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# Recklessness—the Continuing Search for a Definition

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*Abstract* This article examines the different approaches to determining recklessness in the criminal law and the advantages and disadvantages of each will be explored in relation to issues of moral culpability. Whilst a subjective definition of recklessness might seem attractive it fails to catch all those who are morally blameworthy. In contrast, a purely objective interpretation can lead to injustice in circumstances where the defendant lacked the capacity to foresee the risk of harm. It will be argued that recklessness based upon conscious advertence produces too narrow a definition and culpable inadvertence should be encompassed by examining why no thought was given to the risk.

*Keywords* *Mens rea*; Recklessness; Culpability; Subjective and objective; Advertence to risk

This article focuses on the different approaches to recklessness resulting from a judicial and legislative search for a legal definition and analyses the advantages and disadvantages of each. In particular, *Caldwell/Lawrence* recklessness will be scrutinised as it is submitted that the law on recklessness is still not settled following *R v G and R*.<sup>1</sup> A more objective form of recklessness that considers the capacity of the defendant will be advocated, but not a revival of the *Caldwell/Lawrence* ‘Model Direction’.

There are three<sup>2</sup> main approaches which have been employed to deal with the concept of recklessness within the criminal law, although others have been recognised.<sup>3</sup> These will be examined in turn, after a brief historical background has been outlined.

In Victorian times the Criminal Law Commissioners considered the doctrine of implied malice, now the concept of recklessness, as it applied to murder.<sup>4</sup> Norrie notes that the Commissioners reinterpreted the

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1 [2003] UKHL 50, [2004] 4 All ER 765.

2 Advertent and subjective recklessness in *R v Cunningham* [1957] 2 QB 396; objective recklessness including inadvertence in *Commissioner of Police for the Metropolis v Caldwell* [1982] AC 341; and the subjective test in the draft Criminal Code (Law Commission, *A Criminal Code for England and Wales*, Law Com. No. 177 (1989), vol. 1, cl.18).

3 ‘Indifference’ recklessness, i.e. displaying an indifference as to whether there is a risk or not, see *R v Sheppard* [1981] AC 394, *R v Kimber* (1983) 77 Cr App R 225, *R v Breckenridge* (1984) 79 Cr App R 294 and *R v Satnam and Kewal* (1983) Cr App R 149, cited by Andrew Ashworth, ‘Criminal Liability in a Medical Context: the Treatment of Good Intentions’ in A. P. Simester and A. T. H. Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press, 1996) 175. Norrie considers a fifth interpretation, i.e. recklessness as committing a crime of ‘basic intent’ whilst intoxicated (*DPP v Majewski* [1976] 2 All ER 142): A. W. Norrie, *Law and the Beautiful Soul* (Glasshouse Press: London, 2005) 112. There could yet be another definition added by the Law Commission’s draft Criminal Law Bill for offences against the person: Law Com. No. 218 (1993).

4 A. W. Norrie, *Crime, Reason and History*, 2nd edn (Butterworths: London, 2001) 76.

words used by the 18th century lawyer, Sir Michael Foster, which would have extended liability beyond foresight, restricting the concept to a 'question of subjective advertence' which 'was a means of depositivising, de-moralising and thereby rendering certain the law of recklessness with regard to homicide'.<sup>5</sup> For the sake of certainty and consistency in decisions a more objective approach, with its inherent flaw of allowing a jury to influence decisions by bringing to bear their own values and opinions on what the law should be into their deliberations, was rejected.

### *Cunningham* recklessness

Prior to 2004, it is well known that there were two main opposing interpretations of the term 'reckless', within the criminal law. The first of these approaches came from *R v Cunningham*,<sup>6</sup> which maintained the approach of the Commissioners referred to above. In *Cunningham*, Byrne J had cited with approval the definition apparently<sup>7</sup> proposed by Professor Kenny in *Outlines of Criminal Law*: 'the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it'.<sup>8</sup> When the term 'malicious' was replaced by the word 'reckless' in statutes, starting with the Criminal Damage Act 1971, subsequent cases followed this subjective line and *Cunningham* recklessness was later extended and clarified in the cases of *R v Parker*,<sup>9</sup> *R v Briggs*,<sup>10</sup> and *R v Stephenson*,<sup>11</sup> to mean that foresight of 'some' damage was all that was required and that 'knowledge or appreciation of a risk . . . must have entered the defendant's mind even though he may have suppressed it or driven it out'.<sup>12</sup>

The unfortunate consequence of applying this subjective definition to recklessness is that failing to think about a risk would not ground criminal culpability. This establishes what Norrie terms a morally unsubstantive account of criminal responsibility,<sup>13</sup> as a defendant could still be morally culpable for his actions, for example by behaving with a callous disregard for others, but by failing to consider the effect of his actions he could not be deemed criminally reckless. The dilemma which arises as a result of *Cunningham* is whether it is appropriate to adopt a narrow liability based solely upon whether, as a question of fact, the accused foresaw the risk of harm. Admittedly, this approach<sup>14</sup> clearly establishes the morally censurable behaviour of D in that he exercised a

5 Above n. 4 at 77.

6 [1957] 2 All ER 412.

7 See J. Horder, 'Two Histories and Four Hidden Principles of Mens Rea' [1997] 113 LQR 95 at 114, who submits that the 'definition' was in fact J. W. C. Turner's misleading paraphrasing of Kenny's more precise definition in *Outlines of Criminal Law* (1902) 147–8.

8 [1957] 2 All ER 412.

9 [1977] 2 All ER 37.

10 [1977] 1 All ER 475.

11 [1979] QB 695 at 704.

12 *Ibid.* per Lord Lane.

13 A. W. Norrie, *Law and the Beautiful Soul* (Glasshouse Press: London, 2005) 84.

14 Now adopted in the leading case of *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765 discussed below.

free choice to take the risk. It also has the advantage of providing a seemingly simple question for a jury to determine when compared with a more objective test of asking the jury to determine whether D *should* have foreseen the risk. But a subjective approach to the *mens rea* of recklessness also has the unfortunate side-effect of risking undermining confidence in, and support for, the criminal justice system because if the members of the jury accept that D did not foresee the risk they must acquit, even where D should have foreseen it and was capable of such foresight.

### *Caldwell* recklessness

The second interpretation of recklessness, adopted by the House of Lords in *Commissioner of Police for the Metropolis v Caldwell*,<sup>15</sup> produced a more objective definition of recklessness: Lord Diplock stated that a person would be reckless under the Criminal Damage Act 1971 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 that act he either has not given any thought to the possibility of there being any such risk or he has recognised that there was some risk involved and has none the less gone on to do it.<sup>16</sup>

In *R v Lawrence*,<sup>17</sup> decided after *Caldwell* but on the same day, Lord Diplock again used this model direction but the ‘obvious risk’ under (1) was amended to an ‘obvious and serious risk’ for offences of reckless driving. The model direction ‘defined’<sup>18</sup> statutory recklessness, with the exception of offences under the Offences Against the Person Act 1861, for more than 20 years.

Norrie draws attention to the fact that this direction is presented as a unity, but notes that with point (2) it is actually two distinct tests. This is because for the inadvertent strand (‘has not given any thought’) the risk foreseen by the ‘reasonable person’ must be an ‘obvious’ one, whereas with the advertent strand (‘has recognised that there was some risk involved’) there is no such requirement for the risk to be obvious as ‘the element of deliberation suffices to convict for recklessness’<sup>19</sup> for running even a small risk.

