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Principles of Criminal Law

Andrew Cornford

Abstract: In *Principles of Criminal Law*, Andrew Ashworth defends a range of principles that he argues should govern the scope and conditions of criminal liability. This chapter examines Ashworth's arguments for these principles, their significance in their context, and their subsequent influence on criminal law scholarship. It begins by identifying Ashworth's overarching concerns with retributive justice and liberal autonomy, and his scepticism towards policies of social defence. It then turns to his arguments for, and applications of, a range of more specific principles: those relating to minimum criminalisation, fair labelling, subjective fault, and the rule of law. Overall, it is argued, the retributive aspects of Ashworth's normative vision have been more influential than its liberal aspects. The chapter also reflects on the book's prioritisation of principle over policy, and on its distinctive 'middle range' approach to normative theorising.

Keywords: criminal law; criminalisation; fair labelling; subjective fault; rule of law

The Work

Andrew Ashworth is the preeminent scholar of English criminal law of recent generations. He is the author of leading works on numerous aspects of criminal law and justice, including sentencing,[1] procedure,[2] and the impact of human rights law.[3] His best known and most influential work, however, is *Principles of Criminal Law*, which examines the scope and conditions of substantive criminal liability. Six editions of the book were published with Ashworth as sole author, between 1991 and 2009; Jeremy Horder then took over as co- and later sole author.[4] The first and last of Ashworth's sole-authored editions will be our

[1] A Ashworth, *Sentencing and Criminal Justice* (1st edn, Weidenfeld and Nicolson 1992). For the most recent edition, see A Ashworth and R Kelly, *Sentencing and Criminal Justice* (7th edn, OUP 2021).
[2] A Ashworth, *The Criminal Process: An Evaluative Study* (1st edn, OUP 1994). For the most recent edition, see L Campbell, A Ashworth and M Redmayne, *The Criminal Process* (5th edn, OUP 2019).
[3] B Emmerson and A Ashworth, *Human Rights and Criminal Justice* (Sweet and Maxwell 2001); A Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell 2002).
[4] Horder is another eminent scholar of English criminal law. However, he is also a prominent critic of Ashworth

reference points in what follows.[5]

Ashworth's main aim in *Principles* is 'to examine some of the principles and policies at work in the shaping of the criminal law'.[6] He draws these principles and policies from the work of courts, legislators, academic commentators, and law reform bodies.[7] His project, however, is not descriptive or historical but normative:[8] he asks whether these principles and policies are 'soundly based' or whether 'other principles and policies… would be more appropriate'.[9] He acknowledges that, in reality, criminal law is shaped by 'a number of conflicting social, political, and historical factors'.[10] His goal is rather to identify those factors that *should* shape the law, some of which are not currently recognised or immanent within it.[11]

Ashworth focuses specifically on what he calls 'middle-range' principles and policies. These 'link the rules of the criminal law to views about its social function', and to other matters of moral and political principle.[12] *Principles*, in other words, is not a work of applied philosophy. But nor is it an introductory text: it 'does not purport to be a textbook', and is explicitly selective in its description of the law.[13] This point is worth emphasising. *Principles* covers similar areas of the law to a conventional criminal law textbook, and particularly since the second edition, it has contained 'more citation and discussion of statutes and case law, in the hope that it will be suitable for use by teachers and students'.[14] From the third edition onwards, the book has also more closely resembled a textbook in appearance and length.[15] For Ashworth, however, the principles of criminal law, and not its rules, have remained the main object of analysis.

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on some of the key issues that *Principles* covers. In his own words, he was given 'a free hand to re-write the book', and has made 'major changes' to the material on principles: J Horder, *Ashworth's Principles of Criminal Law* (8th edn, OUP 2016) v-vi. I therefore restrict my focus here to the work as Ashworth developed it.

[5] A Ashworth, *Principles of Criminal Law* (1st edn, OUP 1991), hereafter *Principles 1*; A Ashworth, *Principles of Criminal Law* (6th edn, OUP 2009), hereafter *Principles 6*.

[6] *Principles 1* v; see also *Principles 6* v.

[7] *Principles 1* v; *Principles 6* v.

[8] *Principles 1* 54; *Principles 6* 20-21, 45.

[9] *Principles 1* v.

[10] *Principles 1* 11.

[11] *Principles 1* v; *Principles 6* v-vi.

[12] *Principles 1* vi-vii. Interestingly, there is no equivalent discussion in the later edition.

[13] *Principles 1* v-vi, 18; *Principles 6* 20.

[14] A Ashworth, *Principles of Criminal Law* (2nd edn, OUP 1995) v.

[15] A Ashworth, *Principles of Criminal Law* (3rd edn, OUP 1999); hereafter *Principles 3*. This was the first edition of *Principles* to be published effectively as a textbook by Oxford University Press, rather than as part of its more concise Clarendon Law Series. It and subsequent editions have also been around 50 to 100 pages longer, and less compact in size, than *Principles 1*.

Ashworth's starting point is to see criminal law as a distinctive kind of legal regulation. Criminal liability involves censure and punishment, and 'carries the strong implication of "ought not to do"'.[16] Justifying criminalisation means justifying these aspects of criminal liability, especially potential conviction and sentence.[17] One justifying aim of criminal law and sentencing, Ashworth thinks, is general deterrence.[18] But another derives from a 'basic relationship of justice':[19] punishment is justified (only) as a 'deserved response to culpable wrongdoing'.[20] This claim has significant implications for Ashworth. Most importantly, it 'suggests that the criminal law… should be concerned only with major wrongs'.[21] But also, 'it is a major function of the criminal law… to grade offences and label them proportionately'.[22] These thoughts motivate Ashworth's views about such core matters as criminalisation, fair labelling, and criminal fault, as we shall see below.

Alongside these retributive aspects, Ashworth's vision of criminal law is also strongly liberal. One of his core principles is *individual autonomy*: we are responsible agents who are capable of choosing freely, and the law should treat us with corresponding respect.[23] Again, this principle has significant implications. Most obviously, we should be criminally liable only for what we choose to do,[24] and we should not be liable where our freedom or capacity to choose are significantly impaired.[25] Furthermore, we should not become liable in respect of others' autonomous choices,[26] and the law should accord 'great importance to liberty and individual rights'.[27] These latter concerns are again important in Ashworth's 'minimalist' approach to criminalisation, as we shall later see.

These liberal and retributive principles tend, on Ashworth's account, to favour narrowing the scope of criminal liability. But other principles tend to favour broadening it:

[16] *Principles 1* 1; *Principles 6* 1.
[17] *Principles 6* 19-20.
[18] *Principles 1* 11; *Principles 6* 16-17. In the earlier edition, Ashworth describes deterrence as *the* 'overall or justifying aim' of criminal law and sentencing, whereas in the later edition, he gives desert equal billing.
[19] *Principles 1* 14.
[20] *Principles 6* 17.
[21] *Principles 6* 17.
[22] *Principles 1* 16; *Principles 6* 20.
[23] *Principles 1* ch 4.2; *Principles 6* ch 2.1.
[24] See the discussions below of subjective fault and rule of law principles, which on Ashworth's account are grounded mainly in this concern.
[25] See, in particular, Ashworth's discussions of involuntariness and excusatory defences: *Principles 1* chs 4.4, 4.5, and 6; *Principles 6* chs 4.2, 4.3, 5.2, and 6.
[26] This aspect of autonomy is the main driving force in e.g. Ashworth's discussion of causation in criminal law: *Principles 1* ch 4.6; *Principles 6* ch 4.5.
[27] *Principles 6* 24.

most importantly, the principle of *welfare*. According to this principle, states may sometimes use the criminal law to protect collective goals and the practices that serve them, even when this infringes the principle of autonomy. While Ashworth's feelings towards the welfare principle are complex, he clearly endorses it in theory.[28] He is particularly open to arguments from *social responsibility*: criminal law can legitimately require us to act for the good of others, provided that the good is sufficiently important and the impact on autonomy sufficiently small.[29]

Ashworth is much less open, by contrast, to arguments from what he calls *social defence*. These arguments are a disparate group. Some correspond to what others would call *crime control* arguments: we should avoid creating obstacles to conviction of the guilty, which might undermine criminal law's deterrent effect.[30] Others treat criminal liability as a way of controlling dangerous persons,[31] or of symbolically 'doing something about' conduct that creates social concern.[32] What unites these arguments is, perhaps, Ashworth's reasons for doubting them. The preventive effects that they envisage are often illusory, he thinks, or could be achieved by alternative means. More fundamentally, these effects do not justify measures that disrespect autonomy or lead to undeserved punishment. Indeed, if *Principles* has a single main argument, it is this: social defence arguments must be carefully scrutinised, and fairness to individuals should normally take priority.[33]

The Context

As its title suggests, *Principles* is distinguished by the principles of criminal law that Ashworth identifies and examines. These are set out in the book's early chapters, which, as

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[28] See e.g. *Principles 1* 24-25; *Principles 6* 26-27. Ashworth's main concerns are not with the principle itself, but with how easily it gets deployed in favour of restricting individual rights and liberties. By the time of *Principles 6*, he is more explicit in giving autonomy priority over welfare, and in arguing that some individual rights should not be balanced against the collective good.

