grounds, but an attempt was made to rationalise the decision within existing criminal law principles. Underlying all the opinions was the view that intoxication was a major cause of crime and the public had to be protected from violent, intoxicated individuals. It is curious that the court did not consider that these policy considerations should apply equally to specific intent offences, which were often more serious and violent. Nevertheless, the essence of the judgments is captured in the words of Lawton LJ in the Court of Appeal:

> The facts are commonplace – indeed so commonplace that their very nature reveals how serious from a social and public standpoint the consequences would be if men could behave as the defendant and then claim that they were not guilty of any offence.67

The assumption that intoxication causes violent behaviour is questionable.68 Although there is a high *correlation* between intoxication and criminal behaviour,69 there is no

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67 *DPP v Majewski* [1977] AC 443 at 447 per Lawton LJ (CA).
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empirical evidence that intoxication causes criminal behaviour. The judges admitted that the decision was contrary to logic and legal principles, but held that it was necessary for policy reasons. The legal reasoning was based on three separate but inter-related grounds. First, the House relied on the doctrines of recklessness and prior fault. It was held that the intentional taking of alcohol or drugs substituted for the mental element of the crime. As the House of Lords put it in 1994 in R v Kingston, "The intent is transferred from the taking of drink to the commission of the prohibited act." Secondly, the House held that voluntary intoxication to the point of irresponsibility was in itself morally blameworthy and therefore the accused deserved to be punished for any violation of the law as a result of intoxication. In Kingston, this was described as an estoppel argument, i.e. the accused was estopped from arguing that he or she did not have a relevant mental state if that condition were caused by some prior blameworthy conduct of the accused, such as voluntary intoxication. Finally, it was held that a distinction could be drawn between basic and specific intent offences. Evidence of intoxication was limited to the latter. The three grounds upon which the Majewski decision stood will be examined. It will become apparent that Majewski


70 See, C N Mitchell, "The Intoxicated Offender - Refuting the Legal and Medical Myths" (1988) 11 International Journal of Law and Psychiatry 77 at 89, where the author speculates that the percentage of drunks who might commit crimes is less than 1%.

71 [1994] 3 All ER 353.

72 [1994] 3 All ER 353 at 364.

73 R v Kingston [1994] 3 All ER 353.
adopted a normative approach to criminal culpability. The *Majewski* outcome was, in fact, laudable. That it had to abandon the current doctrine of mens rea to reach this outcome is a clear indictment of the orthodox doctrine.

*Majewski* recklessness

Although the House was presented with an opportunity to refine the doctrine of mens rea, the Lords rigidly adhered to the orthodox approach to mens rea, characterised by subjectivism and correspondence between the mental state and the particular offence. This was evident from their unanimous approval of Stephen J’s judgment in *R v Tolson*:

> Though this phrase *[actus non facit reum nisi mens sit rea]* is in common use, I think it is most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a “mens rea”, or “guilty mind”, which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely.

Voluntary intoxication was treated as the equivalent of a guilty mind, characterised by recklessness. As Lord Elwyn-Jones said:

> His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases.

The problem is that even if such conduct were reckless, it was not reckless in a legally relevant sense. Reckless drinking was a form of conduct, not a mental state. Even if one viewed reckless drinking as supplying a mental state, there was no correspondence between such a “mental state” and the particular offence that was committed. Further, this approach contradicted the requirement of coincidence of

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74 (1889) 23 QBD 168 at 185. Stephen J went on to give examples of different kinds of mens rea for different offences. “‘Mens rea’ means in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal.”

75 *DPP v Majewski* [1977] AC 443 at 474-5.
actus reus and mens rea. The Majewski recklessness occurred separately from, and prior to, the actus reus of the crime.

Correspondence

The recklessness theory did not adequately explain or justify the Majewski rule because it was unclear exactly what sort of recklessness was being considered. Subjective recklessness required that the accused was aware of a risk and unreasonably took that risk. A person who consumed alcohol was very unlikely to have actually contemplated a particular crime. Subjective recklessness was therefore incompatible with Majewski. Objective recklessness was where the defendant failed to consider a risk which would have been obvious to the reasonable person. This was the special type of recklessness recognised in Caldwell. The difficulty with this approach was that Caldwell recklessness was limited to a very small number of offences. The Majewski court gave no indication that it was foreshadowing Caldwell, much less that it intended to apply objective recklessness to all basic intent crimes. Further, Caldwell required that the risk had to be with respect to the relevant harm. While it may be argued that a reasonable person might have considered the risk of committing some offence if they became intoxicated, such foresight was not sufficient. It had to be shown that the reasonable person would have foreseen the risk of committing the particular offence. This point was made by Lord Edmund-Davies in Caldwell.

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78 See discussion in Chapter II.


80 See H Fingarette, “Diminished Mental Capacity as a Defence” (1954) Modern Law Review 275 at 279: “In short, diminished mental capacity constitutes a situation of high risk with regard to a broad range of harms, though low risk with respect to any specific harm.”

Whichever way the recklessness argument in *Majewski* is viewed, it fails the correspondence requirement, ie the mental state has to be the particular one with respect to the particular crime. As stated by Dickson J:

Recklessness in a legal sense imports foresight. Recklessness cannot exist in the air; it must have reference to the consequences of a particular act. In the circumstances of a particular case, the ingestion of alcohol may be sufficiently connected to the consequences as to constitute recklessness in a legal sense with respect to the occurrence of the prohibited act. But to say that everyone who gets drunk is thereby reckless and therefore accountable is to use the word “reckless” in a non-legal sense and, in effect, in the case of an intoxicated offender, to convert any crime into one of absolute or strict liability.\(^2\)

A further practical problem with *Majewski* is the time for assessing the risk. When is a person who has consumed alcohol or drugs considered to be reckless? There is clearly a continuum of foreseeability in intoxication cases.\(^3\) At one end of the spectrum is the “Dutch Courage” type case, ie a person resolves to commit the particular crime and becomes intoxicated to steel the nerves.\(^4\) At the other end of the spectrum is the first time drinker who has no experience with alcohol and has no propensity for violence. In between would be the example of the habitual drunk who has on previous occasions been violent when intoxicated, the habitual drunk who has never been violent in the past, the habitual drunk who has no propensity for violence, the occasional drunk who has been violent, the occasional drunk who has a propensity for violence but has never yet been violent, the first time drinker who has a propensity for violence and the first time drinker who has no propensity for violence.