Although Lord Diplock intended to expand the definition of recklessness, it is clear from the model direction that certain defendants would be technically outside the scope of his direction. Smith,<sup>20</sup> Williams,<sup>21</sup> and

15 [1982] AC 341.

16 *Commissioner of Police for the Metropolis v Caldwell* [1981] 1 All ER 961 at 967, *per* Lord Diplock.

17 [1982] AC 510.

18 Halpin notes that an actual definition of recklessness was not provided. The word was to bear its ordinary English meaning, Lord Diplock recognising a number of states of mind but not providing a synthesising definition: A. Halpin, *Definition in the Criminal Law* (Hart Publishing: Oxford, 2004), 78–80.

19 Norrie, above n. 4 at 76.

20 J. C. Smith, ‘Commentary on *Caldwell*’ [1981] Crim LR 392 at 394.

21 G. Williams, ‘Recklessness Redefined’ [1981] 40 CLJ 252 at 278.

Griew<sup>22</sup> all identified a lacuna within the *Caldwell/Lawrence* direction where D had considered whether there was a risk and decided that there was none or where D had foreseen a risk and believed he had taken ample precautions to prevent it from happening. Smith and Williams suggest this would excuse the genuine but negligent mistake-maker from liability for recklessness. Birch makes clear that a reference to such an individual was unnecessary on the facts in either case; however, there would be no justification for acquitting a driver 'whose unshakeable faith in their ability to avoid danger displays an arrogance bordering on lunacy'.<sup>23</sup>

Birch states that evidence supporting the lacuna is possibly in the extra dictum to the model direction found in *Lawrence*, that the inference of recklessness might be displaced by 'any explanation' that D might give as to his state of mind at the time.<sup>24</sup> Smith also identifies the defendant with special knowledge who identifies a risk that would not be obvious to the ordinary prudent man. Such a person would have been convicted under the subjective test because he foresaw the risk and yet would unjustifiably escape liability on an objective test because the ordinary prudent individual would have lacked the expertise to realise that a risk existed.

If consideration is given to circumstances where the defendant claims to have ruled out the risk, Williams sees this as a challenge to Lord Diplock's dismissal of the restricted meaning given to recklessness in *Cunningham* because:

it called for meticulous analysis by the jury of the thoughts that passed through the mind of the accused to distinguish between not attending to risk and knowingly running the risk.<sup>25</sup>

He argues that on the same basis the distinction between not attending to risk and ruling out the risk is at least as 'narrow' and difficult for the jury.

However, these lacunae have never been successfully argued. In *Chief Constable of Avon and Somerset v Shimmen*<sup>26</sup> D had been acquitted at first instance because he fell within the lacuna, having foreseen the risk but deciding, wrongly, that he had eliminated it. On appeal, it was held that the wrong interpretation had been placed upon D's evidence; it was not that he believed he had completely eliminated the risk but rather that he thought he had eliminated it as much as possible leaving him caught by the model direction. Birch suggests that this case narrowed the lacuna, by extending the time frame within which the recklessness would be tested, so that 'only . . . those who confidently believe that . . . no precautions are required because no risk exists' would benefit from it.<sup>27</sup>

22 E. Griew, 'Reckless Damage and Reckless Driving: Living with *Caldwell* and *Lawrence*' [1981] Crim LR 743 at 748.

23 D. J. Birch, 'The Foresight Saga: The Biggest Mistake of All?' [1988] Crim LR 4 at 5.

24 *Ibid.* at 5.

25 Williams, above n. 21 at 279.

26 (1987) 84 Cr App R 145.

27 Birch, above n. 23 at 17–18. See also the comments of Mustill LJ in *R v Reid* (1989) 91 Cr App Rep at 269.

This, she argues, could be a morally flawed distinction to make as the person who realises ‘that precautions are necessary and who is trying his incompetent best may be the worthier soul’.

Birch makes two further points in relation to the negligent mistake-maker. First, society expects people to form their opinions based upon reasonable grounds and, secondly, any moral distinction based upon D’s opinion that there was no risk must rely on an assumption that D would have acted differently had he known otherwise and this is not always the case.

As is known, *Caldwell* attracted widespread criticism<sup>28</sup> and its application was subsequently judicially limited to the offences of criminal damage, reckless manslaughter<sup>29</sup> and reckless driving.<sup>30</sup> Lord Diplock’s leading judgment had changed the definition of recklessness from the subjective test in *Cunningham*<sup>31</sup> to an objective test, based upon the state of mind of the ‘ordinary prudent individual’.<sup>32</sup>

The attraction of a more objective approach is that those agents who *should* have foreseen the risk of their conduct causing harm to others would be found culpable. One disadvantage is that this would allow the law to be affected by politics and social value judgements which could lead to uncertainty as different panels may decide similar cases, but come to different conclusions. However, allowing such influences makes the law arguably fairer because justice can be done in a particular case.

On closer examination, it is difficult to assess exactly what the majority in *Caldwell* actually intended the *ratio* of the case and the legal definition of recklessness to be. While the judgments offer no definitive answer they do reveal some insights into their Lordships’ reasoning and give rise to several issues requiring further consideration.

One such issue is that the question before the House in *Caldwell* was not whether the term ‘reckless’ should be subjectively or objectively defined but whether self-induced intoxication was a defence to a charge based on intention or recklessness under s. 1(2)(b) of the Criminal Damage Act 1971, following *R v Majewski*.<sup>33</sup> On that basis it could be argued that the direction on recklessness was not the complete *ratio* of the case and the direction should have been viewed in the context

28 See, e.g., the judgments of Glidewell J and Goff LJ in *Elliott v C (A Minor)* (1983) 77 Cr App R 103; Smith, above n. 20; Williams, above n. 21; Griew, above n. 22; cf. G. Syrota, ‘A Radical Change in the Law of Recklessness’ [1982] Crim LR 97 and also J. McEwan and St John Robilliard, ‘Recklessness: the House of Lords and the Criminal Law’ (1981) 1 LS 267.

29 *R v Seymour* [1983] 2 AC 493. The extent to which this offence still exists following *R v Adomako* [1995] 1 AC 171 is questionable.

30 Later replaced by dangerous driving following the Department of Transport and the Home Office, Road Traffic Review Report in 1998 which found *Lawrence* recklessness too subjective, see C. Clarkson and H. M. Keating, *Criminal Law: Text and Materials*, 5th edn (Sweet & Maxwell: London, 2003).

31 [1957] 2 All ER 412.

32 *Commissioner of Police for the Metropolis v Caldwell* [1982] AC 341 at 354c.

33 [1977] AC 443.

of Lord Diplock's whole judgment before the *ratio* was determined.<sup>34</sup> It is submitted that such an approach might have produced a fairer capacity-based test for reckless conduct, which may well have been what Lord Diplock envisaged.

Alternatively, accepting the *ratio* solely on the facts of the case, in situations where D was neither drunk, enraged or over-excited, the precedent could have been distinguished. This option could have drastically limited the scope of a more objective test and an opportunity to close a gap in the law to ground culpability where the risk was obvious and D should have foreseen it would have been missed.

After formulating his novel direction as to what constituted recklessness, Lord Diplock cited with approval the speech of Lord Elwyn-Jones LC in *Majewski* and the correct interpretation of English Law found in the provision in § 2.08(2) of the American Penal Code:

When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of the risk of which he would have been aware had he been sober, such awareness is immaterial.