[29] The clearest example is Ashworth's famous analysis of liability for omissions: *Principles 1* 56-57, 91-93, 369-371; *Principles 6* 54-56, 98-101, 408-410. But see the discussion of fault principles, below, for another place where social responsibility arguments play an important role.

[30] Ashworth sees such arguments as the primary rationale for e.g. strict liability and restrictions on various excusatory doctrines: *Principles 1* chs 5.3(a) and 6; *Principles 6* chs 5.5(a) and 6.

[31] The best example here is Ashworth's discussion of insanity, automatism, and the boundary between them: *Principles 1* chs 4.5 and 6.2; *Principles 6* chs 4.2 and 5.2.

[32] *Principles 1* 55; *Principles 6* 53.

[33] In the first edition, Ashworth explicitly concludes his discussion of principles and policies in criminal law with this claim: *Principles 1* 76-77.

Ashworth says, 'have no counterparts in standard works on the criminal law'.[34] As we just noted, he locates his 'middle range' approach between two others: the doctrinal analyses of textbooks and analyses in terms of applied philosophy. These alternative approaches provide useful orientation for understanding the context in which *Principles* was first published.

Consider first the tradition of criminal law textbooks and treatises. By the latter half of the twentieth century, these had assumed their now-familiar form.[35] They covered specific areas of the substantive criminal law: namely, the 'core' offences, such as homicide, property offences, and offences against the person; and 'general part' doctrines, such as defences, complicity, inchoate liability, and principles of *actus reus* and *mens rea*. Principles of fault, derived from the general part, were also used as the basis for critique of the law. In England, the leading exemplar of this approach was JC Smith and Brian Hogan's *Criminal Law*, which was in its sixth edition when *Principles* was first published.[36] In some ways, *Principles* resembles such works, in its similar coverage and employment of general principles of fault.

In other ways, however, *Principles* differs significantly from these works of doctrinal criminal law. Most importantly, the principles, and not the legal rules, are Ashworth's main focus. He gives an explicit, critical account of these principles in the early chapters, and applies them throughout the rest of the book. Correspondingly, as we have seen, Ashworth insists that *Principles* is not an introductory text. His account of the legal rules is thus deliberately selective and lacking in detail. Furthermore, Ashworth's principles address a broader range of issues than the traditional textbooks do. Besides principles of fault, he also defends principles of criminalisation and principles relating to procedural fairness and the rule of law. *Principles* remains distinct from most other widely used criminal law texts in all these respects.[37]

Consider next philosophical analyses of criminal law. These seek to resolve issues of principle in criminal law using insights from such fields as moral philosophy and the philosophy of action. Scholarship of this kind has mushroomed since *Principles* was first

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[34] *Principles 1* vi.

[35] N Lacey, 'Principles, Policies, and Politics of Criminal Law' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 20-23; L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (OUP 2016) 149-153.

[36] JC Smith and B Hogan, *Criminal Law* (1st edn, Butterworths 1965); JC Smith and B Hogan, *Criminal Law* (6th edn, Butterworths 1988).

[37] The notable exception is AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (1st edn, Hart 2000); for the most recent edition, see JJ Child et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (8th edn, Hart 2022). Simester and Sullivan's book resembles Ashworth's in its theoretical depth and

published, but some early works are among Ashworth's main reference points. The most notable are HLA Hart's *Punishment and Responsibility*[38] and Antony Duff's work on *mens rea*.[39] Ashworth also discusses the debate among legal and political philosophers over the 'legal enforcement of morality': roughly, whether conduct can legitimately be prohibited simply because society regards it as immoral, or whether it must also be harmful to persons other than the actor.[40] This debate was not originally about criminal law specifically, but was the main touchstone for principled discussions of criminalisation prior to Ashworth's book.

These analyses share Ashworth's concern with the principles that ought to underlie the criminal law. They differ, however, in their approach to this issue. Again, Ashworth's is a 'middle range' approach: he is interested in particular principles that are implied by his liberal and retributive philosophical stances, which he draws mostly from legal sources and discourse. He does not purport to defend those stances, and he pays much closer attention to legal doctrine and policy than philosophers of law typically do. Also, his interests are again more wide-ranging than those of most of these philosophers. To this point, the philosophy of criminal law had, like the textbooks, focused mostly on principles relating to the general part. Aside from the 'legal enforcement of morality', it was not yet concerned with criminalisation more broadly.

Perhaps the only notable English-language work to occupy this space prior to *Principles* was George Fletcher's *Rethinking Criminal Law*. Like Ashworth's book, Fletcher's was 'neither a hornbook nor a treatise, but a reformist, critical work'.[41] It also proceeded from a retributive understanding of criminal law's justification and limits that the book itself did not defend.[42] However, *Rethinking* differs significantly from *Principles* in its style, length, source materials, and ultimate agenda.[43] It also focused mainly on principles derived from criminal law's general part, like the other previous works mentioned above.

Ashworth is also unique among his contemporaries as an expert in neighbouring fields: for example, evidence, procedure, sentencing, and human rights law. This expertise

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breadth, although it is much heavier on doctrinal detail.

[38] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (OUP 1968).

[39] This work culminated in a monograph published shortly before *Principles*: RA Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (Blackwell 1990).

[40] The modern touchstones are HLA Hart, *Law, Liberty, and Morality* (OUP 1963) and P Devlin, *The Enforcement of Morals* (OUP 1965). For a detailed account of the debate and its legacy, see Nicola Lacey's chapter in this volume.

[41] GP Fletcher, *Rethinking Criminal Law* (Little, Brown 1978) xxiii.

[42] Ibid xix-xxi.

informs his analysis of the substantive law, which some see as another distinguishing feature of *Principles*.[44] *Principles* certainly has clear links to Ashworth's work on proportionate sentencing.[45] It has given an increasingly prominent role to human rights law:[46] while later editions continue to emphasise that the book is primarily normative rather than descriptive, they give 'considerable prominence to the European Convention on Human Rights as a source'.[47] The book has also always included a discussion of the criminal process, and of how the 'law in action' differs from the 'law in the books'.[48] That said, this discussion has always concluded with Ashworth setting it aside in favour of a focus on doctrine.[49] And while some of his principles explicitly implicate the roles of actors in the criminal process,[50] most of them do not. In short, while *Principles* doubtless reflects Ashworth's deep understanding of the context in which criminal law operates, we might debate how far this context influences the arguments that he makes.

The Significance

Not only are Ashworth's principles the most distinctive feature of *Principles of Criminal Law*; they are also its most influential. Ashworth discusses them under three headings: the range of the criminal law, the conditions of liability, and the rule of law and fair procedures. A further principle – the principle of fair labelling – does not fit neatly into any of these categories,[51] and is worth considering separately. The following four sections examine the influence of these principles on the study of criminal law, in approximate order of their significance.

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[43] See Lindsay Farmer's chapter in this volume for detailed discussion.
[44] See e.g. Lacey (n 35) 26.
[45] Much of which is the fruit of a long-term collaboration with Andreas von Hirsch: see e.g. A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005).
[46] Since the Human Rights Act 1998, the book has explicitly attempted 'to integrate discussion of the relevant Convention provisions and case-law where relevant': *Principles 3* v.
[47] *Principles 6* 21.
[48] *Principles 1* 4-10; *Principles 6* 9-16.
[49] *Principles 1* 18; *Principles 6* 21.
[50] Notably those relating to the rule of law and fair procedures, discussed below.
[51] Ashworth discusses it under the third heading in *Principles 1*, and under the second in *Principles 6*.

The Range of the Criminal Law: Criminalisation and Minimalism

The most influential aspect of *Principles* is Ashworth's 'minimalist' account of criminalisation.[52] The 'core' or 'chief concern' of criminal law, he says, 'is behaviour that represents a serious wrong against an individual or against some fundamental social value'.[53] This claim is explicitly not descriptive or explanatory. In actuality, Ashworth thinks, criminal law's scope is explained by politics, and not by criteria of wrongfulness or seriousness.[54] Rather, the claim is normative: it follows from a set of principles that, he argues, *should* guide decisions about what conduct to criminalise. What are these principles, and where does Ashworth derive them from?