It may be arguable that the habitual drunk who has been violent in the past should have foreseen that when intoxicated, he or she could commit a similar offence.\(^5\) Even if this argument were accepted, the question arises as to whether inadvertence should

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\(^2\) *Leary v The Queen* (1977) DLR (3d) at 125.


be sufficient for all crimes of recklessness.\textsuperscript{86} Such an argument becomes more
difficult at the next stage and virtually impossible in the middle of the spectrum. At
the opposite end of the spectrum such an argument is nothing short of farcical.
Related to this is the question of the relevant time for assessing the recklessness of the
intoxicated offender. Is it when the person decides to consume intoxicants, or when
the person begins consumption, or when the person becomes intoxicated? The
general view is that recklessness is assessed at the point of beginning to consume the
intoxicants.\textsuperscript{87} This means that Majewski must have foreseen on Sunday morning
when he began drinking and taking drugs that he would assault a police officer on
Monday afternoon!\textsuperscript{88}

In addition to failing the correspondence requirement and being practically impossible
to fairly apply, the recklessness approach advocated in Majewski fails another crucial
requirement of the orthodox approach to criminal culpability. That is the requirement
of coincidence between actus reus and mens rea.

\textit{Coincidence between actus reus and mens rea}

The Majewski court relied on the doctrine of prior fault to bridge the gap between
actus reus and mens rea.\textsuperscript{89} This doctrine was derived from cases such as \textit{Fagan v
Metropolitan Police Commissioner}\textsuperscript{80} and \textit{Thabo Meli v The Queen}.\textsuperscript{91} The notion of
prior fault in Majewski is quite different from the prior fault doctrine applied in these
cases. In both \textit{Fagan} and \textit{Thabo Meli} the relevant intent was present. The only
problem was the lack of contemporaneity between actus reus and mens rea. In \textit{Fagan},

\textsuperscript{86} Currently inadvertence constitutes recklessness only for limited offences, including \textit{Caldwell
recklessness and certain sexual offences} – \textit{R v Kimber} [1983] 1 WLR 1118; \textit{R v Kitchener}

\textsuperscript{87} \textit{R v Kingston} [1994] 3 All ER 353; G L Williams, \textit{Criminal Law: The General Part} (2\textsuperscript{nd} ed,
1961) 182-3.

\textsuperscript{88} See N L A Barlow, "Drug Intoxication and Capacitas Rationalis" (1984) 100 Law Quarterly
Review 639 at 643.

\textsuperscript{89} See, J C Smith, \textit{Criminal Law}, (9\textsuperscript{th} ed, 1999) 75-6 for a discussion of the prior fault doctrine.

\textsuperscript{90} [1968] 3 All ER 442 (CA).

\textsuperscript{91} [1954] 1 All ER 373 (PC).
the accused unknowingly parked his car on a policeman’s foot. His lack of intent meant that there was no assault. Upon becoming aware of the incident and refusing to remove the car, the act of assault was accompanied by an intention to assault. Thus, the mens rea and actus reus coincided. In Thabo Meli, the accused had the intention to kill when they assaulted the victim. Believing the victim to be dead they threw him over a cliff whereupon he died. The cause of death was the throwing of the victim over the cliff, at which point there was no intention to kill. The court held that the earlier intention was sufficient. There was initially an intent to kill, and that was exactly what the accused, in fact, did.

With Majewski recklessness, the prior fault, whatever it may be, is not directly connected to the offence. A person who drank irresponsibly and then committed an assault could not be said to have had the mental element for assault while drinking. The only instance where the doctrine of prior fault may be justifiably used in intoxication cases is the “Dutch Courage” type situations. Majewski recklessness is a species of recklessness that is not recognised elsewhere in the criminal law.\(^{92}\)

**Voluntary intoxication as moral blameworthiness**

It is impossible to justify in principle the recklessness approach adopted in Majewski. Indeed, the judges themselves conceded that perhaps their approach was not in accordance with legal doctrine or principle. The fact that the accused was intoxicated seemed to provide the culpability required for criminal liability. Intoxication was, in fact, viewed as an alternative form of culpability in the absence of any mens rea.\(^{93}\) As Lord Russell put it:

Mens rea has many aspects. If asked to define it in such a case as the present I would say that the element of guilt or moral turpitude is supplied by the act of self-intoxication reckless of possible consequences.\(^{94}\)

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\(^{92}\) *R v O’Connor* (1980) 146 CLR 64 at 85 per Barwick CJ.


\(^{94}\) *DPP v Majewski* [1977] AC 443 at 498 per Lord Russell.
Similarly, Lord Simon said:

... a mind rendered self-inducedly insensible (short of M’Naghten insanity), through drink or drugs, to the nature of a prohibited act or to its probable consequences is a wrongful a mind as one which consciously contemplates the prohibited act and foresees its probable consequences (or is reckless whether they ensue). 95

The view that intoxication provided the moral blameworthiness required for criminal culpability, despite the absence of a technical mental element, is characteristic of the normative theory of criminal culpability. 96 The question is not whether the accused acted with a relevant mental state, but whether the accused acted in a culpable state. This of course accords with the early development of the law relating to intoxication, 97 which in turn is in line with the historical, moral basis of criminal culpability. 98 The problem with the moral blameworthiness approach adopted in Majewski is that the court tried to explain it in terms of recklessness. A distinction was drawn between blameworthy and non-blameworthy intoxication. The former supplied a reckless mental state whereas the latter did not. This distinction between blameworthy and non-blameworthy intoxication seemed to hinge on judicial notice as to what type of intoxication was legitimate.