It should be noted that this quote is also partially subjective in that the actor 'would have been aware had he been sober'. This offers perhaps evidence that a capacity to foresee risk could have been an essential element of the objective test. In consequence, although it is possible that their Lordships did intend to extend the scope of recklessness in *Caldwell* to include those who were capable of foreseeing the risk under different circumstances, for example when they were not in a rage,<sup>35</sup> nor drunk, nor even excited,<sup>36</sup> it is less clear that they really intended that individuals who were incapable of ever foreseeing the risk could be guilty of an offence.<sup>37</sup>

## **The problems of a capacity-based test**

It is necessary here to consider what factors could be relevant in assessing D's culpability where he fails to foresee a risk. It is interesting to consider the two examples that Lord Diplock examined to justify his departure from a subjective test. He referred to the situation where it had crossed a defendant's mind that there was a risk but the defendant's mind was so 'affected by rage or excitement or confused by drink, he did not appreciate the seriousness of the risk or trusted that good luck would prevent its happening'.<sup>38</sup> Such a defendant would be guilty under a subjective test because he had thought about it, but if the same defendant for any of the same reasons had not given it any thought he would

34 Note the judgments of Lords Goff and Ackner in *R v Reid* [1992] 3 All ER 673 where they consider that directions such as the model direction should be adapted to fit the facts of a particular case and should be capable of adaptation as it is difficult to foresee what new situations may occur.

35 Williams, above n. 21 at 260 supports this argument as it is culpable.

36 Ibid. at 260, where he rejects extending culpability to include those who are excited.

37 However, Lord Bingham of Cornhill states that it is 'questionable whether such consideration would have led to a different result' because of the overruling by the majority of *Stephenson*, see *R v G and R* [2004] 4 All ER 765 at 786a.

38 [1982] AC 341 at 352b.

not be guilty, unless voluntarily intoxicated.<sup>39</sup> The important point here is that Lord Diplock regarded both scenarios as equally blameworthy,<sup>40</sup> but did not elaborate on why this should be so.

However, if a defendant has the capacity to foresee a risk but fails to do so because, for example, he is enraged, then such a person may be deemed morally blameworthy and criminally culpable for failing to show sufficient practical concern for the welfare of others and failing to control his behaviour. Arguably even the person who is reckless because of over-excitement would be deemed blameworthy if he caused harm to others.

The leading academic subjectivists at that time were highly critical of this extension of culpability in *Caldwell*. Griew<sup>41</sup> argued that where the lack of perception arises not from indifference but from the 'effects of shock, stress or fatigue' censure would be inappropriate in some cases. The example offered to support this assertion is that of the driver who is told some shocking news by his passenger and as a result of this shock he fails to foresee a risk. This would surely depend upon whether the driver had the opportunity to pull over and stop the vehicle until he recovered.

Williams<sup>42</sup> admits that the factors Lord Diplock considered in his example—rage, excitement and drink—are problematic for supporters of a subjective approach. Finding uncontrolled rage and drink reprehensible, he suggested that these could profitably be added to the draft Bill on the Mental Element in Crime,<sup>43</sup> but questions extending the proposition to excitement. Williams does seem to accept that it might be possible to permit a degree of objectivity in particular cases, always assuming that it does not mean it should apply to recklessness generally. However, he does not develop this point further.

Syrota,<sup>44</sup> believing that *Caldwell* recklessness was intended to be subjectively interpreted, goes further than Williams by suggesting that evidence that the perception of risk was affected by excitement, violent rage, exhaustion, the taking of a medically prescribed drug which induces drowsiness, as well as mental capacity should all be relevant factors in affecting a determination of recklessness. However, Smith<sup>45</sup> criticises this extension of incapacity; if such factors could be considered then why not 'absent-mindedness arising from worry or anxiety . . . or any other cause' apart from self-induced intoxication. He asks what principle makes it permissible to select between different factors affecting foresight and remarks that such an approach would restrict the decision in *Caldwell* to intoxication.

39 *DPP v Majewski* [1977] AC 443.

40 [1982] AC 341 at 352c: 'Neither state of mind seems to me to be less blameworthy than the other'.

41 Griew, above n. 22 at 747.

42 Williams, above n. 21 at 260.

43 Law Commission, *Draft Criminal Liability (Mental Element) Bill*, Law Com. No. 89 (1978).

44 G. Syrota, 'A Radical Change in the Law of Recklessness' [1982] Crim LR 97.

45 Smith, above n. 20.



Smith makes a salient point in this regard as there could be further complications, such as those raised by Field and Lynn,<sup>46</sup> who include the inexperienced in the group of persons who may lack capacity to foresee at least some of the risks obvious to the prudent person in some circumstances.<sup>47</sup> Williams too observes that unless we have learned by experience or have information that risk exists in some particular activity we are unlikely to think about it.<sup>48</sup> However, there is an alternative argument, which is that the inexperienced might take more care precisely because they are unfamiliar with a situation whereas, with the experienced person, experience can produce automatic responses to situations without much conscious thought and this can result in a diminished awareness of reality. Furthermore, there is another factor which would need to be considered; there is evidence that young people's perception of risk differs from that of the average adult.<sup>49</sup>

Although Smith's argument has merit, we have moral principles that could be used to guide us in our selection of factors that affect foresight, certain factors we may well excuse; but those factors which demonstrate undesirable character traits, like rage and intoxication, we would not.

Lord Diplock in *Caldwell* stated that the subjective approach in *Cunningham* was flawed because it required 'the meticulous analysis by the jury of the thoughts of the accused'<sup>50</sup> before they would be able to determine what exactly the defendant was thinking at or before the time he acted. He believed it was unnecessarily complicating matters to expect a jury to decide beyond reasonable doubt whether D's mind had crossed 'the narrow dividing line'<sup>51</sup> between awareness of the risk and not troubling to think about it.

The jury's task must therefore be further complicated if they are expected to determine whether D must have suppressed an awareness of the risk or have 'driven it out of his mind'. Although *Caldwell* overruled *R v Stephenson*,<sup>52</sup> this, it is submitted, was in regard to the more restrictive definition of recklessness rather than the decision itself. Lord Diplock was extremely critical of the Court of Appeal's decision in *R v Briggs*<sup>53</sup> on two counts. First, it excluded from recklessness the accused who gave no thought to the risk even where the risk is great and would

46 S. Field and M. Lynn, 'The Capacity for Recklessness' (1992) 12 LS 74.

47 *Ibid.* at 76. They use the example of the inexperienced driver, but suggest that this may not be the only social context in which experience brings an enhanced capacity to spot hazards.

48 Williams, above n. 21 at 279.

49 See, e.g., the view of Brown that young male drivers are more dangerous than other drivers because of hazard perception failure rather than a different attitude to risk: I. D. Brown, 'The Traffic Offence as a Rational Decision' in S. Lloyd-Bostock (ed.), *Psychology in Legal Contexts* (1981) 203; cited in Field and Lynn, above n. 46.

50 [1982] AC 341 at 351.

51 *Ibid.* at 352.

52 [1979] QB 695, the first case to interpret recklessness for the purposes of s. 1 of the Criminal Damage Act 1971, where it required the defendant to have an appreciation of the risk: '... the knowledge or appreciation of risk of some damage must have entered [his] mind even though he may have suppressed it or driven it out' ([1979] QB 695 at 703-4).