The answer begins where *Principles* in general does. To criminalise conduct, Ashworth says, is 'to declare that it is a public wrong that should not be done, to institute a threat of punishment in order to supply a pragmatic reason for not doing it, and to censure those who nevertheless do it'.[55] To justify criminalisation is thus to justify such prohibition, punishment, and censure.[56] What might supply the required justification? Part of Ashworth's answer is a familiar liberal one. He endorses (a version of) the harm principle: generally, we have reason to criminalise conduct only if it harms persons other than the actor.[57] But given criminal law's distinctive features, harmfulness is not enough. Criminal conduct must also be a *wrong*: specifically, a wrong that is *public*, in the sense that the state can legitimately take responsibility for censuring and punishing it.[58]

A related principle is the need to consider alternatives to criminalisation. Non-serious wrongs, Ashworth argues, are often adequately addressed through civil or administrative

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[52] The main elements of the minimalist approach have been present in *Principles* throughout its publishing history. However, they evolve into a much more coherent approach by the time of the sixth edition. (Indeed, this edition involved 'considerable re-writing' of the chapter on criminalisation: *Principles 6* v.) In the first edition, the relevant points emerge from a more general discussion of criminalisation theory, and from a wider discussion of offence seriousness than appears in subsequent editions: see generally *Principles 1* ch 2. Thus, while I refer to passages in both editions here, I mainly follow the presentation of the sixth.

[53] *Principles 6* 1; cf. *Principles 1* 19.

[54] See e.g. *Principles 1* 1-2, 55; *Principles 6* 1-2, 39. The argument is more fully developed in another famous article: A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 Law Quarterly Review 225. There, Ashworth endorses seriousness of wrongdoing as a criterion for what conduct should be criminalised, while also arguing that no content-focused criteria can describe what conduct is in fact criminalised.

[55] *Principles 6* 22.

[56] *Principles 6* 32; cf. *Principles 1* 31.

[57] *Principles 6*, 27-28. Correspondingly, Ashworth rejects the criminalisation of merely immoral or offensive conduct as inconsistent with autonomy – although he accepts some paternalistic criminalisation for reasons of welfare. See *Principles 1* 22-27; *Principles 6* 34-37.

regulation, or even by non-legal means.[59] Again, criminal law's distinctive censuring and punitive qualities are key to this argument. In the case of serious wrongs, these qualities provide reasons for choosing criminalisation over other responses. Hence, Ashworth acknowledges, criminalisation can be the right response to newly recognised or previously under-acknowledged harms.[60] By contrast, these qualities tell against the use of the criminal law for purely preventive or regulatory reasons. Although Ashworth thinks that deterrence is a legitimate aim of criminal law, prevention can also be achieved by other means. These may thus be preferable for dealing with non-serious wrongs, where the need for censure and punishment is less urgent.[61]

These constraints are part of a broader framework that, at least in later editions of *Principles,* is clearly inspired by the European Convention on Human Rights. In these later editions, Ashworth advocates specific attention to the freedoms protected by the Convention, especially Articles 8 to 11.[62] As we have seen, the minimalist approach admits only a limited range of justifications for criminalisation, and requires legislators to consider alternative ways of achieving their aims.[63] It also requires them to consider the likely effects of criminalisation: conduct should not be criminalised if this would be ineffective, or if it would cause more harm than it would prevent.[64] Although Ashworth does not put it this way, his principles thus effectively require that criminalisation be subjected to a proportionality test. In this way, minimalism embodies the more general spirit of Convention jurisprudence.

Principles applies this minimalist approach to several core areas of English criminal law. Ashworth raises concerns about the criminalisation of trivial wrongdoing in contexts including battery,[65] property crime,[66] complicity,[67] and conspiracy.[68] He also draws attention

[58] *Principles 6* 1-2, 29-30.
[59] *Principles 1* 28-30; *Principles 6* 32-33. Interestingly, *Principles* has mostly not addressed the question of how we should determine the seriousness of an offence; only the first edition contains an extended discussion, which draws heavily on work relating to proportionate sentencing: see n 52 above.
[60] *Principles 1* 55-56; *Principles 6* 53-54. Given this aspect of Ashworth's view, I think it is misleading to describe him – as he describes himself in *Principles 6* – as subscribing to the idea of criminalisation as a 'last resort'.
[61] Ibid. The argument is developed more fully in A Ashworth, 'Conceptions of Overcriminalization' (2008) 5 Ohio State Journal of Criminal Law 407.
[62] *Principles 6* 31-32. Ashworth acknowledges that, in reality, the Convention has had only a limited impact on the substantive criminal law: *Principles 6* 52.
[63] Ashworth refers to this principle using the human rights language of 'subsidiarity': *Principles 6* 33.
[64] *Principles 1* 27-28; *Principles 6* 33-34.
[65] *Principles 1* 282-283; *Principles 6* 304.
[66] *Principles 1* 358-360; *Principles 6* 399-401.
[67] *Principles 1* 391-392; *Principles 6* 433-434.

to issues of criminalisation beyond the core. One important example is regulatory offences. For Ashworth, these offences are sometimes serious enough to warrant criminalisation; however, they are too often created for 'reasons of expediency', without regard to their seriousness or the possible alternatives.[69] Another example is the criminalisation of 'remote harms': that is, of conduct that is not harmful in itself, but that may lead or contribute to harm in future. Ashworth advocates additional constraints on criminalisation in this context, derived from the principle of autonomy.[70] Although both examples are discussed only briefly in *Principles*, they demonstrate the wider potential significance of the minimalist approach.

To readers today, Ashworth's principles of criminalisation may sound modest or unremarkable. If so, that only demonstrates the depth of their influence on how criminal law scholars in the English-speaking world now think and write about criminalisation. When *Principles* was first published, this topic was barely on the agenda of these scholars. What little discussion there was concerned the 'legal enforcement of morality', as we noted above. Yet not only did *Principles* help to put criminalisation on the scholarly agenda; it also encouraged a way of thinking about it that focuses on criminal law's distinctive features, especially liability to censure and punishment. Criminalisation theory has since become a sub-field in its own right, and Ashworth's way of thinking has become its orthodoxy.

The most important work in this sub-field is *Overcriminalization*, by the American legal philosopher Doug Husak.[71] This book is often seen as the first sustained attempt to develop a normative theory of criminalisation, and its account is strikingly similar to Ashworth's. Husak himself names Ashworth as his only real forebear.[72] He likewise begins with the thought that criminalisation matters primarily because it creates liability to punishment.[73] Indeed, he argues that we have a *right* not to be punished, and that criminalisation must be justified as an infringement of this right[74] – a framing that Ashworth in turn adopts in later editions of *Principles*.[75] For Husak, like Ashworth, such a justification requires at least that the conduct concerned is culpably wrongful and deserving of state

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[68] *Principles 1* 411-412; *Principles 6* 452.
[69] *Principles 1* 20-21.
[70] *Principles 6* 38-39. For further development of these special constraints, see A Ashworth and L Zedner, *Preventive Justice* (OUP 2014) ch 5.
[71] D Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2007).
[72] Ibid 60.
[73] Ibid 3.
[74] Ibid 95-103.
[75] *Principles 6* 22.

censure and punishment.[76] And he likewise argues for further constraints inspired by individual rights law. These include that criminalisation must actually advance a legitimate state interest, and that no less restrictive means is available to advance that interest.[77] Even Husak's name for his theory – minimalism – is borrowed from Ashworth.[78]

Other major points of reference in the criminalisation theory literature include works by Antony Duff,[79] Michael Moore,[80] Victor Tadros,[81] and Andrew Simester and Andreas von Hirsch.[82] While these are less striking in their similarity to Ashworth's account, they share some core commitments and embody a similar way of thinking. Perhaps most notably, all share the familiar starting point: that to criminalise is to prohibit, and to create liability to state censure and punishment. All thus agree that what we may criminalise is importantly related to what the state may prohibit, censure, and punish.[83] The exact implications of these claims are, unsurprisingly, contested. Is the state properly concerned with all wrongdoing or only a subset?[84] Is there an absolute constraint against criminalising non-wrongful conduct, or can this sometimes be justified?[85] In the grand scheme of things, however, these are internecine disputes. On all these accounts, wrongfulness limits legitimate criminalisation in some significant way.