In R v Hardie, 99 the defendant had taken unprescribed valium and, in an alleged state of intoxication, committed an offence contrary to s1(2)(a) of the Criminal Damage Act 1971 (UK). It was held:

It is true that valium is a drug and it is true that it was taken deliberately and not taken on medical prescription, but the drug is, in our view, wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness. 100 [emphasis added]

In Hardie, intoxication was held to be relevant. 101 The court’s view raises many difficult questions. How is self induced intoxication as a result of consuming valium

97 See text at nn 22-42.
98 See Chapters I and II.
99 [1984] 3 All ER 848 (C A).
100 [1984] 3 All ER 848 at 853.
different from self induced intoxication as a result of consuming alcohol or social
drugs? Why is one conduct reckless but not the other? What happens when the
intoxication is a result of a combination of alcohol and medically prescribed drugs? If
the intoxication is due to the former, the defendant may not plead intoxication as a
defence, but if it is due to the latter, such a defence is possible. If it is proved that
neither source could independently cause the intoxication, how would the court rule?

The Hardie court’s explanation was that the valium was taken for the purpose of
calming the nerves only and that there was no evidence that the accused knew that
taking valium in such quantity could have such effects on him. This reasoning could
equally apply to the first time drinker who had a couple of beers to unwind, and then,
due to inexperience with alcohol, became intoxicated and committed an offence.
Could a distinction really be drawn between people who were bent on “going on a
trip’ or ‘blowing the mind,’ the avowed intention of the taker of hallucinatory drugs
being to lose contact with reality”102 and people who voluntarily consumed
intoxicating substances for medical or related reasons? How could we find that the
former was reckless but not the latter, if recklessness were foresight of possible
consequences? The distinction, if it were to be drawn, could not be on the basis of
recklessness but could only be on an independent basis of moral responsibility.

Majewski recklessness and the normative theory of mens rea

Under the German normative theory of mens rea described in Chapter I, proof of a
particular mental state is not necessary. Criminal culpability under the German
normative theory lay in the blameworthiness with which the unlawful act was
committed. Culpability was not a mental state but a blameworthy state. If the
accused could have acted differently or have refrained from acting, but did not refrain
or act differently, the accused was blameworthy.103 This approach freed the criminal
law from the psychological aspect of mens rea that was so elusive in the intoxication

101 This case can be contrasted with R v Bailey [1983] 2 All ER 503, where the claim of self-
intoxication was held to be unmeritorious.
102 DPP v Majewski [1977] AC 443 at 495.
cases. The question whether an intoxicated person was blameworthy could be more readily answered under a normative approach. A person was blameworthy where he or she freely chose to become intoxicated; by so choosing, the person accepted the risk of acting irresponsibly. Having taken that risk, the person was answerable for it. As Barlow put it, "... the moral justification for punishment was the essential immorality in the conduct of freely inducing the incapacitated condition leading to the harm, ..."104

In the intoxication cases there was a blameworthy state, because the person voluntarily put him or herself in a situation where he or she was unable to control his or her actions. Such a person was blameworthy because he or she could have refrained from placing him or herself in that position. As Bacon stated in his 1639 treatise:

So if the common case proveth this exception that is, if a madman commits a felony, he shall not lose his life for it, because his infirmatie came by the Act of God; but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default; ... 105

The normative approach could provide a logical explanation to Majewski. Majewski should not have been concerned with rationalising its decision within the orthodox mens rea doctrine. It was impossible to do so, because what was operating in Majewski was an alternative model of criminal culpability; the normative theory of fault. The focus shifted away from subjective mental states and was centred on moral blameworthiness. This moral blameworthiness could be characterised as a culpable failure to advert to the risk.106 The normative approach could also be used to explain the "Dutch Courage" cases. The law held that individuals who formed the relevant mental state prior to becoming intoxicated were estopped from using evidence of intoxication to negative the subjective mental state at the time of the commission of


105 F Bacon, The Elements of the Common Law (1639) 29.

106 See for example, S Gardner, "The Importance of Majewski" (1994) 14 Oxford Journal of Legal Studies 279, where he argues that intoxication is akin to blameworthy inadvertence or blameworthy mistake.
the offence.\textsuperscript{107} This was rationalised under the prior fault doctrine. An alternative rationalisation is that normatively, such individuals are blameworthy, despite the absence of a technical mental element at the moment of committing the offence.

**The basic intent-specific intent distinction**

*Majewski* held that a distinction between crimes of specific intent and crimes of basic intent was necessary. Intoxication was relevant only to crimes of specific intent. It was argued earlier that this distinction arose out of a misunderstanding of *Beard*. Lord Birkenhead in *Beard* did not use the term "specific intent" as a term of art, rather he used it to refer to the particular intent in that case. Stroud, in an article published in the same year *Beard* was decided, argued that Lord Birkenhead had not distinguished between basic and specific intent, and had in fact permitted evidence of intoxication to be relevant to all mens rea crimes.\textsuperscript{108} Later writers were also of the view that the correct interpretation of *Beard* was that intoxication was relevant to all crimes of mens rea.\textsuperscript{109} Nearly all commentators agree that the distinction between basic and specific intent is a false one.\textsuperscript{110}

*Majewski* took the view that there was a clear distinction between basic and specific intent offences. Intoxication was relevant only to the latter. Having accepted this distinction the court had to define what was meant by basic intent offences and specific intent offences. There were two senses in which the term specific intent was

\textsuperscript{107} Attorney-General (Northern Ireland) v Gallagher [1963] AC 349; Bratty v Attorney-General (Northern Ireland) [1963] AC 386; R v O’Connor (1980) 146 CLR 64; Crimes Act 1900 (NSW) s428C(2).