53 [1977] 1 WLR 605.

be obvious to D if he thought about it, and, secondly, but to a lesser extent, because it failed to address the situation where ‘the risk might be so slight that even the most prudent of men would feel justified in taking it’.

*R v Parker*<sup>54</sup> attracted less criticism from his Lordship because it extended *Cunningham* recklessness to cover closing the mind to an obvious risk but still omitted the accused whose mind was never open in the first place. To suppress an awareness of a risk suggests that at least a fleeting awareness of the risk must be present before it can be suppressed. Similarly, to drive awareness of a risk out of your mind<sup>55</sup> suggests that you would have to have thought about it first before you could drive it out.

However, cases like *Parker* raise suspicion as to whether foresight is actually the test in cases where the risk is obvious to a reasonable man. If the judiciary is prepared to go to such lengths to secure the conviction of defendants that are deemed to be morally blameworthy, it is questionable whether in cases like *Parker* a capacity-based objective test is actually in operation. It is submitted that where the risk is an obvious one a jury may simply disbelieve a defendant who claims not to have foreseen it on the grounds that if he had the capacity he therefore must have seen it. In *Parker* itself, it is quite possible that the defendant did not even fleetingly think of a risk of damaging the phone. If in practice a constructive advertence test is being applied<sup>56</sup> it is submitted that it would be preferable to be transparent about it and adopt a more objective definition of recklessness, although as the judgments in *Caldwell/Lawrence* are ambiguous and have caused difficulties, a return to *Caldwell* recklessness will not be advocated here.

As determining the thoughts of the accused is always going to be a factor in any trial by jury where there is any subjective element at all, Lord Diplock stated:

... *mens rea* is, by definition, a state of mind of the accused himself at the time he did the physical act that constitutes the *actus reus* of the offence; it cannot be the mental state of some non-existent, hypothetical person.<sup>57</sup>

The decision in *Caldwell*, and also that of *Lawrence*,<sup>58</sup> the judgment of which was delivered on the same day, were seen to create a change to an ‘objective’ test for recklessness, but was this really the case? Smith<sup>59</sup> believed that *Caldwell* left no room, ‘in the great majority of cases, for any inquiry into the defendant’s state of mind’, Lord Diplock contradicting his own assertion that ‘*mens rea* is . . . a state of mind of the accused himself’.<sup>60</sup> Smith found confirmation of his belief in Lord Diplock’s own words in *Lawrence*, that the new recklessness test would generally be no different in effect from the ‘totally objective’ test

54 [1977] 2 All ER 37.

55 *R v Stephenson* [1979] QB 695.

56 See also *Booth v CPS* [2006] EWHC 192, [2006] All ER (D) 225 (Jan).

57 *Commissioner of Police for the Metropolis v Caldwell* [1982] AC 341 at 354b.

58 [1981] 2 WLR 524.

59 Smith, above n. 20.

60 *Commissioner of Police for the Metropolis v Caldwell* [1982] AC 341 at 354b.

adopted by the Scottish courts. However, this apparent confirmation can be viewed simply as a statement of the obvious, given that the majority of defendants would either foresee the risk or be deemed to be capable of foreseeing it.

Williams considered that it was possible that *Caldwell* could be partly subjective in that the risk could be interpreted as needing to be obvious to the particular defendant,<sup>61</sup> but he regarded *Lawrence* to be completely objective<sup>62</sup> as the risk only had to be obvious to the 'ordinary prudent man'. However, it is suggested that this argument is incorrect and *Lawrence* is not entirely objective.<sup>63</sup> Although the judgment appears to apply the *Caldwell* model direction of recklessness to reckless driving, Lord Diplock then states:

If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; *but regard must be given to any explanation he gives as to his state of mind which may displace the inference.*<sup>64</sup>

This highlighted dictum certainly appears to introduce an element of subjectivity and if, as Griew<sup>65</sup> and Syrota<sup>66</sup> suggest, *Caldwell* and *Lawrence* 'must clearly be read together' for what they have to say on the concept of recklessness, it lends support to Syrota's interpretation that the two judgments did not effect such a radical change to the definition of recklessness. Their Lordships did not intend to criminalise the acts of those who lacked the cognitive capacity to appreciate risk, merely those who were capable but indifferent.<sup>67</sup> As a consequence, it is submitted that the potential for injustice lies more with how *Caldwell* was subsequently interpreted than with the decision itself.<sup>68</sup>

Syrota<sup>69</sup> refers to Lord Diplock's comparison in *Lawrence* of s. 3 of the Road Traffic Act 1972 with s. 2 of that Act,<sup>70</sup> where his Lordship stated that even for an absolute offence the defendant's mind must have been 'conscious of what his body was doing' but not of the consequences of his actions. From this Lord Diplock argues that for a s. 2 offence it was therefore necessary to show that the defendant was both 'conscious' of his acts and their consequences. Syrota proposes that the use of the word 'conscious' is not in the sense of actually thinking about his actions, but that the defendant 'could instantly have brought his mind to

61 Williams, above n. 21; Syrota, above n. 44, who supported this approach.

62 Williams, above n. 21.

63 See above n. 30.

64 *R v Lawrence* [1981] 1 All ER 974 at 982 (emphasis added).

65 Griew, above n. 22.

66 Syrota, above n. 44.

67 See also the judgments of Lords Keith, Ackner, Goff and Browne-Wilkinson in *R v Reid* [1992] 3 All ER 673.

68 See, e.g., *Elliott v C (A Minor)* [1983] 1 WLR 939.

69 Syrota, above n. 44 at 100.

70 Section 2 being the offence of reckless driving and s. 3 that of driving without due care and attention; the latter not necessarily involving any 'moral turpitude', *per* Lord Diplock in *Lawrence*.

bear on what he was doing, had he chosen to do so'.<sup>71</sup> This is consistent with Lord Diplock's critique of *R v Murphy*.<sup>72</sup>

It is clear that Lord Diplock in *Caldwell* approved of Eveleigh LJ's dictum in *Murphy* on what was meant by the word 'knowledge' in the context of the risk of driving recklessly. His Lordship had concluded that the term could equally apply to:

knowledge which is stored in the brain and available if called upon . . . or knowledge that is actually present because it is being called upon . . . especially as everybody knows that there is a risk of an accident if a vehicle is not driven with due care and attention on the highway, whether he thinks about it or not.<sup>73</sup>

Perhaps Lord Diplock in *Caldwell* was striving to replace the word 'foresight' in the definition of recklessness with 'knowledge' or 'belief' instead. Similar suggestions have been made by Tadros in his discussion of the legal definition of intention.<sup>74</sup> This approach would legitimately catch a person who would have the capacity to appreciate that there was a risk even if the awareness of it, in terms of advertence, failed to cross his or her mind at the time of the *actus reus*.<sup>75</sup>

## The relevance of indifference

In *Lawrence* Lord Hailsham supported Lord Diplock's judgment, stating that the word 'reckless' applied:

to a person or conduct evincing a state of mind stopping short of deliberate intention, and going beyond mere inadvertence, or . . . mere carelessness.<sup>76</sup>

Syrota states that the difference between 'mere inadvertence' and culpable inadvertence amounting to recklessness is provided by Eveleigh LJ in *Murphy*<sup>77</sup> and by Lane LJ in *R v Stone and Dobinson*<sup>78</sup>—it is indifference.<sup>79</sup>

Indifference is used in the sense of not caring,<sup>80</sup> rather than mere carelessness. Thus, indifference is an essential element in both *Lawrence*,

71 Syrota, above n. 44, quotes from G. Williams, *Textbook of Criminal Law* (Stevens: London, 1978) 78–9: 'we use the word "knowledge" to include information that may be summoned to the mind at will, or almost at will . . . It is a misunderstanding of the legal requirement to suppose that this knowledge of risk must be a matter of conscious awareness at the moment of the act'.