Two other broad similarities to Ashworth's and Husak's work are worth noting. First, aptness for censure and punishment is seen not only as a constraint on criminalisation but also as a justification for it. Some theorists – particularly self-identified 'legal moralists' – say as much explicitly.[86] Others give more pluralistic accounts of what might justify criminalisation, but, like Ashworth, see censure and punishment as key in the case of serious

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[76] Husak (n 71) ch 2.
[77] Ibid ch 3.
[78] Ibid 60.
[79] RA Duff, *The Realm of Criminal Law* (OUP 2018). See also his influential earlier discussion in RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) chs 4 and 6.
[80] MS Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 1997) chs 16 and 18.
[81] V Tadros, *Wrongs and Crimes* (OUP 2016).
[82] AP Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011).
[83] Duff, *The Realm of Criminal Law* (n 79) chs 1 and 2; Moore (n 80) ch 16; Tadros (n 81) ch 9; Simester and von Hirsch (ibid) chs 1 and 2.
[84] For the former view, see Moore (ibid); for the latter, see generally Duff (ibid) and Simester and von Hirsch (ibid).
[85] For discussion, see Duff (ibid) ch 2 and Tadros (n 81) ch 6. I have sided with the latter view elsewhere: A Cornford, 'Rethinking the Wrongness Constraint on Criminalisation' (2017) 36 Law and Philosophy 615.
[86] See e.g. Moore (n 80) ch 16; Duff (ibid).

wrongs.[87] Second, there are further considerations that should limit the scope of the criminal law. Some doubt that these should take the form of constraining principles;[88] but all agree that we must be prepared to justify criminalisation in view of its alternatives and likely negative effects.[89] The differences among such accounts may thus be less significant than they at first appear.[90]

No alternative tradition in criminalisation theory has yet emerged that disputes this new orthodoxy. However, it is worth mentioning some developing lines of critique, which are loosely united by their scepticism about the orthodox linkage between criminalisation and retributive punishment. One is historical in nature, and is exemplified in the work of Lindsay Farmer. Farmer takes Ashworth as his exemplar of a 'neo-classical' approach to criminal law, which links its proper scope primarily to its function of retributive punishment.[91] This linkage, Farmer argues, is a distinctly contemporary one; in earlier times, criminal law was thought to have other functions, which had different implications for its proper scope.[92] Another type of critique draws on normative political theory, and is exemplified in the work of Vincent Chiao. Like Farmer, Chiao denies that retributive punishment is the primary function of criminal law. Rather, criminal law should be evaluated by reference to whatever principles we apply to public institutions in general.[93] It follows that, *contra* Ashworth, the proper scope of the criminal law cannot be judged by reference to a 'core' of serious wrongs.[94]

The Principle of Fair Labelling

Another hugely influential aspect of *Principles* is Ashworth's principle of *fair labelling*. This principle requires that 'widely felt distinctions between kinds of offences and degrees of

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[87] See e.g. Tadros (n 81) ch 9. Simester and von Hirsch apparently deny that the wrongfulness of conduct provides any kind of positive reason for its criminalisation, although it is questionable how deeply committed they are to this claim: see J Stanton-Ife, 'What Is the Harm Principle For?' (2016) 10 Criminal Law and Philosophy 329.

[88] See e.g. Duff, *The Realm of Criminal Law* (n 79) ch 6; Tadros (n 81) ch 6.

[89] See e.g. Duff (ibid) 280-299; Moore (n 80) ch 18; Simester and von Hirsch (n 82) ch 11; Tadros (ibid) 170-171. It is fair to say, though, that these issues have received much less attention from contemporary theorists than the others mentioned here.

[90] Cf. MS Moore, 'A Tale of Two Theories' (2009) 28 Criminal Justice Ethics 27.

[91] Farmer (n 35) 103-115.

[92] See generally ibid, especially chs 1 and 2.

[93] V Chiao, *Criminal Law in the Age of the Administrative State* (OUP 2018) ch 2.

[94] Ibid ch 5.

wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking'.[95] One justification for this principle is, Ashworth thinks, its respect for public attitudes about offence seriousness.[96] But the more important is that it ensures proportionality. Again, criminal law entails liability to censure and punishment; it must thus 'express the *degree* of wrongdoing, not simply the fact' of it.[97] The fair labelling principle ensures respect for this demand, by requiring that offenders are 'labelled and punished in proportion to their wrongdoing'.[98]

Fair labelling tends to conflict with policies of *efficient administration*. A criminal law that reflects the nature and degree of offenders' wrongdoing will tend to require a larger number of more narrowly defined offences. But police, prosecutors, and courts will all prefer fewer, broader offences: these create less potential for dispute, and allow difficult arguments about relative seriousness to be left for the sentencing stage.[99] Ashworth acknowledges that these concerns have some validity. Fair labelling is not an 'absolute injunction', and does not require any particular set of distinctions among offences. Rather, at least in Ashworth's original conception, the principle plays a primarily limiting role: it helps to ensure proportionality when 'offences with broad definitions and high maximum penalties are under consideration'.[100]

The tension between fair labelling and efficient administration – and more specifically, the critique of broad definition in serious crimes – play an important role throughout *Principles*. Ashworth foregrounds fair labelling as the main issue of principle arising in the law of homicide[101] and of physical and sexual assault,[102] and as one of the main such issues arising in relation to complicity.[103] Specific offences such as robbery[104] and indecent assault[105] are criticised for failing to reflect significant distinctions in seriousness.

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[95] *Principles 6* 78; cf. the almost identical wording in *Principles 1* 71.
[96] *Principles 1* 72; *Principles 6* 79.
[97] *Principles 1* 31; emphasis in original.
[98] *Principles 1* 72; *Principles 6* 78.
[99] *Principles 1* 73-74; *Principles 6* 80-81.
[100] *Principles 1* 72-73. The later edition is more critical of concerns about efficient administration, saying that they 'often boil down to the convenience of prosecutors': *Principles 6* 81.
[101] *Principles 1* 231-232.
[102] *Principles 1* 275; *Principles 6* 295.
[103] *Principles 1* 393; *Principles 6* 434-435.
[104] *Principles 1* 340-341; *Principles 6* 382.
[105] *Principles 1* 311-312.

The bases on which other offences are currently graded are also criticised as illogical and selective.[106]

Fair labelling also plays some less familiar roles in Ashworth's account. For example, it is invoked in favour of a wider range of more broadly defined excusatory defences. Mitigating factors, Ashworth argues, are too often accounted for through sentencing or prosecutorial discretion, where they could be recognised through the substantive law and dealt with at trial.[107] Ashworth also criticises some offences as too narrow. The old definition of rape, for example, excluded some wrongdoing that was as serious as that which it caught.[108] More generally, there are whole classes of offending that, for Ashworth, would be better treated as cases of traditional 'core' crimes. The law's distinct treatment of 'white collar' offenders, for instance, is highlighted as one of the main issues of principle with crimes of dishonesty.[109]

Again, it is difficult to overstate the influence of this aspect of *Principles*. In a later edition, Horder singles it out as 'one of… Ashworth's most significant contributions to criminal law jurisprudence'.[110] Discussions of taxonomy – of how we should label offences and divide them from one another – now play a prominent role in analyses of the substantive criminal law. Quite possibly, this would not be the case had Ashworth not introduced the idea of fair labelling. This idea, though, has had a different kind of influence to Ashworth's criminalisation principles. As we saw, those have been most influential at the level of general theory. The fair labelling principle, by contrast, has been most influential in its application to specific areas of the criminal law. The theory behind it remains relatively neglected.