\textsuperscript{108} D A Stroud, "Constructive Murder and Drunkenness" (1920) 36 Law Quarterly Review 268 at 270: “The whole of his observations ... suggest an extension of the defence of drunkenness far beyond the limits which have hitherto been assigned to it. The suggestion, put shortly, is that drunkenness may be available as a defence, upon any criminal charge, whenever it can be shown to have affected mens rea. Not only is there no authority for this suggestion: there is abundant authority, both ancient and modern, to the contrary.”


used. One was the purpose test, which distinguished between “direct” and “oblique” intention, i.e., the accused not only could foresee the consequences of the accused’s actions, but actually aimed at bringing about those consequences. The other was the ulterior intent test, which referred to an intention beyond that necessary for the actus reus of the offence. Majewski preferred the purpose test and relied on the Canadian case of R v George:

In considering the question of mens rea, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts apart from their purposes. A general intent [Canadian equivalent of basic intent] attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

For a definition of basic intent, the court adopted the view of Lord Simon in DPP v Morgan:

“By ‘crimes of basic intent’ I mean those crimes whose definition expresses (or, more often, implies) a mens rea which does not go beyond the actus reus. The actus reus generally consists of an act and some consequence. The consequence may be very closely connected with the act or more remotely connected with it; but with a crime of basic intent the mens rea does not extend beyond the act and its consequence, however remote, as defined in the actus reus.”

The contrast between basic and specific intent was made on the basis that for the former the intention went merely to the conduct element, whereas for the latter the intention went to elements ulterior to the conduct element. From this it could be gleaned that specific intent offences were offences where the intention went beyond the conduct element. This is the second way in which specific intent may be viewed, i.e., as “ulterior intent”.

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111 See T Quigley, “Specific and General Nonsense?” (1987) 11 Dalhousie Law Journal 75, who has provided one of the most detailed criticisms of the specific intent-basic intent distinction.

112 See, for a discussion of purpose as intention, J C Smith, Criminal Law (9th ed, 1999) 54-60.

113 See, for a description of ulterior intent, J C Smith, Criminal Law (9th ed, 1999) 70-1.

114 R v George (1960) 128 CCC 289.

115 R v George (1960) 128 CCC 289 at 301 per Fauteux J.


117 The term “ulterior intent” was first used by D A Stroud, Mens Rea (1914) 112-5.
One of the difficulties in this area is the question as to whether the distinction between specific and basic intent is based on a distinction between types of intention or types of offence. The purpose test suggests that it is based on a distinction between types of intention and not on types of offence. One has an intention to kill when the purpose of one's conduct is to bring about the death of another. One also has an intention to kill where one foresees as a virtual certainty that one's conduct would result in the death of another. Under the purpose test, the first type of intention to kill is a species of specific intent, while the latter is a species of basic intent. The offence is still one and the same, i.e., murder. This illustration is all the more vivid in the Australian context. The mental state required for murder in Australia includes recklessness. Murder itself is classed as a specific intent crime, yet recklessness is a sufficient mental state. Recklessness is clearly a species of basic intent. The Majewski court could not have intended the distinction between basic and specific intent to operate in this manner. The same offence could not at the same time be both a basic intent offence and a specific intent offence. The jury directions would be hopelessly complex, as judges would have to instruct juries to consider intoxication in determining intention to kill or cause grievous bodily harm, but not in determining recklessness as to death or grievous bodily harm.

The ulterior intent test provides a better explanation for distinguishing between basic and specific intent. Under the ulterior intent test, the offence itself differs according to the nature of the intent. Take for example, the offence of wounding with intent to inflict grievous bodily harm. Wounding is the basic intent offence. The intention goes to the conduct of wounding. In addition to that intention is an intention to cause a particular consequence, i.e., grievous bodily harm. This additional intention creates a separate offence, which is a specific intent offence. Lord Simon clearly preferred the

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118 R v Woollin [1998] 4 All ER 103.
120 Crimes Act 1900 (NSW) s428 expressly included murder in its schedule of specific intent crimes, to which evidence intoxication was relevant.
121 See for example Crimes Act 1900 (NSW) s33. Where the additional intent is not present, a lesser, separate offence exists in s35.
purpose test, but as shown above the purpose test led to patently absurd results because the same offence could be either specific or basic, depending on whether the intention was “direct” or “oblique”, or whether recklessness sufficed.

The absurdity of the basic intent-specific intent dichotomy is illustrated by Sir John Smith in this example:

If a drunken person takes my vase under the impression that it is his own and smashes it, why should he be guilty of criminal damage which does not require an ulterior intent [nor presumably a specific intent] but not guilty of theft, which does? The mistake as to ownership negatives mens rea in both cases and it would be irrational to impose liability in the one case and not in the other.

The distinction between specific and basic intent is an artificial one which is extremely difficult to apply. The Majewski decision reflected a compromise between legal principle and policy arguments. Orthodox doctrine demanded that intoxication be relevant to all crimes of intention. Policy arguments were advanced in Majewski to reject the “defence” of intoxication. The Majewski court ultimately sacrificed strict logic and legal principle in favour of policy. As Lord Salmon stated:

...I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is, however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. ... Absolute logic in human affairs is an uncertain guide and a very dangerous master.

The two conflicting policy considerations of the criminal law, namely that of protecting the public and that of safeguarding the individual, had to be balanced in

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122 In Majewski, Lord Simon described the purpose test as “the best description of ‘specific intent’ in this sense.” DPP v Majewski [1977] AC 443 at 478.


126 P Stein & J Shand, Legal Values in Western Society (1974) 31: “The first aim of legal rules is to ensure that members of the community are safeguarded in their person and property so that their energies are not exhausted by the business of self-protection.”; cf J C Smith & B Hogan,
Majeski. The Majewski court clearly gave priority to crime control and the preservation of public order. Some of the relevant considerations included the view that the community would be outraged at a drunk’s defence;\(^\text{127}\) that the Majewski rule was a fair compromise between the rights of the victim and those of the accused;\(^\text{128}\) that the deterrent effect of the criminal law would be undermined if intoxication was a defence;\(^\text{129}\) that evidence of intoxication would be too commonly used and juries would too readily acquit;\(^\text{130}\) and that it would be contrary to the fundamental purpose of the criminal law.\(^\text{131}\)

A majority of the Australian High Court in \textit{R v O’Connor},\(^\text{132}\) while sympathetic to the policy concerns in Majewski, nevertheless refused to apply the Majewski rule. The High Court rejected the distinction between basic intent and specific intent offences, and held that evidence of intoxication was relevant to all mens rea crimes. It should be noted that the High Court was split 4-3 in this decision. The Majewski concerns were by no means treated lightly. The majority however, was not concerned that juries would too readily acquit.\(^\text{133}\) Empirical evidence after \textit{O’Connor} was decided proved that these fears were unfounded. A Victorian study demonstrated that, in the year after \textit{O’Connor} was decided, the intoxication defence was raised in only 2.16% of prosecutions, of which only 0.59% resulted in acquittal; and in only 0.2% of the

\begin{quote}
\textit{Criminal Law} (3\textsuperscript{rd} ed, 1973) 37: “While a policy of not allowing a man to escape the consequence of his voluntary drunkenness is understandable, it is submitted that the principle that a man should not be held liable for an act over which he has no control is more important and should prevail.”
\end{quote}

\(^\text{127}\) \textit{DPP v Majewski} [1977] AC 443 at 494 per Lord Russell.