72 Syrota, above n. 44 referring to *R v Lawrence* [1981] 1 All ER 974 at 981g–2d.

73 *R v Murphy* [1980] QB 434 at 440.

74 V. Tadros, *Criminal Responsibility* (Oxford University Press: Oxford, 2005) 218.

75 Lord Edmund-Davies in his dissenting judgment in *Caldwell* cites the Law Commission's definition of recklessness which requires 'knowing that there is a risk and it is unreasonable . . . to take it, having regard to the degree and nature of the risk which he knows to be present': Working Paper No. 31, *Codification of the Criminal Law, General Principles, The Mental Element in Crime* (1970).

76 [1981] 1 All ER at 978, cited in Syrota, above n. 44 at 103. Note that we are not provided with a definition of recklessness here either.

77 [1980] QB at 434 at 440–1.

78 [1977] 2 All ER 341.

79 [1977] QB 354 at 363.

80 The kind of recklessness used in the civil law, as per *Derry v Peek* (1889) 14 App Cas 337.

and by implication *Caldwell* recklessness. It is not the attitude of indifference alone that leads to a finding of culpability, but rather how that indifference is manifested by the acts or omissions of the accused. As Duff suggests:<sup>81</sup>

Some failures of attention or realisation may manifest not mere stupidity or 'thoughtlessness,' but the same indifference or disregard which characterises the conscious risk-taker as reckless.

The submission here is that indifference can include a defendant who gives no thought to a risk but had the capacity to do so and could have called it to the forefront of his mind. The indifferent defendant is either capable of foreseeing the risk but is so caught up with other emotions<sup>82</sup> or so intent on his action that he fails to give any thought to the possibility of such a risk, or he actually foresees the risk but is indifferent to the possible, and maybe unintended, consequences of his actions. In other words, if the accused had given sufficient thought to the matter and had foreseen the risk it would have made no difference to his actions.

Williams submitted that a requirement of indifference cannot include a defendant who gives no thought to the risk because a blank mind cannot be classed as a true state of mind.<sup>83</sup> However, Lord Keith in *R v Reid*<sup>84</sup> stated that 'absence of something from a person's mind is as much part of his state of mind as its presence'.

Birch,<sup>85</sup> also advocating a wider concept of recklessness, considers that in cases of advertence, caring is irrelevant but, as an alternative to foresight, evidence of a 'reprehensible attitude' of indifference should be an adequate alternative, citing *R v Parker*<sup>86</sup> and *R v Kimber*<sup>87</sup> as examples of judicial acceptance of such an approach. In *Parker*, the justifications for conviction in the Court of Appeal were (1) that if D did not foresee the risk 'he was deliberately closing his mind to the obvious', and later, in *Stephenson*, (2) that appreciation of the risk must have entered D's mind 'even though he may have suppressed it or driven it out'. Birch submits that both these reasons 'accord primacy' not to choice but to a 'reprehensible attitude' and in (1) it is a substitute for foresight. It would be relatively easy for a jury to determine that D had a 'reprehensible attitude' but the difficulty a jury would face in trying to determine whether D had 'deliberately closed his mind' to a risk or 'driven it out' were precisely the problems Lord Diplock was trying to avoid by his model direction.

Birch makes the further point that following the reasoning in (2) there must have been a 'flash of awareness' of the risk (which would amount to foresight coupled with an intention to run the risk) but where a defendant is acting on the spur of the moment the 'flash' might

81 R. A. Duff, 'Recklessness' [1980] Crim LR 282 at 290-1.

82 Horder, above n. 7.

83 Williams, above n. 21.

84 [1992] 3 All ER 673.

85 Birch, above n. 23.

86 [1977] 2 All ER 37.

87 (1983) 77 Cr App R 225.

come too late to prevent withdrawal from the *actus reus* which results in no moral distinction between this case and where D gives no conscious thought at all.<sup>88</sup>

In *Kimber*, D raised the defence of honest belief in the victim's consent as a defence to the offence of indecent assault, but admitted that he was indifferent to her feelings. Birch believes what is important here is that if the jury believe that D would have acted in the same way if he had foreseen the risk, then it becomes irrelevant whether D actually had a flash of awareness or not as D's attitude of indifference is an indicator of moral fault, and perhaps a more reliable guide.

However, Birch draws attention to a flaw in relying upon this ground as a replacement for foresight, this being the rules of evidence which would usually prevent evidence of such previous conduct being relied upon in court.<sup>89</sup> Foresight, she submits, has the advantage of being confined to the occasion in question.<sup>90</sup> This is unarguable, but it is possible that D's attitude of indifference manifested in this one instance would be sufficient to establish guilt without recourse to similar conduct on other occasions. It is also possible that following changes to the rules of evidence in the Criminal Justice Act 2003,<sup>91</sup> evidence of conduct showing an attitude of indifference could now be adduced if it arose from previous convictions, as evidence of 'bad character' is admissible if it is 'relevant' to the current offence charged. It is accepted that evidence of indifference would raise a hypothetical question for a jury to determine: what would D have done if he had perceived the risk? However, the members of the jury are charged with determining what the state of mind of the accused actually was at the time of the act and it is questionable whether it would be any more difficult to determine whether the accused would have acted differently if he had foreseen the risk.

Possibly the most crucial point is that, throughout his judgment in *Caldwell*, Lord Diplock only appeared to address his mind to the class of defendant who would usually have had the capacity to foresee the risk<sup>92</sup> and it is submitted that this narrow focus is the crux of the problems that subsequently arose. Lord Diplock did not consider certain classes of defendant who would be incapable of foreseeing any risk, even if they had been asked to think about it.<sup>93</sup> There was no need to do so on the facts of the case before him.<sup>94</sup> But it is also possible that it would have

88 Birch, above n. 23 at 7–8.

89 Ibid. at 6.

90 Ibid. at 9 and see discussion of *Elliott v C (A Minor)* [1983] 1 WLR 939 below.

91 Section 101.

92 See N. P. Metcalfe and A. J. Ashworth, 'Arson: *Mens Rea*—Recklessness Whether Property is Destroyed or Damaged' [2004] Crim LR 369.

93 See, e.g., *Elliott v C (A Minor)* [1983] 1 WLR 939 discussed below.

94 See *R v Cooke* [1986] 2 All ER 985, *per* Lord Bridge: 'judicial language has no legislative force and, if a particular form of words has been used judicially in expressing a decision on one set of facts, it may be dangerous to apply that language literally to another set of facts which give rise to a different problem which was not in contemplation when the language was first used'. And also Lord Scarman in *R v Hancock and Shankland* [1986] AC 455 at 468e; cited in Field and Lynn, above n. 46.

made no difference even if Lord Diplock had had such defendants in mind. Lord Bingham of Cornhill in *R v G and R*<sup>95</sup> suggested that the majority in *Caldwell* were set on their course and such considerations may not have had any impact, instead they remained focused on the moral and social case for departing from the subjective definition. Metcalfe and Ashworth contrast this approach with the narrower focus in *G and R*, with the need for the House of Lords to consider the liability of children.<sup>96</sup> This begs the question of whether the model direction would have still been followed had the defendants in *G and R* not been minors.