The only serious attempt to address this neglect is a 2008 article by James Chalmers and Fiona Leverick.[111] Chalmers and Leverick's analysis, which is highly influential in its own right, takes Ashworth's discussion in *Principles* as its starting point. For Chalmers and Leverick, Ashworth's key insight was that fair labelling is important in ensuring fairness to offenders. However, he left open the question of exactly why this matters.[112] Chalmers and

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[106] See e.g. the discussion of non-fatal offences against the person in *Principles 1* 295-297; *Principles 6* 321-324.
[107] *Principles 1* 215-217, 239-258; *Principles 6* 226-228, 249-271.
[108] *Principles 1* 301.
[109] *Principles 1* 322-323; *Principles 6* 356.
[110] Horder (n 4) vi.
[111] J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217.
[112] Ibid 224-225. I have questioned elsewhere whether fairness to offenders, in either of the senses that Chalmers and Leverick identify, can in fact justify the fair labelling principle: A Cornford, 'Beyond Fair Labelling:

Leverick offer two answers. First, we must avoid condemning offenders wrongfully or risking public misunderstanding of their wrongdoing. Second, we must give useful information to those who make decisions based on offenders' criminal records: for example, employers and criminal justice actors. Fulfilling these demands requires both fair differentiation and accurate naming of offences. Ashworth explicitly adopts this analysis in later editions of *Principles*.[113]

What about the specific uses to which the fair labelling principle has been put? To some extent, these reflect Ashworth's concern with grading of offences in the 'core' of the criminal law. In these areas, the principle is often invoked in favour of more finely graded schemes of offences, or in defence of existing gradations. Such arguments are frequent in, among other areas, the laws of homicide, sexual offences, property offences, and non-fatal offences against the person.[114] However, the principle is also often invoked in favour of new offences. 'Fair labelling' has become a ready-made argument for distinct criminalisation of conduct that was already criminal under another description. These arguments have proved especially powerful where the conduct concerned has historically been neglected by the criminal justice system.[115] Indeed, in later editions, Ashworth identifies 'draw[ing] public attention to the wrongness' of conduct as a further justification for fair labelling.[116]

Two points are worth noting about the influence of the fair labelling principle. First, as we have just seen, it is virtually always used to argue for greater numbers of offences. Although Ashworth clearly anticipated this effect, it is questionable how far he intended it. His original understanding – that the principle acts mainly as a check on broad offences with high maximum penalties – no longer seems to be widely shared. Second, the other uses to which Ashworth puts the principle are more or less absent from subsequent literature. Very few have explored the principle's implications for mitigation in the substantive law. And it is rarely argued that traditional offences should be retained or broadened – or that newer offences should be abolished – to ensure that conduct of equal seriousness is taken equally seriously.

Offence Differentiation in Criminal Law' (2022) 42 Oxford Journal of Legal Studies 985, 991-996.

[113] *Principles 6* 78.

[114] For collections of relevant references, see Chalmers and Leverick (n 111) nn 17-25; Cornford (n 112) nn 1-6.

[115] Perhaps the most notable example is the criminalisation of domestic abuse. See e.g. V Tadros, 'The Distinctiveness of Domestic Abuse: a Freedom-Based Account' in RA Duff and SP Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005); M McMahon and P McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer 2020).

In light of these points, the theoretical neglect of the principle is unfortunate. Is it better understood as a check on broad offences, or as an all-purpose argument for a more differentiated criminal law? The question is difficult to answer without an account of the justifications, implications, and limits of fair labelling. While Chalmers and Leverick made important progress on the first of these points, the latter two remain largely undiscussed. Particularly significant here is Ashworth's portrayal of efficiency as the main factor opposing fair labelling. This unprincipled concern, it is perhaps implied, is all that counts against distinct offences of dog theft[117] or assaulting retail employees.[118] Arguably, though, this concern is connected to deeper ones, including rule of law values and risks of injustice.[119] If so, fair labelling should perhaps not be our only answer to the taxonomical questions that Ashworth rightly raised.

The Conditions of Liability: Subjective Fault and the Correspondence Principle

Ashworth famously advocates a set of what he calls 'subjective principles' of fault. These principles have a common root in the principle of autonomy: we should be criminally liable only for what we choose to do. In truth, however, they have two distinct branches: the types of fault that should suffice for criminal liability and the required relationship between conduct and fault. Ultimately, Ashworth is more strongly committed to subjectivism in the latter context than in the former, and the significance of his work in the two contexts differs correspondingly.

Consider first subjective types of fault. Ashworth argues that, generally speaking, the law should judge people based on their beliefs at the time of their conduct – rather than on the actual facts of the situation, or on what they ought reasonably to have believed. One implication of this view is the *mens rea principle*: defendants should be liable only for conduct and results that they intended or knowingly risked. Another is the *belief principle*: defendants should be judged based on the circumstances as they believed them to be. These principles relate clearly to the principle of autonomy: we choose to do only what we believe

[116] *Principles 6* 80, giving racially and religiously aggravated offences as an example.
[117] Animal Welfare (Kept Animals) Bill (2022-23) cl 43.
[118] Protection of Retail Workers (Retail and Age-Restricted Goods and Services) (Scotland) Act 2021.
[119] See generally Cornford (n 112), especially at 1002-1008.

we are doing.[120] But what are their implications for criminal law doctrine?

Ashworth's answer begins with *strict liability*: that is, criminal liability without a requirement of fault. Strict liability, Ashworth says, is rationalised mainly through social defence arguments: fault can be difficult to prove, so the subjective principles risk undermining the law's deterrent effect. For Ashworth, such arguments share the problems of social defence arguments in general. It is doubtful whether strict liability is useful from a crime control perspective: at best, it might strengthen the hand of enforcement authorities in regulatory contexts. More fundamentally, though, censure for wrongdoing is fair only if the wrongdoer was at fault for their conduct. This principle should not yield to concerns of social defence, at least in the context of more serious, stigmatic crimes.[121]

Ashworth is neither the first advocate of subjective principles nor the first critic of strict criminal liability. However, his account is notable in foregrounding both the issue of liability without fault and a concern with individual fairness. Earlier defences of subjective fault principles were often more pragmatic in character. If liability turns on choice, then people can more easily conform their conduct to the law – and so the law can deter more effectively.[122] By contrast, Ashworth emphasises the roles of *mens rea* in ensuring individual autonomy and avoiding censure of the blameless. These points, along with Ashworth's scepticism about the practical benefits of strict liability, tend to be emphasised in more recent discussions of these topics.[123]

The subjective principles also tell against the use of *objective* fault standards in criminal law. Generally, offences should require a *mens rea* of at least *subjective recklessness*: the defendant, that is, must have knowingly risked the relevant conduct or result. Ashworth criticises English law's former departures from this subjective standard. Again, his main objection is one of fairness: a subjective standard is fairer to those who are less capable of understanding the risks attached to their conduct.[124] However, he also argues that such standards fail to deal adequately with some cases: for example, those where a

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[120] *Principles 1* 128-129; *Principles 6* 74-75, 154-155.
[121] *Principles 1* 137-140; *Principles 6* 161-164.
[122] See Farmer (n 35) 97-99, 183-184.
[123] The main point of reference in recent years is AP Simester (ed), *Appraising Strict Liability* (OUP 2005), particularly the essay by Simester, 'Is Strict Liability Always Wrong?'. See also W Chan and AP Simester, 'Four Functions of Mens Rea' (2011) 70 Cambridge Law Journal 381.
[124] *Principles 1* 153-161; *Principles 6* 177-182.

person's inadvertence can be traced to an indifference to the relevant risk.[125] Ultimately, in fact, Ashworth concludes that awareness need not always be required for criminal liability, and that inattention to capacity is the real concern.[126]

Correspondingly, Ashworth conditionally supports liability for *negligence*: that is, for risk-taking of which the defendant *should* have been aware. Partly, his support reflects an argument from social responsibility. The law can fairly require citizens to take precautions to avoid risks of harm, especially where the risks are serious and the precautions are easily taken. More important for Ashworth, however, is an argument from culpability. Negligence, he thinks, can be just as culpable as subjective recklessness: again, if the risk is serious and obvious, and the defendant had the capacity and opportunity to advert to it. In such cases, negligent conduct is culpable enough to deserve punishment. Negligence liability, unlike strict liability, can thus be consistent with individual fairness.[127]

This theoretical rationale for negligence liability is applied several times in *Principles*. A notable example is the *mens rea* of rape. It should suffice for this, Ashworth argues, that one negligently failed to realise that one's partner was not consenting: the risk of harm here is serious and obvious, and a duty to seek consent is very easily fulfilled.[128] For similar reasons, Ashworth supports an expansion of liability for negligent homicide, particularly in contexts where there are widely known risks of death that should be guarded against.[129] He also at least questions whether 'reasonable belief' standards could be employed in cases of mistake more generally,[130] including mistaken beliefs in defences.[131] In short, Ashworth does endorse subjective fault principles, but these are far from absolute, and are often defeated by arguments from social responsibility and desert.