\(^\text{128}\) \textit{DPP v Majewski} [1977] AC 443 at 483-4 per Lord Salmon.

\(^\text{129}\) \textit{DPP v Majewski} [1977] AC 443 at 497 per Lord Edmund-Davies.

\(^\text{130}\) \textit{DPP v Majewski} [1977] AC 443 at 475 per Lord Elwyn-Jones.

\(^\text{131}\) \textit{DPP v Majewski} [1977] AC 443 at 469 per Lord Elwyn Jones.

\(^\text{132}\) (1980) 146 CLR 64.

\(^\text{133}\) \textit{R v O’Connor} (1980) 146 CLR 64 at 79 per Barwick CJ, quoting Starke J: “I, of course, have no knowledge of how English juries react. But over nearly forty years’ experience in this State I have found juries to be very slow to accept a defence based on intoxication. I do not share the fear held by many in England that if intoxication is accepted as a defence as far as general intent is concerned the floodgates will open and hordes of guilty men will descend on the community.” (1980) VR 635 at 647.
cases could it be unequivocally said that the acquittal was directly attributable to the intoxication factor.\textsuperscript{134} The Australian High Court also took a different view by emphasising the interest of individual liberty in the balance between the protection of public safety and the protection of individual liberty.

Comparable jurisdictions, such as Canada and New Zealand, have preferred the \textit{O'Conner} approach over the \textit{Majewski} approach.\textsuperscript{135} Within Australia, the Code states of Queensland, Western Australia and Tasmania reflected \textit{Majewski}, with intoxication being relevant only to specific intent crimes.\textsuperscript{136} The common law states, with the exception of Victoria, initially adopted \textit{Majewski},\textsuperscript{137} but \textit{O'Conner} now states the law in these jurisdictions. Victoria had from an early stage adopted the position that intoxication was relevant to all crimes of mens rea.\textsuperscript{138} In 1995 the Commonwealth enacted the \textit{Criminal Code Act 1995} (Cth) which abolished \textit{O'Conner} and reintroduced the distinction between basic intent and specific intent offences. Intoxication, under the Code is only relevant to the latter.\textsuperscript{139} In 1996, New South Wales enacted the \textit{Criminal Legislation Amendment Act 1996} (NSW) which inserted a new part into the \textit{Crimes Act 1900} (NSW) abolishing \textit{O'Conner} and restating the law in line with the Commonwealth provisions.\textsuperscript{140}

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\textsuperscript{136} \textit{Criminal Code Act 1899} (Qld) s28(3); \textit{Criminal Code Act 1913} (WA) s28(3); \textit{Criminal Code Act 1924} (Tas) s17(2).
\textsuperscript{137} For the pre-\textit{O’Conner} law in New South Wales see, \textit{R v Menniss} [1973] 2 NSWLR 113; \textit{R v Gordon} (1963) 63 SR (NSW) 631; \textit{R v Stones} (1956) 56 SR (NSW) 25. For South Australia see, \textit{R v Fahey and Lindsay} (1978) 19 SASR 577.
\textsuperscript{139} \textit{Criminal Code Act 1995} (Cth) s8.
\textsuperscript{140} The New South Wales legislation was in part a response to the community outrage over the lenient sentence handed to a killer who relied on intoxication as a defence. \textit{R v Paxman}, NSW District Court, 21 June 1995.
\end{flushright}
The New Zealand law on intoxication was decided the year before *Majewski*. In *R v Kamipelli*, the Court of Appeal of New Zealand considered the case of *Beard* and concluded that the distinction between basic and specific intent was false and that evidence of intoxication was relevant to all crimes of mens rea. The *Kamipelli* court also referred to the Privy Council case of *Broadhurst v R*, an appeal from Malta. The Privy Council held that, under the *Criminal Code* of Malta, evidence of intoxication was relevant to all crimes requiring proof of mens rea. In a postscript to the court’s judgment in *Kamipelli*, the court referred to *R v Sheehan*, a case reported after the judgment in *Kamipelli* was prepared. The English Court of Appeal in that case held that evidence of intoxication was relevant to all crimes of mens rea, regardless of any distinction between basic and specific intent. The *Majeski* decision, given after *Kamipelli* was considered by the New Zealand Court of Appeal, but the court preferred to follow its own decision in *Kamipelli*. Two commissioned reports since then have also supported the *Kamipelli* approach and recommended against adopting *Majewski*.

**PROPOSALS FOR LAW REFORM**

The complexities of the criminal law of intoxication has resulted in several law reform inquiries and reports. None of the efforts have considered reforming the law of criminal intoxication by first reforming the law relating to criminal fault. The various options canvassed by the many commissions were limited to a stark choice between *Majewski* and *O'Connor*, or to enact a separate offence of criminal intoxication.

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141 [1975] 2 NZLR 610.
142 [1964] AC 441.
143 [1975] 1 WLR 739.
United Kingdom

In the last twenty years the United Kingdom has published three separate reports on the criminal law of intoxication. The first was the 1975 report by the United Kingdom Home Office, better known as the Butler Committee Report.\textsuperscript{146} The Committee, which reported prior to the Majewski decision, was of the view that intoxication was relevant to all crimes of mens rea. The Committee was of the view that intoxicated offenders should be held criminally liable, and recommended the creation of a special offence of committing a dangerous act while intoxicated. This offence would be charged if the accused were acquitted of the principal offence on the ground that evidence of intoxication raised a doubt as to the existence of the requisite mental element of the crime. This alternative offence was available only where the charge concerned dangerous behaviour towards another person. Therefore it was not available for offences that did not concern the safety of individuals, or even where the threat to individuals was not serious. The penalty for this statutory offence was quite low, i.e., a maximum of one year’s imprisonment for first time offenders and a maximum of three years’ imprisonment for repeat offenders.