Kimel considers that if it was not for the failure to exempt those without the capacity to foresee risk from the model direction it is possible that *Caldwell* recklessness would not only still be applicable to criminal damage offences, but may also have been a more generally accepted definition under statute and under the common law, providing consistency throughout the criminal law.<sup>97</sup>

*Elliott v C (A Minor)*<sup>98</sup> epitomises the potential for injustice that lies within the model direction. The court had an ideal opportunity to develop a capacity-based test from *Caldwell/Lawrence* but failed to do so. The defendant in this case was a minor with learning difficulties and yet as her actions would have been perceived by the reasonably prudent person as creating a risk, the prosecution's appeal against her acquittal before magistrates was upheld by the Divisional Court. Williams<sup>99</sup> proposal that 'obvious' in the model direction meant obvious to the particular defendant was not adopted as on a literal interpretation of the wording of the model direction, the defendant's foresight was not required.

There is perhaps a more significant factor at play in this decision. As Field and Lynn note,<sup>100</sup> the question the court was asked to consider was not whether a defendant who lacked the cognitive capacity to foresee risk could be *Caldwell* reckless, but whether D was to be judged by the standard of the ordinary prudent man, and this was answered in the affirmative.<sup>101</sup>

Before consideration of the third main approach to defining recklessness it is important to examine how the issue of recklessness has been determined with regard to rape. Prior to *DPP v Morgan*<sup>102</sup> this offence caused little difficulty for the courts as all that had to be proven was sexual intercourse and that the woman had not consented. D could only escape liability if he could show he had made a mistake with regard to

95 [2003] UKHL 50, [2004] 4 All ER 765 at 786.

96 Metcalfe and Ashworth, above n. 92.

97 D. Kimel, 'Inadvertent Recklessness in Criminal Law' (2004) 120 LQR 548.

98 [1983] 1 WLR 939.

99 Williams, above n. 21.

100 Field and Lynn, above n. 46.

101 There was evidence of similar conduct in her past that could not be brought before the court because of the rules of evidence, see Birch, above n. 23 at 9. This fact may have influenced the framing of the question, whereas the Court of Appeal in *G* framed its question in terms of incapacity to foresee the risk.

102 [1976] AC 182.

consent that was both honest and reasonable. *Morgan* introduced a *mens rea* requirement to the offence so that it had to be proved that D either intended to have non-consensual intercourse or intended to have intercourse being reckless as to whether there was consent or not. The case established that it was sufficient for a mistake as to consent to be honestly held as this negated the *mens rea* of intent to have non-consensual intercourse, whilst acknowledging that reasonable mistakes would have more credibility with a jury.<sup>103</sup>

As Power observes,<sup>104</sup> the decision in *Morgan* created a gap between moral culpability and legal liability. If D fails to give any thought to whether V consents or not, perhaps because he is indifferent, it is not clear that inadvertence to the risk of non-consent would be sufficient for conviction if *Cunningham* recklessness was applied. Similarly, if D holds an unreasonable belief that V is consenting, then on *Morgan* he would be acquitted unless *Caldwell* recklessness extended to rape. Power suggests that following *Caldwell*, the Court of Appeal decisions<sup>105</sup> tried to develop an approach to reckless rape which combined a ‘subjective capacity to “do better” with objective failure to do so based on notions of “practical indifference”’.<sup>106</sup> This approach allowed for the inclusion of the inadvertent D who gave no thought to whether the victim consented or otherwise or was indifferent to consent in circumstances where if thought had been given, he could not have genuinely believed there was consent.

In 2000, the Home Office Sex Offences Review Team report<sup>107</sup> recommended that defendants should not be able to rely on a mistaken belief in a victim’s consent unless they could show that they had taken reasonable steps to establish it. The report acknowledged the criminal law’s reluctance ‘to apply a test of negligence to very serious offences, unless there is a clear responsibility or duty of care’<sup>108</sup> on D which is breached.

Whilst wishing to preserve intention as to non-consensual intercourse and intention to have intercourse being recklessness as to consent, the Review Team were against adoption of a purely subjective approach to recklessness, stating that ‘the law needs to state very clearly that the accused is liable if they did not give any thought to consent or could not care less about the victim’s consent’.<sup>109</sup> This resulted in a

103 The Sexual Offences (Amendment) Act 1976 provided that the *mens rea* of rape required proof that D knew there was no consent or was reckless as to consent, s. 1(2) requiring a jury to take account of the reasonableness of the belief in consent.

104 H. Power, ‘Towards a Redefinition of the Mens Rea of Rape’ (2003) 23 OJLS 379.

105 *R v Pigg* (1982) 74 Cr App R 352; *R v Thomas* (1983) 77 Cr App R 63; *R v Taylor* (1985) 80 Cr App R 327; *R v Haughian and Pearson* (1985) 80 Cr App R 335; *R v Gardiner* [1994] Crim LR 455; and *R v Adkins* [2000] 2 All ER 69. Power notes that the decision in *R v Satnam and Kewal* (1983) 78 Cr App R 149 seems at odds with these decisions.

106 Power, above n. 104 at 386–8, noting that the indifference element is from Lord Cross in *DPP v Morgan* [1976] AC 184 at 203.

107 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) vol. 1.

108 *Ibid.* at 2.12.1.

109 *Ibid.* at 2.12.4.



recommendation that recklessness in sex offences 'should include lack of thought to consent; this can be described as "could not care less about consent"'.<sup>110</sup> However, it is submitted that not giving thought to consent is not necessarily the same as indifference and a distinction should be made, if possible, between the callous and the careless. The latter should be regarded as negligent whereas the former are reckless.<sup>111</sup>

In relation to the defence of honest belief in consent, the Review Team were keen to stress that whilst recommending limitation on its availability they were not imposing 'an external and objective requirement of reasonableness on the defendant'<sup>112</sup> as D would not be required to take all objectively reasonable steps but just to take all steps that were reasonable in the circumstances known to him at the time.<sup>113</sup> Unfortunately, as Davies observes,<sup>114</sup> the Review Team's proposals were not mirrored in the Sexual Offences Act 2003 wherein 'the concept of recklessness, along with knowledge, will . . . be banished from the law of sexual offences' in an attempt to provide greater protection for victims, encourage reporting of offences and increase conviction rates. He suggests that the combined effect of the conclusive and rebuttable presumptions as to lack of consent in s. 75 and s. 76 of the 2003 Act respectively and the guidance for juries on determining whether a belief in consent was reasonably held in ss 1(2) and 3(2) will be that a jury will convict if they believe the victim did not consent, regardless of D's actual beliefs. In effect, without allowing for consideration of the particular defendant and the circumstances known to him at the time, a negligent standard had been introduced for some of the most serious sexual offences without the offences being ranked in degrees of moral culpability.

### **Recklessness in *G and R* and the draft Criminal Code**

In 2003, the decision of the House of Lords in *R v G and R*<sup>115</sup> overruled *Caldwell*<sup>116</sup> or at least departed from it, and formulated a third approach to recklessness.<sup>117</sup> In his leading judgment Lord Bingham of Cornhill stated:

It is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an

110 Above, n. 109 at 2.12.6.

111 Note Power advocates a hierarchy of rape offences linked to *mens rea*: intentional rape, reckless rape and negligent rape, see above n. 104.

112 *Setting the Boundaries*, above n. 107 at 2.13.4.