Again, *Principles* is not unique in these respects. The great textbook writers of the twentieth century famously advocated subjective standards of fault.[132] And some theorists

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[125] *Principles 1* 155-157; *Principles 6* 179-180.
[126] *Principles 1* 172-173; *Principles 6* 189.
[127] *Principles 1* 168-172; *Principles 6* 185-188.
[128] *Principles 1* 303-306; *Principles 6* 341. It is worth noting that this was a reformist argument at time of *Principles 1*.
[129] *Principles 1* 266.
[130] *Principles 1* 165-166; *Principles 6* 184.
[131] *Principles 1* 205-207; *Principles 6* 215-219.
[132] See e.g. JC Smith, 'Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England' (1982) 27 Villanova Law Review 1179; G Williams, 'The Unresolved Problem of Recklessness' (1988) 8 Legal Studies 74; and, in the American context, J Hall, 'Negligent Behaviour Should Be Excluded from Penal Liability' (1963) 63 Columbia Law Review 632.

had argued for the culpability of negligence, along similar lines to Ashworth.[133] However, *Principles* is arguably significant in bringing these lines of argument together. In Ashworth's own estimation, it was unusual for works of criminal law to discuss negligence liability at any length; they normally simply opposed it for reasons of subjective principle.[134] *Principles* also places the culpability of negligence – its worthiness of censure and punishment, compared to subjective recklessness – at the centre of its account. In these respects, contemporary analyses more closely resemble Ashworth's than they do earlier ones.[135]

A good illustration of this point is Findlay Stark's *Culpable Carelessness*: the most extensive recent analysis of recklessness and negligence in the common law world.[136] Stark's analysis resembles Ashworth's in several significant ways. He sees culpability as the main criterion for evaluating which forms of *mens rea* should suffice for liability. He thus regards subjective recklessness as a particularly secure basis for liability, as it implies a choice to do wrong.[137] However, he also argues that negligence can be culpable, at least under certain conditions. And he locates the culpability of negligence in the culpable failure to form beliefs about the risks attached to one's conduct.[138] As in Ashworth's account, negligence thus has a place in the criminal law, albeit as an exception to the subjective norm.

What about the required relationship between conduct and fault? Here, the most important of the subjective principles is the *correspondence principle*: the fault elements of offences should correspond to their conduct and result elements. This principle shares the roots of the *mens rea* and belief principles. It ensures that choice is 'linked to the circumstances or consequences specified in the definition of each crime'.[139] Its most important implication is that it tells against *constructive liability*: that is, liability for a given result on the basis of fault as to some less serious conduct or harm. Ashworth objects to

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[133] Two important papers, both of which Ashworth cites, are HLA Hart, 'Negligence, Mens Rea, and Criminal Responsibility' in *Punishment and Responsibility* (n 38); and GP Fletcher, 'The Theory of Criminal Negligence: a Comparative Analysis' (1971) 119 University of Pennsylvania Law Review 401.
[134] *Principles 1* 168; *Principles 6* 185-186.
[135] This is not the place to summarise the now-extensive literature on negligence liability. Suffice it to say that this focuses almost entirely on the culpability of negligence, and that the main dividing lines concern exactly when and why negligence is culpable: see F Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (CUP 2016) ch 7. Absolute subjectivism now has few defenders among criminal law theorists; for the notable exception, see L Alexander and KK Ferzan, *Crime and Culpability: a Theory of Criminal Law* (CUP 2009).
[136] Ibid.
[137] Ibid ch 6.
[138] Ibid ch 8.
[139] *Principles 6* 156.

constructive liability on several grounds. Once again, it is inconsistent with autonomy. Liability is made to turn mainly on whether the relevant result occurs, which is a matter of luck. It also results in unfair labelling: offences are graded, and offenders are labelled, based on consequences for which they were not at fault.[140]

Principles is unwavering in its opposition to constructive liability. Ashworth reserves his strongest criticisms for the law of unlawful act manslaughter, where the only fault required is negligence as to some harm. Here, he argues, luck can make the difference between a homicide conviction and one of common assault. To label offenders in such cases as killers 'grossly exaggerates the amount of culpability'.[141] He makes similar arguments in relation to other core offences against the person, including murder,[142] wounding with intent,[143] and unlawful and malicious wounding.[144] A recurring theme in these arguments is the symbolic importance that English law attaches to resulting harm, even when there is a lesser offence of which the defendant could more fairly be convicted.

Ashworth's discussion of the correspondence principle is now the classic argument against constructive liability. Its most visible impact, however, has been to force a refinement of the arguments in constructive liability's favour. What Ashworth calls the 'unlawful act theory' – that once one performs some criminal action, one can legitimately be liable for any consequences that follow – now has no serious defenders. More popular is the 'moderate constructivist' view advocated by John Gardner and Jeremy Horder, which takes Ashworth's correspondence principle as its foil. For Gardner and Horder, when we intentionally attack others, we change our normative position, such that we are responsible for the consequences that follow. However, the scope of that responsibility is limited to offences within the same family, and to harms that are proportionate to our level of fault.[145]

Ashworth is no more impressed by moderate constructivism than by the unlawful act

[140] *Principles 1* 130-131; *Principles 6* 77-78, 156-157.
[141] *Principles 1* 265-266; *Principles 6* 282-283.
[142] *Principles 1* 234; *Principles 6* 245-246.
[143] In cases where the relevant intent is to prevent lawful apprehension: *Principles 1* 279; *Principles 6* 299-300.
[144] *Principles 1* 280; *Principles 6* 301.
[145] The most important sources are J Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 Cambridge Law Journal 502; J Horder, 'A Critique of the Correspondence Principle in Criminal Law' [1995] Criminal Law Review 759; J Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 119 Law Quarterly Review 95. The same argument has been used to justify other controversial doctrines, such as joint enterprise or 'parasitic accessorial liability' in the context of complicity: see e.g. AP Simester, *Fundamentals of Criminal Law: Responsibility, Culpability, and Wrongdoing* (OUP 2021) 176-183.

theory, and he criticises it in later editions of *Principles*.[146] He rightly regards the 'change of normative position' argument as question-begging, and the limitations of proportionality and offence 'families' as *ad hoc* and vague.[147] In response, others have offered still more sophisticated defences of moderate constructivism. For example, risks of more serious harm are often intrinsic to the wrongness of less seriously harmful conduct: they are part of the reason why we ought not to engage in that conduct in the first place.[148] And in cases of intentional attacks, these risks are imposed for especially bad reasons, such that additional punishment for the more serious harm may be justified.[149] These arguments, however, would likely also fail to impress Ashworth. If they are right, then should it not be easy to establish fault independently as to the more serious harm? Clearly, there is much more to say here about the legitimacy of liability for the results of our actions in general.[150] However, Ashworth is probably right to think that his arguments against constructive liability have yet to be answered satisfactorily.

The Rule of Law and Fair Procedures: Maximum Certainty and Strict Construction

The final group of Ashworth's principles relates to rule of law values.[151] These principles address a conflict between the retributive and liberal aspects of Ashworth's vision of criminal law. On the one hand, criminal law's functions include the prohibition, condemnation, and punishment of certain kinds of wrongdoing. Failures to prohibit such wrongdoing, or to condemn and punish it when it occurs, are thus a legitimate concern. On the other hand, attempts to address this concern can easily threaten liberal values. Respect for individual autonomy demands that citizens be given *fair warning* of their liabilities: they should be able to plan their lives by discovering the law easily and in advance. And in democracies, those

[146] *Principles 6* 77-78; 156-157.
[147] These counter-arguments are more fully developed in A Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in the Criminal Law' (2008) 11 New Criminal Law Review 232. See also B Mitchell, 'In Defence of a Principle of Correspondence' [1999] Criminal Law Review 195.
[148] Simester (n 145) 315-323.
[149] K Simons, 'Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?' (2012) 32 Oxford Journal of Legal Studies 445.
[150] For views like Ashworth's, an important question is whether we can be subjectivists about such issues as constructive liability without thinking that liability for results is more generally illegitimate. Ashworth is at least tempted by the latter thought as well: see e.g. A Ashworth, 'Taking the Consequences' in S Shute, J Gardner and J Horder (eds), *Action and Value in Criminal Law* (OUP 1993).
[151] *Principles 1* 59; *Principles 6* 57. I use the heading from the later edition here; the earlier discussion is headed '"Fairness" Principles'.

liabilities should be a matter for the elected legislature rather than for criminal justice actors. These actors should therefore avoid taking it upon themselves to fill perceived gaps in the law.