The Butler recommendation was rejected in 1980 by the Criminal Law Revision Committee,\textsuperscript{147} (the CLRC) although a minority on the CLRC suggested a modification of the Butler proposal by increasing the maximum sentence to match the original crime. The CLRC itself recommended that evidence of intoxication not be relevant to all crimes of recklessness.\textsuperscript{148} The difficulty with this approach was that certain crimes could be committed either intentionally or recklessly, e.g., assault or, in Australia, even murder. Therefore, if intoxication was an issue, its relevance would depend on whether the prosecution framed the charge in terms of intention or recklessness.


\textsuperscript{147} Criminal Law Revision Committee, \textit{Offences Against the Person}, Fourteenth Report, Cmdn 7844 (1980).

\textsuperscript{148} This is similar to the approach proposed by the American Law Institute in the \textit{Model Penal code} 1963 (US) cl 208.
In 1993, the Law Commission of England and Wales published a Consultation Paper in which the Commission recommended the abolition of Majewski. The committee contemplated two alternatives. One was to adopt the O'Connor/Kamipelli position and the other was to create a separate offence akin to that proposed by the Butler Committee and the minority on the CLRC. The new offence was one of causing harm proscribed by certain offences while deliberately intoxicated. The Consultation Paper drew wide-ranging opinion and largely due to the views of the legal profession, the Commission reversed its own position and abandoned its recommendation of the creation of a new offence on the grounds that it would be too difficult to prosecute and would unnecessarily lengthen trials. Apart from the pragmatic concerns, the substantive question of blameworthiness was not addressed. The Commission was then left with only one recommendation from its own consultation paper, namely the abolition of the Majewski rule and the adoption of the O'Connor rule. Despite strong support from the legal profession and academics, the Commission opted against its own recommendation. It was influenced by the concern expressed by judges:

The majority [of judges] believe that such an acquittal would be viewed by the public as another example of the law, and inevitably the judges who apply that law, being out of touch with public opinion and public perception of fault. There can be little doubt that in such circumstances the media would side with the outraged victim, …

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150 The list of offences to which this new statutory offence could attach were homicide, bodily harm, criminal damage, rape, indecent assault, buggery, assaulting a constable, resisting or obstructing a constable in the execution of his or her duty, certain offences under the *Public Order Act* 1986 (UK) and causing danger to road users. See, United Kingdom Law Commission, *Legislation the Criminal Code: Intoxication and Criminal Liability*, Consultation Paper No 127 (1993) para 6.41.


Australia

The first Australian report on intoxication and the law was published by the Victorian Law Reform Commission in 1986. The Commission considered the special offence of culpable intoxication but rejected it for similar reasons to those given by the United Kingdom Law Commission. Additionally, the Victorian Law Reform Commission also expressed reservations about the morality of turning an innocent activity of consuming alcohol into a potentially unlawful one. The recommendation was to preserve the common law as stated in O'Connor. The next major review of the law of intoxication occurred at the Federal level.

The Criminal Law Officers Committee, responsible for drafting the Model Criminal Code 1995 (Cth) published a report in 1992, which considered the law relating to intoxicated offenders. The Committee recommended that O'Connor continue to state the law. The Standing Committee of Attorney's General refused to accept the Criminal Law Officers Committee's recommendation on intoxication and instead instructed the committee to draft a bill effectively codifying Majewski. That bill became the Criminal Code Act 1995 (Cth). The most recent consideration of intoxication and the criminal law was again undertaken by the Victorian Law Reform Commission. The commission was charged to review the law in light of a recent decision.

159 The acquittal of an ACT football player of assault charges in 1997 on the grounds that self induced intoxication had raised doubts as to his mental state was roundly criticised by the public. SC Small v Noa Kurimalawai, ACT Magistrate's Court, No CC97/01904, 22 October 1997. The various state governments immediately reviewed the law relating to intoxication.
This latest report contains some very practical recommendations. The Commission, however, did not attempt to harmonise the legal doctrines with the policy aspirations and community expectation. In fact, far from trying to harmonise moral and legal considerations, the commission drew a very sharp distinction between “moral blameworthiness” and “breaking the law”. The committee that drafted the report concluded its discussion of the separate offence of culpable intoxication with this statement:

The committee supports the view that to create an offence of committing a dangerous or criminal act while intoxicated is simply legislating against stupidity and that it is punishing people for moral irresponsibility, that is consuming alcohol or drugs, when the real focus of the law should be on “punishing people for their breaches of the law”. [footnotes omitted]

This conclusion misses the very point that criminal culpability should be based on moral blameworthiness. The community has loudly protested that the law is not reflecting community expectations. The legal response has been to separate moral responsibility and legal responsibility, exactly the opposite to what should in fact be done. Majewski tried to resolve this tension by insisting on moral responsibility although the language of the judgment conceals this. The normative basis of the Majewski decision needs to be made explicit and integrated into the law.

RECONCILING PRINCIPLE AND POLICY: LEARNING FROM THE CANADIAN DEVELOPMENTS

Alan Dashwood, relying on the work of Ronald Dworkin has argued that there are four ways in which a court may deal with a conflict between a legal principle and a particular rule:

- by demonstrating that the alleged general principle does not exist

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- by demonstrating that the rule is an exception to the general principle
- by demonstrating that the general principle and or the rule may be interpreted in such manner as to avoid conflict
- by demonstrating that the general principle merely indicates a policy preference.