113 Power, above n. 104.

114 M. Davies, 'Lawmakers, Law Lords and Legal Fault: Two Tales From the (Thames) Riverbank: Sexual Offences Act 2003; *R v G and Another*' (2004) 68 JCL 130.

115 *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765

116 But only in relation to the definition of 'reckless' for the purpose of the Criminal Damage Act 1971: *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765 at 783j, *per* Lord Bingham; however, see *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr App R 367.

117 Lord Rodger states *G and R* overrules *Caldwell*; Lords Bingham and Steyn 'depart' from it which, as Kimel observes, is more technically correct given that the facts in *Caldwell* concerned self-induced intoxication and the case would still be decided the same way, above n. 97.

injurious result to another but that his state of mind when so acting was culpable . . . The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such a risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if . . . one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination but neither of those failings should expose him to conviction of a serious crime or the risk of punishment.

Although it is accepted that no one should be censured for an accidental harm, it does not automatically follow that in every circumstance<sup>118</sup> a person should be exempt from liability when he or she has failed to foresee a risk or acted carelessly or stupidly and as a result harmed others. Note from Lord Bingham of Cornhill's statement above, it is not said that someone who fails to foresee the risk is not blameworthy, just that they are not *necessarily* so. It would seem obvious that the greater the risk of resulting harm, and the more serious the consequences of it, the more care that should be taken, and would be expected by society to be taken, to avoid or seek to prevent harm occurring.<sup>119</sup>

Amirthalingam<sup>120</sup> warns that a 'blind adherence to subjectivism' can result in a gap between the legal test of *mens rea* and the community's sense of moral wrongdoing. Furthermore, Robinson states that if the criminal law accurately reflects the community's perception of justice, people are more likely to defer to its commands and if it fails in this regard its authority is undermined.<sup>121</sup> As Birch comments, the subjective approach produces a simple formula which has triumphed over the need for a comprehensive one.<sup>122</sup>

The judgment in *G and R* heralded a return to a subjective definition of recklessness for the purposes of the Criminal Damage Act 1971. The new definition was not from *Cunningham*, but that contained in the draft Criminal Code:

A person acts recklessly with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.<sup>123</sup>

118 See Lord Rodger's comments in *R v G and R* [2004] 4 All ER 765 at 794–5.

119 J. C. Smith and B. Hogan, *Criminal Law*, 9th edn (Butterworths: London, 1999) 61: 'Whether it is reasonable to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused'.

120 K. Amirthalingam, 'Caldwell Recklessness is Dead, Long Live *Mens Rea*'s Fecklessness' (2004) 67 MLR 491.

121 P. Robinson, 'The Criminal–Civil Distinction and the Utility of Desert' (1996) 76 *Boston University Law Review* 201 at 212–13.

122 Birch, above n. 23.

123 *R v G and R* [2004] 4 All ER 765 at 787, citing cl. 18(c) of the Criminal Code Bill (1989).

This new version, unlike that in *Cunningham*,<sup>124</sup> makes explicit reference to recklessness in relation to circumstances. This definition is different from the wording used in the Law Commission's Report on the Mental Element in Crime<sup>125</sup> which Duff<sup>126</sup> criticised as being 'too wide', in counting every conscious and unreasonable risk-taker as 'reckless' and too narrow' in requiring advertence to the risk.

However, the new definition has the same faults that Duff has identified in the original proposal. Duff dismisses the requirement for actual advertence as 'too narrow' a definition, stating that to hold the view that the 'presence or absence of advertence results in an important difference to the nature and degree of culpability' has been 'convincingly demolished' by Hart and others, because failure to advert may depend upon the attention a defendant pays to what he is doing and is therefore within his control.<sup>127</sup> He submits that a party can be reckless 'even though, and even partly because, he does not realise the risk'<sup>128</sup> because his conduct manifests such serious 'practical indifference' and 'lack of concern', that the possibility of there being a risk is unimportant.<sup>129</sup>

Traditionally, even if we adopt a subjective definition of recklessness it will nevertheless have an objective element to it, which is the taking of 'an unjustified risk'.<sup>130</sup> As Simester and Sullivan note, whether the particular defendant saw the risk as an unreasonable one is irrelevant; it is whether an ordinary and prudent person would have been prepared to take it. 'To this extent defendants cannot be permitted to displace the law and judge what is right for themselves.'<sup>131</sup> However, it is questionable whether this statement is still apposite following one possible interpretation of the draft Criminal Code.<sup>132</sup> Under this new definition, not only must the accused advert to the risk, but on one interpretation he must also be aware that it is unreasonable for him to go on to take it. This would be a form of ideal subjectivism and restrict culpability further.

It appears that to satisfy (i) he must be aware of a risk that it exists or will exist, and for (ii) he must also be certain of there being a risk, therefore an awareness of a possibility of a risk existing would not suffice as it would have done under the RMEC, which only required a person to see that a result *might* occur. Presumably Duff would see this change from the original proposal as a further narrowing of culpability. In each

124 Where 'the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it': *R v Cunningham* [1957] 2 All ER 412 at 414, *per* Byrne J.

125 Law Commission, *Criminal Law, Report on the Mental Element in Crime*, Law Com No. 89 (1978) (hereafter 'RMEC').

126 Duff, above n. 81.

127 *Ibid.* at 289.

128 *Ibid.* at 292.

129 *Ibid.* at 289.

130 See also Amirthalingam, above n. 120, who argues that blameworthiness and culpability cannot be determined without reference to some external standard which calls for a degree of objective evaluation.

131 A. P. Simester and G. R. Sullivan, *Criminal Law Theory and Doctrine*, 2nd edn revised, (Hart Publishing: Oxford, 2004) 139.

132 See the analysis of the draft Criminal Code definition of recklessness applied in *G and R* below.

case, the defendant must know that it is unreasonable for him to continue to act, and once again it would appear that the negligent mistake-maker would escape liability. It is then a matter for the jury to decide whether the defendant genuinely either failed to foresee the risk as definite and/or believed it to be reasonable to take it in the circumstances known to the accused at the time. It is just such a problematic task for the jury that Lord Diplock sought to avoid by his *Caldwell* direction. Arguably it actually makes the jury's task harder because now the jury has to determine not only D's foresight as a fact, but perhaps also his belief that it was unreasonable for him to take the risk.

Why did the House of Lords fail to take the opportunity to modify the *Caldwell* test rather than depart from it? Lord Rodger appeared to rule out the possibility of modification because Lord Diplock's speech:

has proved notoriously difficult to interpret and those difficulties would not have ended with any refinements . . . Indeed those refinements themselves would almost inevitably have prompted further questions and appeals.<sup>133</sup>

He was particularly influenced by the desire to 'set the law back on the track that Parliament originally intended it to follow'.<sup>134</sup> Lord Bingham of Cornhill had four 'compelling' objections to the suggested modification of the model direction to the extent that comparison in cases involving children should be a comparison with a normal reasonable child of the same age. The first was that it offends the principle that conviction requires proof of a defendant's culpable state of mind, as he argues would a constructive advertence test. He also followed Lord Rodger's stance, above,<sup>135</sup> not wanting to substitute one misinterpretation of s. 1 for another. However, he further argued that:

if the rule were to be modified in relation to children on the grounds of their immaturity it would be anomalous if it were not also modified in relation to the mentally handicapped on grounds of their limited understanding.<sup>136</sup>

This reasoning has been criticised by Kimel for being the paramount reason to modify the direction, even indicating 'what kind of modification was needed from the outset', namely that recklessness only occurred where the risk would have been obvious to the defendant had he thought about it.<sup>137</sup> Kimel accepts Lord Bingham of Cornhill's concern that such a modification could complicate matters for a jury but argues

133 *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765 at 793c.