Ashworth derives three principles in particular from this conclusion. The first is *non-retroactivity*: 'a person should never be convicted or punished except in accordance with a previously declared offence'.[152] Although, even in modern times, English courts have not complied perfectly with this principle, Ashworth treats it as uncontroversial.[153] Much more important in his analysis is the second principle: *maximum certainty*. For Ashworth, vague criminal laws raise similar concerns to retroactive conviction and punishment. They likewise fail to give fair warning, as they make it difficult for citizens to discover the extent of their liabilities. And they likewise involve an effective transfer of the power to criminalise away from the legislature. The scope of the criminal law is rather left to courts – or, perhaps more worryingly, to police and prosecutors, whose discretion risks being exercised arbitrarily.[154]

A concern with vagueness also underlies the third principle: *strict construction*. On Ashworth's account, this principle forms part of a broader theory of statutory interpretation. On this theory, when courts must interpret a vague statutory provision, they should aim primarily to ascertain what Parliament meant the provision to do. If any ambiguity remains, then this should be resolved in favour of the defendant.[155] While this principle also helps to ensure fair warning, Ashworth emphasises here the proper roles of Parliament and the courts. Again, Parliament should be responsible for any extension of criminal law's scope. But since courts' interpretations of the law are authoritative, they too can effectively make such extensions. They should thus prefer narrower interpretations where they have a choice, to avoid usurping Parliament's proper role.[156]

These principles are again in tension with arguments from social defence. Flexible drafting and interpretation, it is sometimes argued, can be necessary to ensure that

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[152] *Principles 1* 59-60; *Principles 6* 58.

[153] As Ashworth notes, there have been few cases in recent decades of courts literally creating new offences or extending existing ones by analogy. Judicial law-making of this kind is also now ruled out by Article 7 of the European Convention on Human Rights. However, these practices can be difficult to distinguish from judicial 'development' of the common law, which remains permissible: *Principles 1* 60; *Principles 6* 58-60.

[154] *Principles 1* 64-65; *Principles 6* 65-66.

[155] *Principles 1* 68-69; *Principles 6* 68-69. In the later edition, Ashworth highlights the duty to interpret statutes compatibly with the European Convention on Human Rights as another aspect of this approach.

[156] *Principles 1* 69-70; *Principles 6* 69-70.

wrongdoers do not escape justice.[157] This is true especially for new forms or variants of wrongdoing that the legislature did not anticipate. Vague offences, interpreted broadly, allow courts to convict and punish such wrongdoing without waiting for Parliament's inevitably slow response.[158] Ashworth criticises such arguments for familiar reasons. Courts have never fully adopted a policy of strict construction, so we cannot be sure of its consequences: these might include forcing Parliament to change the law.[159] However, waiting for Parliament to respond is the right solution regardless of this. The rule of law requires that loopholes be closed in this way, rather than through '*ex post facto* lawmaking' by the courts.[160]

Ashworth acknowledges, though, that social defence often defeats rule of law values in practice. Most chapters of *Principles* contain multiple criticisms of vagueness in criminal law, and of the courts for creating or worsening it. Some of these criticisms concern common law doctrines. These often invoke open-ended concepts, like 'reasonable' or 'voluntary', that leave much to discretion.[161] Ashworth's strongest criticisms, however, concern courts' interpretation of criminal statutes – particularly where these also threaten other principles, such as fault and minimum criminalisation. Thus, he criticises courts for regularly declining to read *mens rea* into offences, despite their ostensible support for the *mens rea* principle.[162] And he criticises their uncertain and expansive interpretations of key concepts, particularly those that determine the boundaries of liability in a given area: for example, 'dishonesty' in dishonesty offences,[163] or the minimum threshold for liability as an accomplice.[164]

The spirit of the rule of law principles also underlies several other arguments that Ashworth makes. He advocates codification of criminal law, primarily as a means of ensuring fair warning.[165] For cases where citizens lack fair warning, he advocates a defence of reasonable mistake of law: an obligation to know the criminal law is justifiable, he argues, only if the state has made that law knowable.[166] He also opposes particular uses of vague

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[157] Similar arguments, Ashworth thinks, underlie the so-called *'thin ice' principle*, which is a 'counterpoint' to non-retroactivity: *Principles 1* 63-64; *Principles 6* 63.
[158] *Principles 1* 66, 70-71; *Principles 6* 66-67, 70-71.
[159] *Principles 6* 71.
[160] *Principles 1* 67; *Principles 6* 68.
[161] *Principles 1* 126; *Principles 6* 134-135.
[162] *Principles 1* 142-145; *Principles 6* 165-170.
[163] *Principles 1* 356-358; *Principles 6* 398-400.
[164] *Principles 1* 391-392; *Principles 6* 433. In the later edition, similar criticisms appear of English law's new offences of assisting and encouraging crime: *Principles 6* 462-463.
[165] *Principles 1* 64-65; *Principles 6* 45-46.
[166] *Principles 1* 208-210; *Principles 6* 220-22. For further development of the argument, see A Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 Modern Law Review 1.

definition: for example, as a way of hiding the difficult value judgments that courts must sometimes make. Courts sometimes manipulate concepts like intention and causation to ensure the acquittal of those with good motives:[167] most notably, medical professionals.[168] Such manipulation not only creates inconsistency, but also obscures the true reasons for courts' decisions. If certain motives are thought to justify or excuse criminal conduct, Ashworth argues, then this should be recognised openly, through the creation of new defences.

Viewed in its context, Ashworth's discussion of rule of law principles is arguably just as significant as his discussion of subjective fault. Again, he is neither the first advocate of such principles nor the first critic of vagueness or judicial law-making. However, *Principles* was one of the first major works on criminal law to discuss these issues at length.[169] And it was significant in grounding these principles in deeper concerns with fair warning and the separation of powers.[170] It was also significant in applying these principles to a broad range of issues, from specific doctrinal questions like mistake of law to general issues like the interpretation of criminal statutes. Certainly, its critique of English courts' failures to observe these principles was more comprehensive than any that had come before.

In subsequent work, by contrast, this aspect of *Principles* has been less significant than those examined above. Rule of law principles have not caught the imagination of criminal law theorists as principles of criminalisation and fault have done.[171] They remain absent from most major works of doctrinal criminal law, and where they are discussed, it is often not in terms of Ashworth's deeper concerns.[172] Of course, vagueness is a common

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[167] *Principles 1* 152-153; *Principles 6* 174-177. See also Ashworth's discussion of the mental element in complicity, where he makes similar points: *Principles 1* 377-379; *Principles 6* 417-418.
[168] *Principles 1* 124-125; *Principles 6* 131-132.
[169] A rare precursor in the English context was a short chapter on the principle of legality in G Williams, *Criminal Law: the General Part* (Stevens 1953) ch 12. Cf. the discussion in Farmer (n 35) 99-101.
[170] In this context, Ashworth cites only a couple of previous works relating specifically to criminal law. One is relatively narrowly focused and concerned mainly with fair warning: ATH Smith, 'Judicial Lawmaking in the Criminal Law' (1984) 100 Law Quarterly Review 46. Another is an American law review article that takes an approach more closely resembling Ashworth's: JC Jeffries, 'Legality, Vagueness and the Construction of Penal Statutes' (1985) 71 Virginia Law Review 189.
[171] These principles have perhaps had greater currency with American theorists. For discussions along similar lines to Ashworth's – neither of which cites his work – see GP Fletcher, *Basic Concepts of Criminal Law* (OUP 1998) ch 12; PH Robinson, 'Fair Notice and Fair Adjudication: Two Kinds of Legality' (2005) 154 University of Pennsylvania Law Review 335. Still, none of the major works of criminal law theory cited above, either Anglo or American, discusses these issues at any length.
[172] In England, the closest comparator is probably the treatment in *Simester and Sullivan's Criminal Law*: Child et al (n 37) chs 2.1-2.3 and 3.1. This explicitly covers principles of legality and statutory interpretation, but only in terms of fair warning; it does not reflect Ashworth's concerns with the proper role of Parliament and the

criticism of particular offences and doctrines. But the role of the courts in interpreting, developing, and creating criminal law continues to escape significant scrutiny.[173] It is remarkable, in particular, how little attention has been paid to Ashworth's work on the interpretation of criminal statutes, compared to that on any of the issues discussed so far.[174] At least in the criminal law context, significant literatures on maximum certainty and strict construction have yet to develop.

The Legacy

Principles of Criminal Law is distinguished by the range of principles that it examines, defends, and applies. Most of these principles are grounded in Ashworth's overarching concerns with autonomy and retributive justice, and are in tension with arguments from policy: most notably, policies of social defence. This principled approach to the evaluation of criminal law is the book's most significant legacy. Yet as we can now see, some aspects of this approach have had a more profound and lasting impact than others have. In closing, let us review the aspects of *Principles* that have had the greatest impact on the field, and the respects in which it remains relatively unique.