The first and fourth options are clearly not tenable since the mens rea principle is at the core of the criminal law. Exceptions as a means of justification should always remain the last resort, as an exception is an acknowledgment of the limitation of the rule. The third option offers a solution. If the general principle and the rule were reinterpreted in light of the normative theory, Majewski can be justified both in principle and on policy grounds. The Canadian courts have made some advances in this area. The law of intoxication, as stated by the Supreme Court of Canada in the 1994 decision of R v Daviault,163 was neither along the lines of Majewski, nor along the lines of O’Connor. Relying on the Canadian Charter of Rights and Freedoms, which insisted on principles of fundamental justice, as well on the emerging “moral innocence” thesis in the Supreme Court, the court devised a moderate approach to intoxication which drew from both Majewski and O’Connor.

Until 1994, the common law of intoxication in Canada was the same as Majewski, the Canadian authority being Leary v R.164 Leary was not a unanimous decision and eventually the dissenting voices found majority support in the Supreme Court in Daviault. Daviault held that evidence of intoxication could be relevant to basic intent crimes, but the decision was different to that of the Australian case of O’Connor. The Canadian Supreme Court took a conservative approach in its attempt to bridge the apparent gulf between legal principle and policy. Because of the Canadian Charter of Rights and Freedoms, the majority in Daviault was unable to apply Majewski and exclude evidence of intoxication with respect to basic intent offences. The relevant provisions of the Charter were ss7 and 11(d) which respectively provided:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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11. Any person charged with an offence has the right ...(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Daviault was convicted of sexual assault, which was a basic intent crime. He argued that he was too drunk to form a relevant mental state and that the trial judge had violated the Charter by ruling evidence of intoxication to be irrelevant. The Supreme Court allowed the appeal, holding that excluding evidence of intoxication violated the Charter on the grounds that it allowed a deprivation of liberty without due regard to the principles of fundamental justice. The principles of fundamental justice in criminal law required the prosecution to prove that the conduct was voluntary and that there was a relevant mental state. Excluding evidence of intoxication prevented the accused from raising a reasonable doubt as to the existence of either of these elements and resulted in a presumption of guilt, thereby violating both ss7 and 11(d).

The Daviault court held by a majority that the Leary/Majewski position was no longer applicable in Canada in light of the Charter. The court however did not adopt the opposite position of O'Connor/Kamipelli, instead opting for a middle ground. Relying on dicta by Wilson J in R v Bernard, the majority in Daviault held that evidence of intoxication was relevant to basic intent crimes only if it were evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. What this effectively did was to limit evidence of intoxication to the issues of voluntariness and capacity. This was markedly different from the English, Australian and New Zealand position where intoxication could negative the existence of a mental state without necessarily affecting the capacity of the individual to form a mental state.

The effect of Daviault was that for basic intent offences, evidence of intoxication did not actually go towards negating any mental state, because intoxication was only

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166 [1988] 2 SCR 833.

167 The Canadian position on intoxication with respect to specific intent offences is in line with the modern view that intoxication could negative the existence of a mental state as a matter of fact, without affecting the capacity of the individual.
relevant where the accused was effectively an automaton or insane. Where the intoxicated accused was in a state akin to insanity, it was not necessary to inquire whether the accused had a relevant mental state because it would be presumed that such a person was incapable of having a relevant mental state. Where the intoxicated accused was in a state of automatism, it was again not necessary to investigate whether the accused had the relevant mental state because the actus reus itself was not voluntary and that negated liability by failing to attribute the act to the defendant.\textsuperscript{168}

The weakness of Daviault is that it maintained the distinction between basic and specific intent, and allowed intoxication to be relevant to the latter. The strength of Daviault is its recasting of the intoxication rule with respect to basic intent offences. Cory J's approach is characteristic of Dworkin's approach to rule interpretation.\textsuperscript{169} "If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken."\textsuperscript{170} This reformulation was the Wilson compromise, explained above. The majority in Daviault did not feel it was necessary to completely overrule Leary, but merely to modify it so it did not, in their view, violate the Charter.\textsuperscript{171}

Daviault can be read as supporting the view that voluntary intoxication could provide the moral blameworthiness required for criminal culpability. For basic intent offences, intoxication was only relevant to the voluntariness of the conduct. It was not relevant to criminal fault. Therefore, in the absence of a mental state due to gross

\textsuperscript{168} The Daviault position on intoxication is geared more toward negating causal responsibility and criminal capacity, rather than negating the mental state or fault element. Cory J underscored this point in his judgment by treating the mental state that could be affected by intoxication as actually belonging to the actus reus. See in \textit{R v Daviault} [1994] 3 SCR 63 at 75.

\textsuperscript{169} See text at n 162.


\textsuperscript{171} Daviault also decided to retain the distinction between basic and specific intent on the grounds that the distinction was too entrenched in the law. Cory J referred to \textit{R v George} [1960] SCR 871; \textit{Leary v R} [1978] 1 SCR 29; \textit{Swietlinski v R} [1980] 2 SCR 956; \textit{R v Chase} [1987] 2 SCR 293; \textit{R v Bernard} [1988] 2 SCR 833; \textit{R v Quinn} [1988] 2 SCR 825. The final point to note about Daviault was that the court reversed the onus of proof with respect to intoxication in basic intent offence. The accused was required to prove on the balance of probabilities that the intoxication was not so great as to render him or her effectively insane or an automaton.
intoxication, the Canadian court was in fact holding that intoxication provided the moral blameworthiness. The reason the Supreme Court arrived at this conclusion was due to the reversed approach to criminal culpability. Instead of focusing on blame, the court focused on moral innocence. The paramount concern was that the criminal law should never hold liable the morally innocent. As was stated in *R v Theroux*:

The term mens rea, properly understood, does not encompass all of the mental elements of a crime. The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist. Mens rea, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent - those who do not understand or intend the consequences of their acts.172 [emphasis added]

An individual who voluntarily becomes so intoxicated as to be unable to control his or her actions is not morally innocent and is therefore deserving of blame. The degree of criminal culpability is a separate matter. The Canadian Supreme Court’s moral innocence thesis may well result in the recognition of a normative theory of mens rea in Canada. In *R v Creighton*173 McLachlin J said:

No person can be sent to prison without mens rea, or a guilty mind, and the seriousness of the offence must not be disproportionate to the degree of moral fault. Provided an element of mental fault or moral culpability is present, and provided that it is proportionate to the seriousness and consequences of the offence charged, the principles of fundamental justice are satisfied. ... Thus when considering the constitutionality of the requirement of foreseeability of bodily harm, the question is not whether the general rule of symmetry between mens rea and the consequences prohibited by the offence is met, but rather whether the fundamental principle of justice is satisfied that the gravity and blameworthiness of an offence must be commensurate with the moral fault engaged by that offence.174 [emphasis added]

These statements contain the hallmarks of a normative theory of criminal fault. Mental fault or moral culpability need not be one and the same, ie one is able to show moral culpability without necessarily showing mental fault. The essence of criminal culpability is to avoid the punishment of the morally innocent. There does not always have to be symmetry between mens rea and the actus reus, as long as there was moral blameworthiness. The technical correspondence requirement of particular mental

172 [1993] 2 SCR 5 at 17 per McLachlin J.
174 [1993] 3 SCR 3 at 54.
states for particular crimes, characteristic of the descriptive theory of mens rea, was rejected in this decision. The Canadian courts have recognised that moral blameworthiness cannot always be properly ascertained within the straightjacket of the orthodox mens rea doctrine.\textsuperscript{175}

CONCLUSION

This chapter has sought to demonstrate the weakness of the descriptive theory of mens rea by examining the criminal law of intoxication. The availability of self-induced intoxication as a defence has had a chequered history. The descriptive approach to fault gained ascendency in the latter part of the nineteenth century due to the rise of scientific knowledge and the influence of liberal positivism. This forced the courts to permit evidence of self-induced intoxication to be used to raise doubts as to the existence of a particular mental state. This development was viewed with concern by judges and commentators who viewed self-induced intoxication to the point of being unable to control one's actions to be morally blameworthy. Nevertheless, the descriptive theory of mens rea resulted, in some cases, in the acquittal of individuals who were morally blameworthy.

Community concern and public policy considerations resulted in the English courts restricting the availability of intoxication as a defence. Lacking a principled approach, the courts limited the defence by creating arbitrary distinctions. Thus, the House of Lords, in \textit{Majewski}, held that intoxication was relevant to specific intent offences but not to basic intent offences. Unprincipled distinctions were drawn between legitimate and illegitimate intoxicating substances. The attempt to rationalise the \textit{Majewski} decision within the existing framework of descriptive mens rea failed. The effort resulted in an incorrect extension of recklessness and relied on the above-mentioned arbitrary distinctions. The court in \textit{Majewski} acknowledged that the strict

\textsuperscript{175} In 1995 the Canadian Parliament, in response to public pressure, overruled \textit{Daviault} and reintroduced \textit{Leary}, albeit in a very limited form. \textit{Daviault} still applied with respect to all offences, except for offences against the person, where the \textit{Leary} approach prevailed and evidence of intoxication was not relevant if the offence were a basic intent offence. \textit{Canadian Criminal Code} s33.1
doctrine of the law was being abandoned in favour of a broader concern of justice, ie the morally blameworthy should not escape criminal liability.

According to *Majewski* self-induced intoxication provided the required blameworthiness in the absence of a subjective mental state. Numerous law reform commissions in several jurisdictions have considered creating a special offence of culpable intoxication. Even though this special offence was never recommended, there was considerable support for the view that self-induced intoxication to the point of losing control, was morally blameworthy. Instead of continuing with the current descriptive theory of mens rea, the courts should have recognised that criminal fault required an expressly recognised normative dimension. That normative dimension, as shown in this and the preceding three chapters, should be an evaluation of the moral blameworthiness of the accused. To restate the fundamentals of the normative theory of mens rea:

[The normative theory of mens rea] amounts to a reproach of the wrongdoer for performing a certain act, despite the fact that he was aware of its wrongful character, and *despite the fact that he was personally in a position to refrain from his unlawful conduct*.  

[emphasis added]

The intoxicated offender can fairly be reproached because the offender knew or ought to have known that by voluntarily intoxicating him or herself, it was possible that he or she could cause harm or commit an offence. The Supreme Court of Canada has recognised this normative element of mens rea:

The term mens rea, properly understood, does not encompass all of the mental elements of a crime. The actus reus has its own mental element; the act must be the voluntary act of the accused for the actus reus to exist. Mens rea, on the other hand, refers to the *guilty mind*, the *wrongful* intention, of the accused. Its function in criminal law is to prevent the conviction of the *morally innocent* - those who do not understand or intend the consequences of their acts.  

[emphasis added]

The Canadian approach to intoxication with respect to basic intent offences showed that the mental element that could be negatived by intoxication was that which belonged to the actus reus. The mental element that belonged to the mens rea was in

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176 C R Snyman, "The Normative Concept of Mens Rea – A New Development in Germany" (1979) 28 International and Comparative Law Quarterly 211 at 214.

177 *R v Theroux* [1993] 2 SCR 5 at 17.
fact replaced by the moral blameworthiness of self-induced intoxication. An individual who lost control over his or her mental state and caused harm was not morally innocent and was therefore deserving of criminal liability, despite the absence of a technical mental state at the time of the offence. The degree of blameworthiness of the intoxicated offender was a separate question to whether or not the offender deserved to be blamed. Recall the distinction drawn in Chapter I between the “threshold” and “taliones” questions. Self-induced intoxication was sufficient to cross the “threshold” question of criminal culpability. It may be that the intoxicated offender is not as culpable as the sober offender, or in some cases may be more culpable. That, however, should be treated as a separate matter, relevant to the extent of punishment or other appropriate sanctions.

While the descriptive theory of mens rea was capable of attributing moral blameworthiness in most cases, it failed in the difficult categories, particularly where the subjective mental state was expressly excluded from consideration (strict liability) or where there were doubts as to the subjective mental state due to the defendant’s prior conduct (voluntary intoxication). The normative approach, by expressly focusing on moral blameworthiness and adopting an objective evaluation of the defendant’s culpability, provided a more sophisticated model of criminal fault. The intoxication cases also demonstrate the value of the distinction between “threshold” question of culpability and “taliones” questions of culpability. Thus, the intoxication cases have provided a perfect case study for the central arguments and themes developed in this thesis.