134 *Ibid.* Note the quote from Mr Mark Carlisle in the House of Commons debates cited by Smith, above n. 20 at 394 in support of his proposition that the state of mind required knowledge of the risk, i.e. the word 'reckless' covered the offender who 'did not necessarily intend to cause the damage but could not care less whether he caused it or not'. However, this statement would also be consistent with a requirement of indifference, which may suggest that it is the Law Commission's view that is being returned to and not necessarily that of Parliament. Furthermore, the Law Commission referred to knowledge and not foresight, see above n. 75.

135 Supported by Lord Steyn.

136 *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765 at 786a–d.

137 Kimel, above n. 97 at 552.

that juries already face similar tasks, no less complicated, citing among her examples the defences of provocation and duress, and 'dishonesty' under the Theft Act 1968.

Lord Bingham of Cornhill's final reason against modification was that if the test was modified to take into account some of the characteristics of the defendant, how would the court determine what qualities and characteristics would be considered in such a comparison. Although this would require some consideration it is hardly sufficient reason to avoid modification as such difficulties have been addressed elsewhere within the criminal law. As Fletcher<sup>138</sup> and Horder<sup>139</sup> have noted, there are certain character traits and emotions that we tend to attach blame-worthiness to, for example, lust, greed, anger and jealousy, and it is such characteristics that we rightly expect people to control that, uncontrolled, can lead to culpability. Stupidity would not normally attract such censure, unless it is the product of a failure to give sufficient attention and consideration to what you were doing.<sup>140</sup> On this basis, incapacity would not attract culpability unless it was self-induced. However, a person may have some capacity to foresee a risk and yet not be able to identify the choices that are then open to him. For this reason he must not only lack a full capacity, but additionally lack a fair opportunity to avoid breaking the law before they are deemed culpable.

It is worth noting that Lord Rodger in *G and R* did not find a broader concept of recklessness necessarily 'undesirable'<sup>141</sup> in terms of culpable inadvertence,<sup>142</sup> recognising that there was scope for an objective approach and he referred to the model direction as 'a legitimate choice between two legal policies' which 'may be better suited to some offences than to others'.<sup>143</sup> He stated that historically different views have been adopted by English judges at different times over the centuries,<sup>144</sup> so it remains to be seen if the decision in *G and R* will be the last word on this area.

Following *G and R*, the Court of Appeal has stated that this case laid down general principles to be followed and the definition of recklessness employed should not be restricted to cases of criminal damage, as Lord Bingham had specified.<sup>145</sup> It seems odd, given the view that *Caldwell* recklessness was very ambiguous and potentially caused injustice, that Lord Bingham of Cornhill limited its overruling to criminal damage offences.<sup>146</sup> The new definition was applied in *Booth v CPS*<sup>147</sup> where D was appealing against his conviction for the criminal damage caused to

138 G. P. Fletcher, *Rethinking Criminal Law* (Little, Brown: Boston, 1978) 513.

139 Horder, above n. 7.

140 Field and Lynn, above n. 46 at 86.

141 Birch described the extension of recklessness in *Caldwell* as an understandable attempt to bridge the gap between foresight and a morally culpable attitude, above n. 23.

142 A constructive advertence/awareness test was also proposed by Williams, above n. 21 at 270–1 and Davies, above n. 114.

143 *R v G and R* [2003] UKHL 50, [2004] 4 All ER 765 at 794–5.

144 Norrie, above n. 4.

145 *Attorney-General's Reference (No. 3 of 2003)* [2004] 2 Cr App R 367.

146 A point made by Halpin, above n. 18, ch. 3.

147 [2006] EWHC 192, [2006] All ER (D) 225 (Jan).

a car. His counsel argued that if D had indeed thought of any risk before running across a road to meet a friend it would have been in relation to personal injury to himself but the court upheld the conviction, finding that there was enough evidence on which the magistrates could base their decision that he must have closed his mind to the risk. It is submitted that here, as in *Parker* earlier, an objective approach to foresight is being applied.

### A fourth approach

Under suggested reforms, the Law Commission's draft Criminal Law Bill<sup>148</sup> slightly modifies the definition of recklessness provided by the draft Code so that:

- a person acts—
- (b) 'recklessly' with respect to—
  - (i) a circumstance, when he is aware of a risk that it exists or will exist, and
  - (ii) a result when he is aware of a risk that it will occur,and it is unreasonable, having regard to the circumstances known to him, to take that risk . . .

This definition would apply to the non-fatal offences against the person, whereas the draft Code definition would apply to the remaining criminal offences unless statute specified otherwise. This latest definition seems to be more objective in interpretation than the draft Code, i.e. the reasonable person can take into account what D knew/believed to determine whether they think it was reasonable for D to take the risk. It is questionable whether yet another definition is helpful. Halpin considers that if different definitions of recklessness are to be applied to different offences it is necessary to be able to justify why this is so and yet this has not been attempted.<sup>149</sup>

### Conclusion

It is submitted that the plethora of current definitions and the lack of a morally substantive interpretation will lead to further developments and debate. When employing the subjective approach in *Cunningham* and *G and R* to cases such as *Parker* and *Booth* it is argued that in reality a capacity-based test is already in operation. This is because it is recognised that a definition of recklessness that is too subjective can allow those who are blameworthy to avoid criminal liability. Alternatively, a test that is too objective can lead to injustice without being capacity based. It is submitted that a synthesis of the two approaches is required. This could be achieved by openly developing a capacity-based test or by introducing a form of practical indifference test, discussed earlier. It is submitted, however, that Glidewell J's suggestion in *Elliott* would be a

148 Law Commission, *Legislating the Criminal Code Offences against the Person and General Principles*, Law Com. No. 218, Cm 2370 (1993).

149 Halpin, above n. 18, ch. 3.

way of achieving a more appropriate approach to inadvertent recklessness:

where no thought is given to the risk any further inquiry necessary for the purpose of establishing guilt should *prima facie* be directed to the question why such thought was not given, rather than to the purely hypothetical question of what the particular person would have appreciated had he directed his mind to the matter.<sup>150</sup>

Once the reason why no thought was given to the risk emerged, it would be relatively straightforward to assess the degree of moral blameworthiness and thus any criminal liability. Such an approach would look beyond the subjective/objective dichotomy and add another dimension, why the accused acted as he did, his motivation or emotion behind the *actus reus*.<sup>151</sup> Thus, if the reason D did not foresee the risk was because he was angry or set on a course of revenge against someone who had offended him, he would be morally culpable and reckless. Alternatively if D did not foresee the risk because he was going to the assistance of an innocent third party or because he was distracted because his child had been hurt, he would not be deemed morally culpable or reckless. Metcalfe and Ashworth suggest that there need to be further

discussions of the extent to which requirements for criminal liability should have subjective or objective elements rather than a crude 'subjective or objective' characterisation. The moral and social arguments are not all stacked on one side.<sup>152</sup>

The sooner this happens the better.

150 (1983) 77 Cr App R 103 at 119.

151 See Horder's approach, above n. 7.

152 Metcalfe and Ashworth, above n. 92.