The most influential aspect of *Principles* has been its retributive aspect: the idea that criminal liability is justified (only) as a proportionate response to certain kinds of culpable wrongdoing. This influence is perhaps clearest in contemporary criminalisation theory, of which Ashworth's work is a direct ancestor. The ideas that only wrongful conduct can legitimately be criminalised, and that criminal law's distinctive condemnatory and punitive qualities shape how it can legitimately be used, continue to structure the debate in this new sub-field. This aspect of *Principles* is also clearly visible in the fair labelling principle, which has served to rationalise a range of distinctions among offences based on distinctions in wrongdoing and culpability. Perhaps less obviously, it is also visible in how both Ashworth and his successors think about fault in criminal law. Ultimately, considerations of culpability

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courts, or with countervailing policies of social defence.

[173] This may now be changing, particularly in light of the UK Supreme Court's apparent readiness to take a more interventionist approach. For a recent and very much Ashworth-aligned analysis, see F Stark, 'Judicial Development of the Criminal Law by the Supreme Court' (2021) 41 Oxford Journal of Legal Studies 1.

[174] See e.g. A Ashworth, 'Interpreting Criminal Statutes: a Crisis of Legality?' (1991) 107 Law Quarterly Review 419. This remains one of the only notable articles on the topic, and it is cited much less often than the other articles by Ashworth referred to above.

have proved to be more important here than those underlying his subjective principles.

Less influential, by contrast, has been the liberal aspect of *Principles*: in particular, the principles that Ashworth derives from his overarching principle of autonomy. While many of these principles have not exactly been rejected in subsequent work,[175] they have attracted comparatively little attention – especially where they cut against what retributive justice demands.[176] The clearest examples are the rule of law principles, which are both the most distinctively liberal and the least influential of Ashworth's principles. Another is, again, the prioritisation of culpability over the autonomy-derived demands of subjectivism in discussions of criminal fault. Even the more liberal aspects of the minimalist approach to criminalisation have had comparatively little uptake. For example, few have shared Ashworth's enthusiasm for human rights as a constraint on criminalisation,[177] and his advocacy of the harm principle is increasingly unfashionable among criminal law theorists.[178]

These principles have also sometimes had a different kind of influence to that which Ashworth intended. Whereas they are generally meant to constrain criminalisation and the scope of criminal liability,[179] they have sometimes been used to justify their expansion. We have noted, for example, how both the minimalist approach and the fair labelling principle can support calls for the (distinct) criminalisation of newly acknowledged types of wrongdoing. Similarly, one upshot of Ashworth's discussion of criminal fault is a call for expanded liability for negligence. This trend mirrors a similar one in the human rights principles that Ashworth advocates. As he acknowledges elsewhere, the European Convention has led to expanded criminalisation via states' obligations to protect certain rights. While Ashworth welcomes censure and punishment for breaches of these rights, he is ultimately cautious about this development: 'criminalisation decisions… require principled

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[175] A possible exception here is the correspondence principle, which has served mainly as a foil for arguments in favour of constructive liability: see text at nn 145-150 above.

[176] Andrew Simester stands out as someone else who sees both liberal and retributive principles in criminal law doctrine, and who acknowledges the ways in which these can conflict. See generally Simester (n 145), particularly chs 1 and 3.

[177] This contrasts with Ashworth's advocacy of a human rights-based to criminal procedure, which, perhaps unsurprisingly, has been much more influential: see generally Capmbell, Ashworth and Redmayne (n 2).

[178] The literature on the harm principle is vast, and increasingly sceptical that there is any such thing as 'the' harm principle. For a systematic critical analysis, see J Edwards, 'Harm Principles' (2014) 20 Legal Theory 253.

[179] At least in the case of the liberal and retributive principles: as we noted at the outset, the principle of welfare more often conduces to criminal law's expansion.

debate', which should not be 'short-circuited by the finding of a positive obligation'.[180]

What about the policy concerns that Ashworth identifies as in tension with his principles? Here, the legacy of *Principles* is more complex. At least in more doctrinal and normative types of scholarship, few have followed Ashworth in taking these concerns seriously as influences on criminal law doctrine.[181] *Principles* thus remains distinctive in systematically tackling such arguments – for example, arguments from social defence and efficient administration – on their own terms. By contrast, many have followed Ashworth in thinking that these arguments are in any event defeated by arguments from principle. But it is debatable whether this is a positive aspect of the book's legacy. We should avoid assuming, as Ashworth seems to, that principles defeat competing considerations simply because they flow from retributive justice or liberal political ideals.[182] The competing considerations may have significant weight, and we should not be blind to them simply because they come labelled as matters of 'policy'.[183]

Another aspect of *Principles* that has a more complex legacy is its 'middle range' approach. As we saw earlier, the book was distinguished from previous works of doctrinal criminal law by its focus on normative principles. But it was also distinguished from early work in the philosophy of criminal law by its close engagement with legal sources and discourse, and by its reluctance to delve into underlying philosophical controversy. As a generalisation, both points remain true today. The traditional model for textbooks and treatises has, if anything, become more dominant in the intervening years.[184] And philosophical work on normative principles of criminal law generally remains more abstracted than Ashworth's.[185] While *Principles* helped to spark wide interest in such

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[180] A Ashworth, 'Human Rights and Positive Obligations to Create Particular Criminal Offences' in A Ashworth, *Positive Obligations in Criminal Law* (Hart 2013) 209-210.
[181] Unsurprisingly, they are taken more seriously in scholarship with more historical and explanatory ambitions. For example, Alan Norrie's *Crime, Reason and History,* discussed in Chloë Kennedy's chapter in this volume, resembles *Principles* in seeing tensions between individual justice and social control as a pervasive influence.
[182] See J Gardner, 'Ashworth on Principles' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 17-18.
[183] I have argued elsewhere, for example, that weighty considerations sometimes conflict with the principle of fair labelling, in ways that previous work has not taken sufficiently seriously: see generally Cornford (n 112).
[184] Oxford University Press alone offers a wide range of criminal law books that are essentially variations on this model: <https://global.oup.com/ukhe/disciplines/law/criminal-law/>. This is not to deny, of course, that other alternative types of criminal law text are also now available: see e.g. Chloë Kennedy's and Kate Leader's chapters in this volume for discussions of two.
[185] The field is far more expansive than it was in 1991, so it is difficult to generalise about it without simplifying unfairly. Different authors' approaches depart from Ashworth's to differing degrees, in both style and substance. For example, the theorists cited above diverge significantly in how often they cite and discuss real-world cases.

principles, it thus remains distinctive in its approach to constructing and applying them.

How we should feel about these developments is open to debate. On the one hand, we might see books like *Principles* as a natural stopping point on the journey towards a more abstract type of normative theory. Whatever Ashworth's methods and sources may be, his aims are clearly normative. Ultimately, one might think, a normative theory of criminal law will need to transcend the principles and policies that we find in existing law and legal discourse.[186] On the other hand, we might see 'middle range' theories as having their own distinctive value. If theories are to have explanatory power, then they must proceed from an understanding of the principles that actually structure the law, and of the procedural context in which it operates.[187] The same may be necessary, moreover, for these theories to have any purchase in practice.[188] In this light, we might regret that *Principles* remains as distinctive as it does.

Overall, then, *Principles* can be seen as part of a broader story, in which 'principled' approaches have come to dominate the evaluation of criminal law. It is significant for introducing particular principles, such as fair labelling and minimum criminalisation, to the relevant debates. But it is also significant for its more general elevation of principle over policy. Principles like Ashworth's – especially those that flow from seeing criminal law primarily as a way of doing retributive justice – have become received wisdom in the field. Ironically, subsequent work on these principles has often lacked Ashworth's interest in the policy concerns that they are supposed to defeat. It has also tended to lack his deep understanding of the law itself, and of its practical and political context. In short, while principles of criminal law have become common currency within criminal law scholarship, *Principles of Criminal Law* remains, in significant respects, unique.

But they also differ in how far they are trying to rationalise existing doctrine, rather than to critique it from the outside. It would be misleading to pretend that there is a single distinction in kind that clearly separates their work from Ashworth's.

[186] To which one might respond that transcending current practice need not entail philosophical a priorism: see C Kennedy, 'Immanence and Transcendence: History's Roles in Normative Legal Theory' (2017) 8 Jurisprudence 557. Ashworth would, I think, be sympathetic to that response.

[187] For a parallel argument relating to the law of criminal evidence, see P Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) ch 1.

[188] Compare Nicola Lacey's assessment of the legacy of *Principles*, arguing that even an approach like Ashworth's will struggle to find much purchase in a world of defiantly unprincipled criminal law-making: Lacey (n 35) 29-34.

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